Miller, Tracy, Braun, Funk & Miller, Ltd. presents

School Law Advisor

News and Notes for School Administrators

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An Emerging Population:

Legal Issues Surrounding Student Sexual Orientation

Issues surrounding sexual orientation have trickled down in recent years from the workplace, to colleges and universities, to high schools. An issue that seemed a far cry just a few short years ago is now commonplace in many urban and suburban high schools, and is becoming increasingly common in smaller and rural school districts. New laws, recent cases, and growing visibility make it important for school administrators to have a grasp on the issues that can arise regarding students' sexual orientation.

Included below are basic responses to a few of the major issues that commonly arise when dealing with gay and lesbian students.

What do I do when students want to form a Gay-Straight Alliance (GSA) Club?

As the visibility of gay and lesbian issues has increased, so has the number of gay-related student clubs and organizations. In fact, in 2003, there were nearly 2,000 of these student clubs across each of the fifty states.[1] As these groups have been forming, they have met with resistance in many school districts, and oftentimes this resistance ends up in court. Most of these cases are brought under the Federal Equal Access Act (EAA).[2] The EAA provides that if a high school receiving federal financial assistance creates a limited public forum by allowing non-curriculum student groups to meet on school grounds during non-instructional time, it is unlawful for the school "to deny equal access or a fair opportunity to…any students who wish to conduct a meeting…"

Each of the cases that currently exist on this issue is a federal district court case, meaning that no appellate court has addressed the issue of the applicability of the EAA to gay-related student clubs. Those courts that have addressed the issue have not been unified in their interpretation, and accordingly, school districts must act carefully in an area where the law is yet to be ultimately settled. Even so, districts must not forbid particular student groups which may be unpopular when they allow other non-curricular clubs to meet. Non-curricular clubs can include groups such as Key Club, Bible Club, African-American Students Association, and Chess Club.

For example, in *Boyd County High School Gay-Straight Alliance v. Board of Education of Boyd County*, 258 F.Supp. 2d 667 (E.D. Ky. 2003), members of a student gay rights group successfully brought an action against the school district under the EAA, the First Amendment, and state law. The court in *Boyd County* found that the school district violated the EAA by allowing certain student groups to meet, but not the GSA. Similarly, in *Straights and Gays for Equality v. Osseo Area School District No. 279*, 2006 WL 983904 (D. Minn. 2006), the federal court entered an injunction ordering the school district to grant the student group (SAGE) access for meetings, public address announcements, yearbook photos, fundraising, and distribution of flyers and other materials.

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Can I prohibit a student from wearing a gay pride T-shirt to school?

The answer is most likely "no." Unless a particular shirt is lewd or vulgar, it is likely to be considered protected speech under *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). Under *Tinker* and subsequent First Amendment cases, a school district may only regulate speech if it would create a substantial disruption of or material interference with school activities. Also, any regulation of messages conveyed by students must be content-neutral, meaning the school cannot limit the speech based upon the particular message the student is conveying.

School districts are on the safest legal ground when they apply dress code policies that only prohibit speech that may disrupt the learning environment or interferes with other students' rights. Courts have similarly upheld students' rights to expression for "Straight Pride" shirts[3] and shirts that convey a religious message condemning homosexuality.[4]

Can the school district prevent same-sex couples from attending prom or a school dance together?

Again, the answer is likely "no." There has been at least one reported case in which a male student sought to bring his same-sex date to the school prom, and a federal court found that such an action amounted to a political statement protected by the First Amendment.[5] In *Fricke v. Lynch*, the court recognized other students' opposition to the same-sex couple's attendance at the prom, but stated that "the First Amendment does not tolerate mob rule by unruly school children."

Furthermore, sexual orientation is a protected class under the Illinois Human Rights Act.[6] Just as it would be impermissible discrimination for a school district to prohibit mixed-race couples at the prom, it would be similarly impermissible for a school district to prohibit same-sex couples. However, a school district is free to impose the same restrictions on same-sex prom dates as it would on opposite-sex dates, such as requiring permission slips or other similar school rules.

What is the school district's responsibility when other students harass students because of their sexual orientation?

Gay and lesbian students (as well as students who are perceived to be gay or lesbian) have successfully sued school districts for failing to take action against their harassers.[7] In *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), the Seventh Circuit Court of Appeals found that a school district violated the Equal Protection Clause of the Fourteenth Amendment by failing to protect a gay male student from harassment. In *Hinkle v. Gregory*, 50 F.Supp. 2d 1067 (D. Nev. 2001), a court allowed claims under Title IX for discrimination and harassment by other students, as well as under the First Amendment because of demands by the school district that the student keep his sexual orientation to himself.

Guidance from the U.S. Department of Education's Office for Civil Rights (OCR) states that "sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate or benefit from the school's program constitutes sexual harassment prohibited by Title IX."[8] Accordingly, school districts have a duty to protect gay and lesbian students from harassment just as any other student, and failing to do so can create liability.

In an era when television shows such as *Will & Grace* and *Queer Eye for the Straight Guy* are ordinary, the time will come for every school district to face issues related to sexual orientation. While in years past the law had little to say on the subject and "don't ask, don't tell" seemed progressive, school administrators today must be aware of what the law does to protect gay and lesbian students.

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1. Schulze, Eric W. "Gay-Related Student Groups and the Equal Access Act." 196 Ed. Law Rep. 369 (2005).
2. 20 U.S.C. § 4071 *et seq.*
3. *Chambers v. Babbitt*, 145 F.Supp. 2d 1068 (D. Minn. 2001).
4. *Harper v. Poway Unified School District*, 345 F.Supp. 2d 1096 (S.D. Cal. 2004).
5. *Fricke v. Lynch*, 491 F.Supp. 381 (D. R.I. 1980).
6. 775 ILCS 5/1 *et seq*.
7. See, e.g., *Montgomery v. Independent School District No. 709*, 109 F.Supp. 2d 1021 (D. Minn. 2000).
8. U.S. Dept. of Ed. OCR. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties. (Jan. 19, 2001) at 3.

Meet the Attorneys: Thomas R. Miller

Miller, Tracy, Braun, Funk & Miller, Ltd., has specialized in representing school districts for 30 years, and has grown from one attorney and a secretary to eight attorneys and a full support staff. The firm currently represents over 150 school districts throughout Illinois, with student populations ranging from less than 200 students to over 9,000, and provides a wide array of legal services relating to the many issues faced by Illinois school districts.

Thomas R. Miller

Undergraduate Education:
United States Military Academy at West Point (1966)
Juris Doctor:
University of Illinois (1973)

Admissions:
Supreme Court of Illinois, 1973
United States District Court for the Central District of Illinois, 1977
United States Court of Appeals, Seventh Circuit, 1982
United States Supreme Court, 1983

Tom Miller is the senior, managing partner in the firm, having been a school and labor law attorney for 30 years, and is proud to have the distinction of arguing before the United States Supreme Court in one of his school cases. Tom concentrates his practice in the areas of labor relations, collective bargaining, unfair labor practice representation, grievance representation, and public sector litigation, and during his 30 years of practice, he has given many programs on behalf of the Illinois Association of School Boards, the Illinois Association of School Administrators and the Illinois Principals' Association.

Tom's greatest professional joy has been "working with so many talented and dedicated administrators and board members for more than 30 years." In addition, Tom is proud of "the professional relationship I have developed and maintained over the years with IEA and IFT representatives and local teacher union leaders." Tom has no plans to retire as "I enjoy what I do too much to stop doing it."

Supreme Court Limits Public Employees' Free Speech Protections

Earlier this summer, the United States Supreme Court issued a 5-4 ruling in *Garcetti v. Cebellos*, 126 S.Ct. 1951 (2006), limiting the protections extended to the speech of public employees. In *Garcetti*, a deputy district attorney, the Court held, did not speak as a private citizen when, pursuant to his official duties as a deputy, he wrote a disposition memorandum in which he recommended dismissal of a pending criminal case on the basis of purported governmental misconduct. The Court stated that when he went to work and performed the tasks he was paid to perform, the district attorney acted as a government employee, not as a citizen, and the fact that his duties sometimes required him to speak or write did not prohibit his supervisors from evaluating his performance.

Under this decision, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. While this case does not specifically apply to public school employees, the implications are clear: statements made by teachers in the classroom in the course of their official duties may have fewer constitutional protections than statements made in another forum. This decision, of course, does not impact other protections enjoyed by teachers, including tenure, collective bargaining agreements, and the like.

Based on the U.S. Supreme Court's opinions in *Pickering* in 1968 and *Connick* in 1983, courts have created a three-part test to resolve questions of alleged retaliation by a government agency (such as a school district) against expression by a public employee: (1) Did the employee's speech pertain to a matter of public concern? (2) Did the employee's interest in free speech outweigh the agency's interest in effective operations? (3) Did the employee's speech play a substantial role in the agency's adverse action?

Now there appears to be a fourth prong to this test: Was the employee's speech made pursuant to his or her official duties? We must now wait and see how the lower courts interpret the Supreme Court's recent decision in *Garcetti*.

School Referenda v. the State Officials and Employees Ethics Act: A Trap for the Unwary!

A school district facing a referendum publishes a pamphlet consisting of bulleted points informing voters of the need for a referendum and supporting a "yes" vote; is this a problem? Surprisingly, the answer is ***Yes****!*

School districts, and individual school board members, are prohibited from "distributing, preparing for distribution, or mailing campaign literature, campaign signs, or other campaign material … for or against any referendum question", as well as engaging in a host of other political activities by the State Officials and Employees Ethics Act, 5 ILCS 430/1-1 *et seq*, ("the Act"). School districts, and in turn individual board members, are governed by the provisions of the Act through a two step process. First, the Act defines a "governmental entity" to specifically include school districts, and, second, the Act mandates that all "governmental entities" adopt an ordinance or resolution governing the political activities of its officers and employees.

(5 ILCS 430/1-5) Sec. 1-5. Definitions. As used in this Act:

"Governmental entity" means a unit of local government or **a school district** but not a State agency.

(5 ILCS 430/70-5) Sec. 70-5. Adoption by governmental entities.

(a) Within 6 months after the effective date of this Act, each governmental entity shall adopt an ordinance or resolution that regulates, in a manner no less restrictive than Section 5-15 and Article 10 of this Act, (i) **the political activities of officers and employees of the governmental entity**…

(c) As used in this Article, (i) an "officer" means an elected or appointed official; regardless of whether the official is compensated, and (ii) an "employee" means a full-time, part-time, or contractual employee.

As referenced above, school districts are clearly required to adopt an ordinance or resolution regulating "the political activities of officers and employees", and, as subparagraph (b) indicates, the term "officer" includes individual board members. The required ordinance or resolution adopted by the district must be no less restrictive than Section 5-15 of the act, which states:

(5 ILCS 430/5-15) Sec. 5-15. Prohibited political activities.

State employees **shall not intentionally perform any prohibited political activity during any compensated time (other than vacation, personal, or compensatory time off)**…

The term "prohibited political activity" is more specifically defined in Section 1-5 of the Act, and contains several provisions governing a school district's, or its officers' and employees', ability to act with regard to a referendum.

(5 ILCS 430/5-15) Sec. 1-5. Definitions as used in this Act:

"Prohibited political activity" means

(1) Preparing for, organizing, or participating in any political meeting, political rally, political demonstration, or other political event.

(2) Soliciting contributions, including but not limited to the purchase of, selling, distributing, or receiving payment for tickets for any political fundraiser, political meeting, or other political event.

(3) Soliciting, planning the solicitation of, or preparing any document or report regarding any thing of value intended as a campaign contribution.

(4) Planning, conducting, or participating in a public opinion poll in connection with a campaign for elective office or on behalf of a political organization for political purposes **or for or against any referendum question**.

(5) Surveying or gathering information from potential or actual voters in an election to determine probable vote outcome in connection with a campaign for elective office or on behalf of a political organization for political purposes **or for or against any referendum question**.

(6) Assisting at the polls on election day on behalf of any political organization or candidate for elective office **or for or against any**

referendum question.

(7) Soliciting votes on behalf of a candidate for elective office or a political organization **or for or against any referendum question** or helping in an effort to get voters to the polls.

(8) Initiating for circulation, preparing, circulating, reviewing, or filing any petition on behalf of a candidate for elective office **or for or against any referendum question**. . . .

(11) Distributing, preparing for distribution, or mailing campaign literature, campaign signs, or other campaign material on behalf of any candidate for elective office or for or against any referendum question.

(12) Campaigning for any elective office or for or against any referendum question.

(13) Managing or working on a campaign for elective office **or for or against any referendum question**. . . .

As referenced, the definition of a "prohibited political activity" clearly includes the promotional pamphlet from the above hypothetical. A district engaging in such an activity would have violated its own ordinance or resolution, leaving it exposed to potential litigation. In addition to the hypothetical violation, the definition of a "prohibited political activity" presents several areas where even well-intentioned and seemingly innocent actions by administrators or board members can run afoul of the Act, or raise difficult factual questions about whether the administrator or board member was acting in their official capacity or as a private citizen. Given the scope of activity included within the definition of prohibited political activities, and the emotions that typically surround school referenda, districts should exercise extreme caution in promoting or making public comment on a school referendum.

Appellate Court Clarifies Meaning of "Confidential Employee"

In *Support Council of District 39, Wilmette Local 1274, IFT-AFT, AFL-CIO v. Educational Labor Relations Board*, — N.E.2d —, 2006 WL 1737480 (1st Dist. 2006), the union sought review of the final order of the Illinois Educational Labor Relations Board (IELRB), excluding a newly-created computer network manager position in the school district form the union's bargaining unit. The 1st District Appellate Court held that the position was "confidential" and upheld the IELRB's decision.

The network manager had broad, district-wide access to computer files at all levels, including the confidential data of high-level administrators. The Appellate Court held that under the "labor-nexus" test, the network manager's regular duties included providing assistance in a confidential capacity. The Court also held that the school district was not required to create a system to prevent the network manager from accessing confidential information, so as to avoid excluding him from the bargaining unit.

The Court's decision clarifies the meaning of a confidential employee under the Educational Labor Relations Act, but note that each position should be evaluated on a case-by-case basis, subject to the situation's particular facts.

New Federal Special Education Rules Published

On August 3, 2006, the U.S. Department of Education announced the final Part B regulations to implement the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). On August 14, 2006, the official copy of the final Part B regulations of the IDEA was published in the *Federal Register*.

A copy of the regulations can be found at:

http://www.ed.gov/legislation/FedRegister/finrule/2006-3/081406a.pdf

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"Timely and Meaningful Consultations" Should Include Home-School Parents

On July 25, 2006, the Illinois State Board of Education issued guidance regarding parentally-placed private school students with disabilities for the 2006-2007 school year. The guidance focuses on the requirement for each district to conduct "timely and meaningful consultations" with private schools within the district's boundaries under the IDEA.

Under ISBE's new guidance, each school district must conduct its timely and meaningful consultation with private schools and parent representatives of private school students with disabilities by ***September 30, 2006***. Each district is then required to submit the required documentation evidencing completion of the timely and meaningful consultation by ***October 7, 2006***.

Also new for the 2006-2007 school year is the requirement that home-schooled students are included not only in the obligation to conduct a timely and meaningful consultation, but also in the allocation of a proportionate share of Part B funds.

What does this mean? Under ISBE's most recent guidance document, school districts must 1) provide written notice to known home school parents of the timely and meaningful consultation; 2) post notice in a newspaper of general circulation to give notice to the public of the timely and meaningful consultation process; and 3) allow home school students with disabilities access to a proportionate share of Part B funds.

Remember that the overall requirements for consultation include child find, determining proportionate share, allowing meaningful participation of representatives of private school students, and allocating services to those parentally-placed private school (*and home school*) students with disabilities.

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