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Supreme Court, Education, and Religion

Aaron Martin

602.382.6267

atmartin@swlaw.com

My LinkedIn Profile

Dear Friends and Clients,

Everyone's year is back in full swing now and the U.S. Supreme Court is no different. Yesterday was the first day of arguments for October Term 2016, the Court's 2016–17 term. And there are some interesting education-related cases on the docket that I address in this month's issue.

Also in this issue, we look at some cases involving the perennial issue of how public schools interact with religion, and how the State interacts with religious schools. It's an ongoing constitutional debate that has perplexed law students and lawyers for years. Yet despite all the lawsuits, we are not likely to have much clarity soon.

If this is the first newsletter you have received, thanks for joining the email list. You can see the September 2016 newsletter here.

As always, if you have questions about the cases or information in the newsletter, please contact me. Look for another opportunity to join an amicus brief for the U.S. Supreme Court regarding special-education standards.

Best,
Aaron

"While some of the tales of woe emanating from the court are enough to bring tears to the eyes, it is true that only Supreme Court justices and schoolchildren are expected to and do take the entire summer off."

– Chief Justice John Roberts

"Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."

– Justice Antonin Scalia in
Lamb's Chapel v. Center Moriches Union Free School District

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One Arizona Center | 400 East Van Buren Street | Suite 1900 | Phoenix, Arizona 85004
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Religion and Public Schools

Several recent cases, both locally and nationally, have addressed how public schools interact with religion—in the school's curriculum or in public funding of religious schools. In one case, a school district was taken over by a group of Hasidic Jews who used district resources to serve their own goals and even fund their own Hasidic schools. In another, an Arizona charter school is accused of teaching religion in its history curriculum. In a third case, a Colorado school district implemented a voucher program that was held to be unconstitutional—at least for now. These cases are described below.

John Doe v. Heritage Academy, Inc.

In Arizona, Heritage Academy was sued by Rev. David Felten and an unnamed plaintiff for allegedly teaching religious principles in the context of its overall curriculum, but particularly in the context of the school's mandatory American History course. The Plaintiffs claim that Heritage Academy's actions violated the federal and state Constitutions. The Plaintiffs argue that the school violated the First Amendment, in part, because it is the parents' role under the Constitution to direct the religious upbringing of their children, not the school's. They also object to State tax dollars going to a public school that chooses to expose its students "to religious beliefs." Complaint, ¶ 49. Some of these religious beliefs are contained in 28 "principles" that are taught in the school's American History course. The Complaint details a number of these "principles" and explains what the Plaintiffs find objectionable.

According to the Complaint, the State Board for Charter Schools received complaints from a Heritage Academy parent in 2000, 2003, and 2004. A lawyer, on behalf of a Heritage Academy parent, wrote the Board in 2013, 2014, and 2015. All of these complaints and letters had no effect. Either the Board did not respond or the Board and the school took no action in response to them. Ultimately, these complaints were just a prelude to the Complaint filed on September 7.

The U.S. Supreme Court has said for more than 50 years that teaching religion in public schools can be permissible: "In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963). At the same time, other cases have discussed when individual schools or districts have gone too far to sanction the outright promotion of certain religious beliefs. Whether the court in this case will find that Heritage Academy's curriculum has gone too far is yet to

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be seen.

From the court record, it appears that the Defendants were only served at the end of September. They have not filed an Answer yet, so we do not know what their response will be to these accusations. I'll be watching this case closely and will provide an update next month.

Douglas County School District v. Taxpayers for Public Education

For those of you in Colorado, there has been longstanding confusion over the constitutionality of school voucher programs in the state. The program at issue in this case was created by Douglas County and provided $4,575 to the parents of each student in the program. The parents had to certify that the funds were being used to pay for tuition at a private school that was a "Private School Partner" in the voucher program. Of the 23 private schools that participated in the program, 16 of them were religious. More than 90% of students who participated in the program enrolled in religious schools.

The Supreme Court determined that the voucher program violated the Establishment Clause and Colorado law, but did so without a majority of votes on the court. And the four justices who voted against the vouchers did not agree as to the theory for why the voucher program violated the law. This uncertainty will no doubt continue as one of the justices in the plurality voting against vouchers recently retired and was replaced by Justice Gabriel. When the issue comes before the court again, the result could be entirely different and Justice Gabriel may very well be the deciding vote.

But before the issue ever returns to the Colorado Supreme Court, Douglas County has appealed to the U.S. Supreme Court, where its petition is still pending. It is unclear whether the Supreme Court will accept the case. The petition was supposed to be considered during the Court's February 19 conference. As you may remember, Justice Scalia passed away on February 13 and the February 19 conference was postponed. It is not clear whether the members of the Court are waiting for a ninth justice to be appointed before deciding whether to take the case or whether it will take the case at all.

Montesa, et al. v. Schwartz, et al.

The radio program, "This American Life," aired a story in 2014 about the school district in East Ramapo, New York whose board was taken over by a majority of Hasidic Jews. The story discussed how Hasidic Jews moved into the school district and took over the school board, despite sending their children to religious schools—*yeshivas*. The story also explained how the Hasidic population could handpick their candidates for the school board, which then created a majority on the board when voting on school district

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budgets.

Allegedly, the Hasidic Jews slowly took over the East Ramapo school district and, according to a lawsuit filed in 2014, siphoned money from the district budget to religious schools run by Hasidic Jews. The mechanism for siphoning off money was using district settlements based on questionable claims under the Individuals with Disabilities Education Act (IDEA) to pay money to special-education Hasidic students who would attend private *yeshivas*. These *yeshivas* benefitted to the tune of $27,000 per student per year for these special-education Hasidic students. The Hasidic board members did not send their own children to the district schools but to the *yeshivas* that were benefiting from the increased payments from the district.

The lawsuit also alleged that the board acted improperly by hiring a lawyer, Al D'Agostino, who had a history of helping Hasidic Jews by manipulating state funding and the sale and lease of the district's real estate to *yeshivas*. Mr. D'Agostino charged more than double the hourly rate of the long-time district lawyer. He also immediately led the district to close two schools (and sell the buildings to *yeshivas*) and helped the board hire a new SPED Director. He then orchestrated the use of IDEA monies to send students to Hasidic schools.

The case was just decided on appeal by the Second Circuit. The Court of Appeals determined that student plaintiffs did not have standing to bring their claims and dismissed their claims. Part of the lawsuit brought by taxpayers for misuse of government funds remains at the District Court level and will proceed toward trial.

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(Another) Special education case to be decided by the U.S. Supreme Court

Supreme Court takes on another special-education case this term—will answer fundamental question about what constitutes "FAPE"

On September 29, the Supreme Court granted certiorari in *Endrew F. Douglas County School District*, a case that asks the following question: "What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.?"

Finally, the Supreme Court may weigh in on what it means to have a "basic floor of opportunity" for students that provides "some educational benefit." The case arose out of Douglas County in Colorado (the same county arguing about vouchers mentioned above). Parents sued the district and claimed that their student's IEP for 5th grade was inadequate because their student had not made sufficient progress in 4th grade and the goals and IEP was identical to the 4th-grade IEP. The parents also complained that the student's behavioral issues were not adequately addressed by the school.

The District Court held that the school did not violate the IDEA because the student's IEP was reasonably calculated to give the student some educational benefit. The Tenth Circuit agreed with the District Court, holding that "some educational benefit" is all that is required. The parents argued that other circuits in the country use an allegedly higher standard, "meaningful benefit," to judge whether an IEP is sufficient under the IDEA.

When the case is heard in the Supreme Court, the main issue will be whether the IDEA requires an IEP to have "some educational benefit" or a "meaningful benefit" to comply. This issues is fundamental to all special education cases. We are currently gathering a group of schools together to file an amicus brief in support of upholding the Tenth Circuit's "some educational benefit" standard and to make that the consistent law in the United States. If you would like to join in the effort, please contact me.

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Update on *Napoleon Community Schools*

Last month, I told you about an opportunity to join in an amicus brief for a special-education case called *Fry v. Napoleon Community Schools*. The petitioner gathered a diverse group of seven different groups (and a few states) who wrote in support of its position. The school district was only able to have one amicus support it, the National Association of School Boards. Napoleon Community Schools just filed their Answering Brief on Friday, September 30. Amicus briefs supporting the school are due October 7. The Supreme Court has set oral argument for October 31 and I'll have an update for you in the November newsletter.

Teachers can be personally liable for failing to protect children

L.R. v. School District of Philadelphia

The Third Circuit Court of Appeals issued an opinion on September 6 in which it held that a kindergarten teacher was personally liable for letting a student go home with a stranger who had refused to provide identification when she came to pick up the student. That student was sexually molested later that day by the woman who came to get her.

The school had a policy where those who were going to pick up students had to show identification, the identification had to be checked against school records, and the release of the student must take place in the school office. In this case, the kindergarten teacher requested identification, the woman refused to provide it, and the teacher let the student go home from the kindergarten classroom with the stranger. This behavior, the court held, "shocks the conscience" and exposed the teacher to personal liability even though teachers typically have qualified immunity from lawsuits for actions they take in their professional capacities. Here, the court said, the situation was different. The teacher knew of the potential harm the student could suffer, he had control over whether to

Private schools may allow guns on campus

The Arizona Attorney General issued an opinion on September 2 pertaining to private schools. The opinion was issued in response to the question of whether someone may carry a firearm on a private school campus.

The opinion notes that concealed-carry permit holders may carry weapons on campus: "Arizona law does not prohibit CCW permittees from carrying concealed weapons on private school campuses." Also, individuals that have a POST—Peace Officer Standards Training—certification may have firearms on campus. Finally, individual private schools may develop programs that allow for individuals to carry firearms based on standards the school imposes. The AG

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release the student from the safety of the classroom, and he took the affirmative step of releasing the student to an unidentified woman. These actions displayed a "deliberate indifference" to the safety of the student that warranted personal liability.

This is a sober reminder for all schools to have a clear policy about releasing students only to those that are on an approved list and for ensuring that teachers abide by school policy. Had the teacher done so here, he would not be liable and, more importantly, the student would not have suffered the emotional and physical trauma that she did.

opinion also allows schools to securely store firearms for use by authorized employees.

Schools might not want to teach about what the Bible says, but they should teach incredible things like this that happen to involve the Bible.

Questions?

Comments?

Aaron Martin

602.382.6267

atmartin@swlaw.com

My LinkedIn Profile

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