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School Law Advisor

News and Notes for School Administrators

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Seventh Circuit OKs District's Restriction on Teacher Speech in Classroom

The United States Court of Appeals for the Seventh Circuit issued an opinion in *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477 (2007) with important ramifications for Illinois school districts—applying the Supreme Court's 2006 decision in *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) to the speech of teachers in the classroom.

The facts in *Mayer* were the following: Deborah Mayer was a probationary teacher in an elementary classroom in Monroe County, Indiana. She was using an issue of *Time for Kids* to discuss the war in Iraq. The article mentioned a peace march in Washington, DC, and a student asked the teacher whether she would ever join an anti-war protest. The teacher told the class that she sometimes blew her car horn to support demonstrators carrying "Honk for Peace" signs. She also told the class she thought it was important to seek out peaceful solutions before going to war. Some parents complained about this classroom incident, and Mayer was dismissed at the end of the year. While the school district claimed her dismissal was due to poor classroom performance, Mayer claimed that it was this incident that led the district to let her go.

The District Court held in favor of the school district, and on appeal, the Seventh Circuit affirmed the lower court's ruling. The court cited the words of *Garcetti*, saying "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." *Id.* at 1960.

The court went on to say that "the Constitution does not entitle teachers to present personal views to captive audiences against the instructions of [school officials]." *Mayer* at 480. Interestingly, the court noted:

> Children who attend school because they must ought not be subject to teachers' idiosyncratic perspectives. Majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination; elected school boards are tempted to support majority positions about religious or patriotic subjects especially. But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers.

Because Monroe County School District officials had instructed teachers to express no particular viewpoint on the Iraq war, and because Mayer had departed from those instructions, the court held the District's actions in dismissing her were not violative of the First Amendment. The court concluded its opinion, saying that the First Amendment "does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system." *Id.*

Also in this issue…

Guiles v. Marineau:

2nd Circuit Enlarges Sphere of Student Speech Rights

Q: A student attends school wearing a t-shirt with a picture of a large marijuana leaf above the text "LEGALIZE." Can the school regulate this situation?

Prior to the 2nd Circuit Court of Appeals opinion in *Guiles v. Marineau*, 461 F.3d 320 (2nd Cir. 2006), the general consensus was that the above example of student speech could be regulated. However, *Guiles* seems to alter the landscape of what a school may regulate in terms of student free speech, particularly a school's ability to regulate political speech involving alcohol and/or drugs.

The case involves Zachary Guiles, a 13 year old student at Williamstown Middle School, Williamstown, Vermont, who wore a t-shirt which was critical of President Bush, accused him of being a former alcohol and cocaine abuser, and included images of alcohol and cocaine. The t-shirt at issue, which had been purchased at an anti-war rally, was described by the Court as follows:

> The front of the shirt, at the top, has large print that reads "George W. Bush," below it is the text, "Chicken-Hawk-In-Chief." Directly below these words is a large picture of the President's face, wearing a helmet, superimposed on the body of a chicken. Surrounding the President are images of oil rigs and dollar symbols. To one side of the President, three lines of cocaine and a razor blade appear. In the "chicken wing" of the President nearest the cocaine, there is a straw. In the other "wing" the President is holding a martini glass with an olive in it. Directly below all these depictions is printed, "1st Chicken Hawk Wing," and below that is text reading "World Domination Tour."
>
> The back of the T-shirt has similar pictures and language, including the lines of cocaine and the martini glass. The representations on the back of the shirt are surrounded by smaller print accusing the President of being a "Crook," "Cocaine Addict," "AWOL, Draft Dodger," and "Lying Drunk Driver." The sleeves of the shirt each depict a military patch, one with a man drinking from a bottle, and the other with a chicken flanked by a bottle and three lines of cocaine with a razor.

Guiles wore the t-shirt in question to school on average once a week for two months without incident until a date when Guiles was to attend a school field trip. *Guiles*, 461 F.3d 320, 322 (2nd Cir. 2006). Guiles was given three choices: 1) turn the shirt inside out; 2) tape over the images of the drugs and alcohol and the word "cocaine"; or 3) change shirts. *Id* at 323.

In determining whether Guiles's First Amendment rights were violated, the 2nd Circuit engaged in the standard *Tinker, Fraser* and *Hazelwood* school speech analysis stating:

> We distill the following from *Tinker, Fraser*, and *Hazelwood*: (1) schools have wide discretion to prohibit speech that is less than obscene-to wit, vulgar, lewd, indecent or plainly offensive speech; (2) if the speech at issue is "school sponsored," educators may censor student speech so long as the censorship is "reasonably related to legitimate pedagogical concerns,"; and (3) for all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser*, non school sponsored under *Hazelwood*, the rule of *Tinker* applies. Schools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school. *Id* at 325, (internal citations omitted).

The t-shirt at issue is clearly not school sponsored, and, therefore, could only be regulated as "vulgar, lewd, indecent or plainly offensive" (*Fraser*) or if it would "materially and substantially disrupt classwork and discipline in the school" (*Tinker*). The Court held that alcohol and drug images on Guiles's t-shirt were not vulgar, lewd, indecent or plainly offensive on their own, and, therefore, could not be regulated under *Fraser*. *Id*. at 327.

In holding that the t-shirt fell within the *Tinker* analysis, and could not be regulated under *Fraser*, the Court essentially breaks the Fraser criteria into two parts; 1) vulgar, lewd and indecent, and 2) plainly offensive. The Court quickly dismisses the first set, referencing the concept that lewdness, vulgarity and indecency normally connote sexual innuendo or profanity, which is not present on Guiles's shirt. *Id.* at 327. With regard to whether the t-shirt is "plainly offensive," the Court engages in a more lengthy analysis, but ultimately concludes that the images are not "plainly offensive," stating:

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> Here, the images of a martini glass, alcohol, and lines of cocaine… may cause school administrators displeasure and could be construed as insulting or in poor taste. We cannot say, however, that these images, by themselves, are as plainly offensive as the sexually charged speech considered in *Fraser* nor are they as offensive as profanity used to make a political point. We do not think in light of this discussion that the images on plaintiff's T-shirt are plainly offensive, especially when considering that they are part of an anti-drug political message. *Id*. at 329 (internal citations omitted).

The Court held that the situation was governed by *Tinker*, and that the t-shirt did not cause any disruption nor did the school have any reasonable belief that it would. *Id* at 330.

Despite the school's Student/Parent Handbook, which prohibited wearing images any images of alcohol and drugs, the Court dismissed the school's position that all images of illegal drugs and alcohol are plainly offensive because they undermine the school's anti-drug message. Id at 329.

> The flaw in the defendants' position is that it conflates the rule of *Hazelwood* with *Fraser*, and in doing so, eviscerates *Tinker*. Defendants censored the images because they believed such images were contrary to the school's basic educational aim of having an anti-drug school environment.
>
> …[T]he phrase "plainly offensive" as used in *Fraser* cannot be so broad as to be triggered whenever a school decides a student's expression conflicts with its "educational mission" or claims a legitimate pedagogical concern. Were that the rule then *Fraser* would effectively swallow *Hazelwood's* holding that school officials may censor student speech if (1) the censorship reasonably relates to a legitimate pedagogical concern, and (2) the speech is school sponsored. Indeed, if schools were allowed to censor on such a wide-ranging basis, then *Tinker* would no longer have any effect. *Id*. at 330 (internal citations omitted).

The Court's analysis in *Guiles* seemingly changes the appropriate response to the hypothetical above. While the Court states several times in its opinion that drug and alcohol images on Guiles's t-shirt were actually an anti-drug message, the images were still used in the context of clearly political speech. While a school may still be able to regulate alcohol and drug images in some contexts, administrators should tread with great care where these images are part of clear political speech.

Meet the Attorneys: Brian A. Braun

Miller, Tracy, Braun, Funk & Miller, Ltd., has specialized in representing school districts for 30 years, and has grown from one attorney and 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.

Brian A. Braun

Undergraduate Education:
University of Illinois (1969)

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Supreme Court of Illinois, 1975
United States District Court for the Central District of Illinois, 1983
United States Seventh Circuit Court of Appeals, 1987

Brian Braun has been a partner in the firm since 1983. Prior to his time with the firm, he was an attorney on the staff of Illinois Association of School Boards, 1977 to 1983, and a language arts teacher in DuPage County, 1969 to 1977. He has lectured on school law and labor relations at a number of Illinois colleges and universities, and was a member of the Board of Directors of the National Council of School Attorneys (1991-95) and is a past chairman of the Executive Committee of the Illinois Council of School Attorneys (IASB). In November, 1996, Brian A. Braun received the Harold P. Seamon Award from IASB for distinguished service to public education.

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Appellate Court Restricts Use of Tort Levy

On March 27, 2007, the Second District Appellate Court issued an Opinion which severely limits the use of risk management plans for the payment of salaries. *In re Objections to Tax Levy of Freeport School District No. 145, et al.*, No. 2-06-0250 and 2-06-0258 cons. (2nd Dist. March 27, 2007).

In 2001 several taxpayers objected to the payment of certain expenses from the tort immunity levy by Freeport School District No. 145, Freeport Park District, Pearl City School District No. 200 and Highland Community College District No. 519. Each of those taxing bodies had adopted a risk management plan which provided for the payment of a specified percentage of certain employees' salaries through the tort immunity levy.

Section 9-107(b) of the Local Governmental and Governmental Employees Tort Immunity Act allows a taxing body, including a school district, to levy, separately from any limitation otherwise applicable to tax levies, at a rate

> that will be sufficient to: (i) pay the cost of insurance, individual or joint self-insurance ..., claims services and *risk management directly attributable to loss prevention and loss reduction,* self-insurance, or joint self-insurance program, and educational, inspectional, and supervisory services directly relating to loss prevention and loss reduction ...; (ii) pay the costs of and principal and interest on bonds issued under Section 9-105 ...; (iii) pay judgments and settlements under Section 9-104 ...; and (iv) ... pay the cost of risk management programs.

The terms "risk management" and "risk management programs" are not defined in the Tort Immunity Act. Following a bench trial which included 719 stipulations and 21 exhibits, the Circuit Court of Stephenson County issued an opinion in August 2005 finding the use of tort fund levies by Freeport School District, Freeport Park District and Highland Community College District to partially pay salaries was not authorized by the Tort Immunity Act, while the Pearl City School District's payments were authorized by the Act. Interlocutory appeals were taken to the Second District Appellate Court, which issued an opinion on March 27, 2007.

After noting that the term "risk management" as used in the Tort Immunity Act was ambiguous, the Appellate Court adopted the interpretation offered by the expert witness of the tax objectors. According to the Court, "risk management" is a process that consists of the following four steps:

(1) identifying and analyzing loss exposures;
(2) selecting a technique or combination thereof to be used to handle each exposure;
(3) implementing the chosen techniques; and
(4) monitoring the decisions made and implementing appropriate changes.

The Court rejected the school district's broader interpretation of the term, which would have resulted in a conclusion that school personnel, including teachers, coaches, janitors, bus drivers and administrators, regularly engage in risk management activities. The Appellate Court upheld the payment of a portion of the Pearl City School District's superintendent's salary as part of a risk management plan because the written plan included the following statement:

> The Superintendent shall be responsible for the development of the program, identifying the various components of the program, and delegating responsibilities for these components to the appropriate personnel. It is expected that the Superintendent will continually evaluate the effectiveness of the program and be apprised of needed revisions, additions or deletions to the components and assigned responsibilities.

The Court reversed the trial court's holding which allowed the payment of percentages of salaries of other Pearl City employees, including bus drivers, food services workers, school nurses, principals and teachers, through the tort levy. The Appellate Court ruled those employees' job descriptions did not reflect that they were "assigned any tasks that are above and beyond the ordinary tasks associated with the respective job titles." Most notable, according to the Court, was the absence from their job descriptions of any "responsibilities to identify and implement techniques to reduce liability exposure and to monitor the effectiveness of the implemented techniques."

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Following the Second District Appellate Court's decision, it is clear the widespread practice of school districts utilizing risk management programs to pay for specified percentages of employee salaries has been greatly hampered, if not completely halted. If the payment of any portion of a salary as part of a risk management plan has any chance of withstanding a challenge from tax objectors, it must be supported by evidence of an ongoing analysis of risks and of the implementation of changes in the program as needed, as described above. It is an open question whether the payment of any salaries of any employees other than the superintendent is permissible. MTBFM will keep you informed of any further developments or changes in the law.

New Minimum Wage Set To Take Effect July 1st

P.A. 94-1072, legislation increasing the state minimum wage to $7.50 per hour, takes effect on July 1, 2007. The minimum wage will increase by an additional 25 cents in each of the following three years to $7.75 on July 1, 2008; $8.00 on July 1, 2009; and $8.25 on July 1, 2010.

Under the law, during the first 90 consecutive calendar days after an employee is initially employed by the employer, an employer can pay a wage that is not more than 50¢ less than the wage prescribed.

Also, at no time shall the wages paid to any employee under 18 years of age be more than 50¢ less than the wage required to be paid to employees who are at least 18 years of age.

As this new law takes effect, it is important to review the wages being paid to employees (and to review the terms of your collective bargaining agreements) to look for any changes that may be necessary.

Family Medical Leave Act:
Seventh Circuit Clarifies Rule Regarding Temporary Disability Benefits

In *Repa v. Roadway Express, Inc.* 477 F.3d 938 (2007), the Seventh Circuit held in favor of an employee, finding that the employer improperly required her to use sick and vacation leave while she was using FMLA leave and receiving disability benefits.

The FMLA guarantees qualifying employees twelve weeks of unpaid leave each year, though "an employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for the leave provided" by the FMLA. 29 U.S.C. 2612(d)(2). This substitution is limited by Department of Labor regulations at 29 C.F.R. 825.207(d)(1), providing that the substitution of paid leave is inapplicable when an employee is taking leave and receiving benefits pursuant to a temporary disability benefit plan.

The employer in *Repa* argued that the DOL regulations apply only to disability leave for the birth of a child, and because Repa's leave was not for this purpose, that the employer could require her to use accrued paid leave during her FMLA leave. The Seventh Circuit disagreed and found in favor of the employee, stating that when an employee is receiving benefits from an employer's (or third party's) temporary disability benefit plan, an employer cannot require the employee to use accrued paid leave.

The employer also argued that the DOL regulation was invalid as it "contravenes Congress's intent." The Court did not address this issue, stating that the employer had waived the issue by not raising it at the trial court level.

This case should remind school districts to review their policies regarding FMLA leave, particularly as it relates to the intersection of paid and unpaid leave. It is also important to ensure that districts' practices in granting leave are in line with districts' policies.

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Statute Mandates Reporting Significant School Incidents to Law Enforcement

Even though the statutes in question took effect in 2005, it has been noted by the Illinois State Board of Education and the Illinois State Police that many school districts are not in compliance with the requirement to report significant school incidents to law enforcement.

The relevant statutes (105 ILCS 5/10-27.1A, 10-27.1B, and 10-21.7), require "the superintendent or his or her designee" to report these significant incidents to both local law enforcement and the Illinois State Police. These incidents include any verified incident involving drugs, firearms, or "all incidents of battery committed against teachers, teacher personnel, administrative personnel or educational support personnel" to law enforcement.

Notification to local law enforcement authorities must occur "immediately" under the statutes. Notification to the Illinois State Police must occur "in a form, manner, and frequency as prescribed by the Department of State Police." The ISP and ISBE have created an electronic reporting system through IWAS which satisfies the requirement to report significant incidents to the State Police, but does not satisfy the requirement to report such incidents to local law enforcement.

These reporting requirements apply not only to public school districts, but to private schools as well.

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