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RELIGION IN PUBLIC SCHOOLS 2010: THE CLASSROOM AND FREE SPEECH

Overview

For more than sixty years, mainly through several landmark decisions of the United States Supreme Court [e.g., McCullum (1948), Zorach (1952), Engel (1962), Schempp (1963), Lemon (1971), Wallace (1985), Edwards (1987), Mergens (1990), Weisman (1992), Zobrest (1993), Santa Fe (2000), Newdow (2004)] and a series of highly publicized lower court decisions, the law concerning religion (i.e., religious instruction and religious-oriented activities) in public schools has been clarified. The creation, sustained application, and publication of judicially- created standards (e.g., neutrality, child benefit, excessive entanglement [excessive involvement], endorsement [imprimatur/sanctioning], accommodation [balancing the Establishment Clause with the Free Exercise Clause]) have painted a clear legal landscape. To put it another way, in 2010 there is no excuse for informed state legislators, local school system policy-makers, school building administrators, school staff members (especially classroom teachers), and parent groups not knowing what is or is not acceptable practice in a public school setting—religiosity is religiosity. Yet, every school year, without fail, the potential for a highly emotional religion/public school issue springs up somewhere in our nation.

In the recent past several reports have appeared in the media (e.g., local newspapers, national magazines, cable news programs) involving an effort in several states and localities to incorporate the Bible (as an elective academic course; and/or with other religious books and documents as a part of an elective course in comparative religions) in the public school curriculum. In my view while the idea has pedagogical merit, incorporation of the Bible in a public school curriculum nonetheless serves as a lightning rod for protest. Where protest already has been heard the focus is not on the Bible itself but rather on (1) how and by whom it will be used, (2) at what grade level, and (3) for what purpose—a series of questions not new to education law observers.

Busch v. Marple Newton School District (3rd Cir. 2009)

Recently I came across a decision from the United States Circuit Court of Appeals for the Third Circuit where the above three questions were addressed by the court. While the case does not involve an official incorporation of the Bible as an area of study in the curriculum it does, however, involve use of the Bible in an elementary

school classroom as a part of a teacher organized student “show and tell” assignment. It is what this decision says about curriculum, the limits of free speech in public school classrooms, the authority of teachers, the role of parents in class room activities, and the fact that several organizations (e.g., National School Boards Association) filed amicus briefs that make it an important decision to report and discuss in this month’s commentary. Plus, the Court’s opinion (including concurring and dissenting opinions) reads like a restatement of the law.

Facts: As a part of a social studies curriculum unit (titled “All About Me”), a kindergarten teacher encouraged her students to “identify individual interests and learn about others,” and to “identify sources of conflict with others and ways that conflicts can be resolved.” The teacher gave each student the opportunity to share information about them selves by bringing in a poster with pictures. Students were also permitted to bring a snack, a toy, or stuffed animal to class. Parents were invited, during their child’s designated week, to participate in the unit by visiting the class to share “a talent, short game, small craft, or story.”

One of the students in the class (Wesley) made a poster on which he placed, among other things, a picture of a church. Because he was five years old Wesley asked his Mom to write the following phrase under the picture: “I love to go to the House of the Lord,” or “I like to go to church.” She did so and Wesley’s poster was displayed in the classroom. Subsequently, Wesley had an opportunity to present his poster to the class and to talk about the various items on it.

When Wesley’s Mom’s turn came to visit the class she asked Wesley what he would like her to read. He answered, “The Bible.” Wesley often carried a Bible with him. The night before her visit to the classroom, the Mom, who described herself as an “Evangelical Christian,” pondered the verses to read. Wesley was not with her when she made the selection. She testified that she selected verses 1 through 4 and verse 14 of Psalm 118, from the King James Bible because: (1) she and her son frequently read from the Book of Psalms, (2) she thought the children in the class would like Psalms because they are similar to poetry, and (3) the selected verses did not make specific references to Jesus. She also testified that she intended to read the selected verses without comment or explanation; and, if the students asked questions she would respond that “it was ancient psalms and poetry and one of Wesley’s favorite things to hear.”

On the morning she was to be in the class, Wesley’s Mom informed the teacher of her intention to read from the Bible. The teacher responded that she would first have to check with the principal. Subsequently the principal spoke to Wesley’s Mom and said that reading from the Bible would be against the law (separation of church and state). In his view, “the Bible is holy scripture” and reading from the Bible to kindergarten students “is promoting a specific religious point of view.” He asked that she read from another book.

Wesley’s Mom objected to the principal’s request saying that her son had just finished reading a book called Gershon’s Monster: A Story of the Jewish New Year, which he obtained from the school library. The principal responded: “Well, that’s cultural and your son chose that book and these children are not choosing to hear from the Bible....I can’t let you do that.”

Other parents already had participated in their child’s “All About Me” activity by reading stories to the class, sharing snacks, and doing crafts. One parent visited the class twice to give presentations on Hanukkah and Passover.

The classroom teacher kept several books in her classroom from which she read passages to the class. Some of the books contained Christmas, Easter, and Hanukkah themes. Christmas and Kwanzaa had been discussed in class as a part of a winter holiday unit in the social studies curriculum.

Subsequently, the school superintendent supported the principal's decision. He based his decision on the following factors: (1) the captive nature of the classroom audience, (2) the parent appearing to take the place of the classroom teacher, and (3) the likely perception that the school district was advocating or supporting whatever was being said to the class.

Federal District Court Action: Wesley's Mom went into a federal district court where she alleged that the school system's restriction of her efforts to read aloud from the Bible to her son's kindergarten class, as a part of a "show and tell" activity, violated the First Amendment's Free Speech guarantee and the Establishment Clause, the Equal Protection Clause of the Fourteenth Amendment, and sections of the Pennsylvania Constitution. The court granted summary judgment to defendant school officials (at 2007 WL 1589507), and Wesley's Mom filed an appeal in the United States Court of Appeals for the Third Circuit.

Third Circuit Decision and Rationale: In a very comprehensive and carefully detailed opinion the Third Circuit first turned to the issue of free speech in the classroom and in doing so relied on several of the landmark decisions from the United States Supreme Court. Citing Hazelwood v. Kuhlmeier (1988), Perry Education Association v. Perry Local Educators' Association (1983), Good News Club v. Milford School District (2001), and others the appellate court opined that while public schools that intentionally open facilities for public discussion take on characteristics of public fora, in classrooms, during school hours, when curricular activities are supervised by teachers, the non-public nature of a public school is present for purposes of a free speech analysis. More specifically, in an elementary school classroom the appropriateness of expression depends on: (1) the type of speech, (2) the age of the locator and audience, (3) the school's control over the activity in which the expression occurs, and (4) whether the school solicits individual views from students during the activity.

The Court focused on the elementary school classroom context and the age and maturity of the students present in the classroom. At this point the Third Circuit quoted directly from an earlier decision in Walz v. Egg Harbor (3rd Cir. 2003) where it said: "While secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis, kindergarteners and first graders are different....The line between school-endorsed and merely allowable speech is blurred...." As such, said the Court, the age of the students present bears an inverse relationship to the degree and kind of control a public school may exercise in the classroom—i.e., "the younger the students the more control a school may exercise."

At this point in the opinion the Third Circuit quoted the United States Supreme Court in Hazelwood (1988) where it was said that "[e]ducators are entitled to exercise greater control over [school-sponsored expressive activities] to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners not be exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school" Thus, said the Third Circuit Court, restrictions on speech during a public school's organized, curricular activities are within the school's legitimate area of control—because they help create the structural environment in which the school imparts basic social, behavioral, and academic lessons. As such, curricular standards, consistent with pedagogical goals, applied during organized public school classroom activities, especially those that occur in kindergarten and first grade, when children are most impressionable, should not be lightly overturned, in analyzing whether the standards violate free speech rights.

The Third Circuit next turned to the fact that parent involvement in the "show and tell" activity was invited by the teacher. In the Court's view, the fact that the speech involvement was invited during a curricular activity does not necessarily prevent restrictions on that speech. "By inviting participation in curricular activities," said

the Court, “educators do not cede control over the message and content of the subject matter presented in the classroom.” When it invites speech, a public school may require that the solicited speech respond to the subject matter at hand, without violating the free speech rights of the speaker. Here, the school officials did not violate Wesley’s Mom’s free speech rights.

In the Court’s opinion, school officials acted reasonably in disallowing “the reading of a religious text” because they believed it would proselytize a specific religious point of view. Even though school officials allowed students to discuss in class religious holidays and to read from certain holiday-oriented religious materials, the Mom’s reading from the Bible is different. A reading from the Bible or other religious texts “is more than a message and unquestionably conveys a strong sense of spiritual and moral authority....Parents of public school kindergarten students may reasonably expect their children will not become captive audiences to an adult’s reading of religious texts.” Thus, said the Court, “if the Mom’s classroom speech had not been restricted, it would appear to be an endorsement by the school of a particular religion which would implicate the Establishment Clause—especially where public authorities are perceived to have undertaken to give one religious belief official approval over other religious beliefs.”

Directly applying the three prongs of Lemon v. Kurtzman (1971), the Third Circuit saw no Equal Protection violation. First, restricting the Mom’s reading to the class from the Bible was in furtherance of a legitimate secular (educational) purpose. Second, the actions of school officials neither endorsed nor disapproved religion. Third, the actions of school officials avoided excessive entanglement with religion. Citing Santa Fe ISD v. Doe (2000) and Lee v. Weisman (1992) The Court concluded its analysis by stating that the restrictions placed on the Wesley’s Mom did not evidence hostility toward their particular faith.

The decision of the federal district court was affirmed.

Concurring and Dissenting Opinions: One Circuit Judge filed a concurring opinion. While agreeing with the majority decision, he nonetheless took issue with two specific aspects of the case. First, he doubted the Mom’s claim that the Bible is Wesley’s favorite book and that Wesley’s classmates would have been able to understand excerpts from Psalm 118. In his view the contents of this work have been “the subject of discussion and debate among biblical scholars for centuries.” Second, he found fault with the fact that courts (as was so in this case) continue to “scrutinize and analyze purported violations of the First Amendment rights of children at the pre-K and kindergarten levels.”

Another Circuit Judge filed an opinion concurring in part and dissenting in part. In a very comprehensive and detailed rationale, in which he cited many of the same United States Supreme Court decisions relied on in the majority opinion. However, he added several others in a discussion of the difference between *subject-matter* and *view-point* discrimination. Morse v. Frederick (2007), Bethel School District v. Fraser (1986), Tinker v. Des Moines (1969), Rosenberger v. Rector and Visitors of UVA (1995), Lamb’s Chapel v. Center Moriches Union Free School District (1993) In his view, “Clearly, ‘the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.’ Fraser, 478 U.S. at 682, 106 S.Ct. 3159. It does not follow, however, that the state may regulate one’s viewpoint merely because speech occurs in a school house—especially when the facts of the case demonstrate that speech is personal to the student and/or his parent rather than the school’s speech. The majority’s desire to protect young children from potentially influential speech in the classroom is understandable. But that goal, however admirable, does not allow the government to offer a student and his parents the opportunity to express something about themselves, except what is most important to them.”

Policy Implications

As stated at the outset of this commentary, Busch v. Marple Newton School District (3rd Cir. 2009) is a significant court decision. While the Bible (*i.e.*, in this situation the potential for scripture reading) is present in a public elementary school classroom and triggers the initial controversy, and the difference between teaching religion and teaching about religion is implicated, Busch is more important for what the Third Circuit Court says about (1) public *school curriculum* (especially in elementary schools), (2) the *role of classroom teachers* in presenting subject matter units, (3) the *relevance and appropriateness of student assigned curricular activities*, and (4) the *role, expression rights, and prerogatives of parents*—especially those invited into the classroom by the teacher to directly interact with students in curricular activities. In my opinion the following suggestions for policy can be gleaned from the Court’s rationale:

Local school system policy must make it clear that:

- The Board is vested with the legal authority to develop and ensure the implementation of the curriculum presented in each of the school district’s schools.
- The curriculum (including all curricular activities and student assignments) presented in each of the school district’s schools meets all legal standards set by the State and all requirements set by appropriate accrediting bodies.
- All curricular requirements, assignments, and activities offered in each school must be directly related to the curriculum and the subject matter being covered, and are appropriate to age, grade level, and maturity of the students involved.
- Classroom teachers are expected to: (1) carefully plan (including but not limited to textbook readings, computer access and assignments, supplementary readings, student research requirements, quizzes and tests, guest speakers), and (2) control and implement instruction directly related to student mastery of the specific subject matter being covered in each curricular unit.
- While parental involvement in each school is highly valued and encouraged, clear *expectations* (including restrictions) and *guidelines for interaction* with students (especially in classroom instruction) shall be presented and explained to parents by teachers, prior to the involvement of parents in classes and student activities.

Postscript

One final observation is offered. It would be wise to revisit the United States Supreme Court’s benchmark decision in Abington Township v. Schempp (1963), and its companion case Murray v. Curlett (1963) where, in reference to the Bible’s *literary* and *historic* qualities, the Court said: “Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistent with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that government maintain strict neutrality, neither aiding nor opposing religion....”

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Note: The views expressed in this commentary are those of the author.