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School Law Newsletter

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Rocky D. v. South Carolina Association of School Administrators

In a case in which our law firm represented the South Carolina Association of School Administrators ("SCASA"), the Richland County Circuit Court ruled this month that SCASA is not subject to lawsuit under the South Carolina Freedom of Information Act ("FOIA"). The Court dismissed the lawsuit filed by Rocky Disabato ("Rocky D") against SCASA seeking a judicial declaration that SCASA is a public body subject to the requirements of the FOIA. Importantly, the Court held that:

> "[T]he FOIA unconstitutionally burdens SCASA's protected speech and associational rights. Specifically, the FOIA's open meeting and records disclosure requirements restrict SCASA's political speech and issue advocacy without a substantial relation to the purpose of the FOIA, and where narrower means are available to achieve FOIA's purpose. As a result, the First Amendment prohibits the application of the FOIA's requirements to SCASA, and the Plaintiff's claim must fail because Plaintiff cannot, as a matter of law, state a claim for relief under the FOIA against SCASA.

Although this decision can be appealed, we believe the Court's ruling is legally sound and is an important step in protecting SCASA and similar advocacy associations from harassing litigation under the FOIA.

Fourth Circuit Court of Appeals Addresses Off-Campus Student Speech

With the rise of technology, school districts around the country are being forced to address off-campus cyberbullying and other forms of student misconduct involving social media. On July 27, 2011, in the case of *Kowalski v. Berkeley County (W.Va.) Schools, et al.*, a three judge panel of the United States Court of Appeals for the Fourth Circuit (MD, NC, SC, VA, WV) issued an opinion providing some guidance in this somewhat unsettled area of the law.

In this case, Kara Kowalski, a senior at Mussellman High School in West Virginia, created and posted a MySpace webpage labeled "S.A.S.H." which reportedly stood for "Students Against Shay's Herpes" and was dedicated to ridiculing a fellow classmate, Shay N. (S.N.). Kowalski created the webpage using her home computer and invited approximately 100 individuals, some of whom attended the high school, to join the chat group and

post comments and other items. Several members of the chat group posted extremely vulgar and defamatory comments about S.N. In addition, another member of the group posted an altered photograph of S.N. which depicted red dots on her face to simulate herpes and displayed a sign near her pelvic region that read "Warning: Enter At Your Own Risk." Another photograph captioned S.N's face with a sign that read "Portrait of a Whore." Although Kowalski did not post any comments or photographs aimed directly at S.N., she commented approvingly on many of the derogatory postings.

When S.N.'s parents learned of the chat groups and postings, they contacted the school, provided the administration with a printout of the webpage, and filed a harassment complaint. Following an investigation, school administrators concluded that Kowalski had created a "hate website" in violation of the school's policy against harassment, bullying, and intimidation. As a result, Kowalski ultimately was suspended for 5 days and was issued a 90 day "social suspension" which prevented her from attending school events in which she was not a direct participant. In addition, she was not allowed to participate on the cheerleading squad for the remainder of the school year.

In response to the disciplinary action taken by the school, Kowalski commenced a lawsuit in federal district court against the school district and various school officials asserting claims of free speech violations, due process violations, and various other claims. The federal district court dismissed Kowalski's claims, and she appealed the ruling to the United States Court of Appeals for the Fourth Circuit, arguing among other things, that because the case involved off-campus, non-school related speech, school administrators had no power to discipline her. Accordingly, on appeal, the Fourth Circuit framed the question as presented as "whether Kowalski's activity fell within the outer boundaries of the high school's legitimate interest in maintaining order in the school and protecting the wellbeing and educational rights of its students."

Relying on student speech case precedent, a three judge panel of the Fourth Circuit affirmed the lower court's ruling, concluding that in the circumstances of the case, the school district's imposition of sanctions was permissible. Particularly, the panel recognized that the language and analysis in the landmark student speech case, *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, supported the conclusion that "public schools have a compelling interest in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying." The Fourth Circuit panel reasoned that even though Kowalski was not physically present at school when she created the webpage, given the nature of internet activity and the members of the S.A.S.H group, it was foreseeable that her conduct would reach and impact the school environment. Further, the Fourth Circuit panel noted that Kowalski's conduct had disrupted the work and discipline of the school because the creation of the page forced S.N. to miss school to avoid abuse and because the harassment had the potential to continue and expand absent school intervention.

With regard to Kowalski's due process claims, the Fourth Circuit concluded that the school's policy had provided Kowalski with sufficient notice of the consequences that could result from her off-campus conduct and that she had been given an opportunity to be heard on the issue prior to sanctions being imposed. In addition, the Fourth Circuit panel upheld the lower court's dismissal of all of Kowalski's other claims.

Although this decision may make the discipline of off-campus student cyberbullying more legally defensible for school districts, it is important to note that this ruling is extremely fact specific. Decisions based on this issue could vary on a case-by-case basis, as illustrated by other jurisdictions who have reached contrary conclusions. Depending on whether Kowalski decides to seek further appellate review of the decision, the United States Supreme Court could possibly address this case, in addition to three other student off-campus online speech cases, during the 2011-2012 term.

South Carolina Courts Clarify Issue Under Teacher Employment and Dismissal Act

On June 3, 2011, the federal district court of South Carolina issued an order in *Henry-Davenport v. School District of Fairfield County*, ruling in favor of the school district. As background, the Plaintiff alleged that the school district violated the South Carolina Teacher Employment and Dismissal Act ("TEDA") when she was demoted from her position

as Deputy Superintendent to Director of Food Services and she received a corresponding salary reduction, but she was not afforded a hearing under the TEDA. The school district argued that the Plaintiff was not entitled to a hearing under the TEDA because of S.C. Code § 59-24-15, which provides:

> Certified education personnel who are employed as administrators on an annual or multi year contract will retain their rights as a teacher under the provisions of Article 3 of Chapter 19 and Article 5 of Chapter 25 of this title but no such rights are granted to the position or salary of administrator. Any such administrator who presently is under a contract granting such rights shall retain that status until the expiration of that contract.

Prior to issuing a ruling, the federal district court certified the underlying legal question to the South Carolina Supreme Court. Specifically, the question asked of the Supreme Court was:

> Does South Carolina law, pursuant to S.C. Code Ann. § 59-24-15, afford a certified educator employed as an administrator rights as available under the Teacher Employment and Dismissal Act when she is denied a hearing to contest her administrative demotion and salary reduction?

The Supreme Court responded: "We answer the question, 'no'." Specifically, the South Carolina Supreme Court concluded:

> The statute plainly states that an administrator has no rights in her "position or salary," and the legislature made no exception or distinction concerning the administrator's status as a certified educator.

For these reasons, the federal district court concluded the school district was entitled to summary judgment, and dismissed Plaintiff's TEDA claim. The federal district court further found the school district was entitled to summary judgment on Plaintiff's procedural due process claim finding that because Plaintiff had no rights in her position or salary, she could not show she was deprived of a constitutionally protected property interest.

"Family" is Growing: Ethics Act Amended

On June 7, 2011, two sections of the South Carolina Ethics Act were amended. First, Section 8-13-100(15) was amended to expand the definition of "family member" to include brothers-in-law and sisters-in-law. Section 8-13-100(15) now reads:

(15) 'Family member' means an individual who is:

(a) the spouse, parent, brother, sister, child, mother-in-law, father-in-law, son-in-law, daughter-in-law, **brother-in-law,** **sister-in-law,** grand-parent, or grandchild;

(b) a member of the individual's immediate family.

Second, Section 8-13-700(a)-(b) was amended, and references to "member of his immediate family" were replaced with "family member" as defined above. The portions of Section 8-13-700(a) and (b) that were amended now read:

(A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a **family member**, an individual with whom he is associated, or a business with which he is associated.

(B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a **family member**, an individual with whom he is associated, or a business with which he is associated has an economic interest.

The effect of these amendments is to broaden the scope of the Ethics Act to regulate a public official's or public employee's actions involving family members, as broadly defined above. For example, after the amendment, a public official or employee may not knowingly use his or her office or employment to obtain an economic advantage for a "family member." Additionally, a public official or employee may not use his office or employment to influence a governmental decision in which a "family member" has an economic interest. A public official or employee who is required to make a decision or take an action which affects an economic interest of a "family member" must prepare a statement describing

the potential conflict of interest and deliver it to the presiding supervisor or officer. *See* § 8-13-700(b).

In addition, the recent amendments effectively broaden Section 8-13-750, which is the provision in the Ethics Act that governs public officials and public employees in the employment, appointment, promotion, transfer, advancement, or discipline of family members. Specifically, Section 8-13-750 prohibits a public official or public employee from employing, appointing, promoting, transferring, or advancing a "family member" whom the public official or public employee supervises or manages. Section 8-13-750 also prohibits a public official or employee from disciplining any "family member." Following the recent amendments, Section 8-13-750 now applies to a public official's or public employee's employment actions concerning a brother-in-law or sister-in-law.

Model Procurement Code Revised

The Budget & Control Board has issued an updated School District Model Procurement Code. Significant features of the update include express authorization and procedures for design-build and construction management at risk delivery methods through competitive sealed proposals instead of sealed bids. The general procedures for conducting competitive sealed proposal procurement (i.e., an "RFP") have been revised to enhance the school district's negotiating position.

Volunteer or Employee: Fourth Circuit Court of Appeals Examines FLSA Classification of Golf Coach

In March 2011, in *Purdam v. Fairfax County Public Schools*, the United States Court of Appeals for the Fourth Circuit (MD, NC, SC, VA, WV) held that under the Fair Labor Standards Act (FLSA), a public school employee who volunteered his services as a high school golf coach was not entitled to overtime wages for time spent coaching. In this case, Purdham was employed as a safety and security assistant in a Virginia school district. He also served as a high school golf coach in the school district and received an annual stipend of approximately $2,000. Following a dispute concerning payment for overtime, he initiated a lawsuit, asserting that, under the FLSA, he was entitled to overtime wages for his services as a golf coach. Purdham estimated that he spent 300-400 hours annually coaching golf.

Under the FLSA, generally, when a public employee engages in services different from those he or she is normally employed to perform, and receives no compensation or only a nominal fee for such services, the employee is deemed a volunteer and exempt from the FLSA in connection with those services. A "volunteer" must be motivated, at least in part, by civic, charitable, or humanitarian reasons. Further, a "volunteer" must offer services freely and without any pressure, direct or implied, from the employer. Thus, the school district argued that Purdham was not entitled to overtime wages because he was exempt from the FLSA as a "volunteer."

Addressing the matter on appeal, the Fourth Circuit held that Purdham was a volunteer under the FLSA in connection with his services as a golf coach because Purdham was not pressured by the school district to serve as a golf coach and he could quit coaching at any time without impacting his employment as a safety and security assistant. The Fourth Circuit found that Purdham was motivated to coach golf, in significant part, by humanitarian and charitable instincts, such as his love of golf and his dedication to student-athletes. The fact that a coaching stipend partially motivated Purdham did not change the Fourth Circuit's decision.

Additionally, the Fourth Circuit concluded that Purdham's annual stipend of approximately $2,000 was only a nominal fee because it was not a substitute for compensation or tied to productivity. Finally, in reaching its decision, the Fourth Circuit noted that the services Purdham provided as a golf coach were different from the services he provided as a safety and security assistant.

Although this case may provide guidance for school districts, it is important to note that classifications made under the FLSA are extremely fact specific and should be made on a case-by-case basis and in consultation with legal counsel when appropriate.

United States Supreme Court Expands Miranda Protection for Juveniles

A decision issued by the United States Supreme Court on June 16, 2011, in the case of *J.B.D. v. North Carolina*, could have an impact on the way school resource officers conduct investigations and

interrogations on school campuses. In this case, a seventh grade student was suspected of committing a pair of home break-ins. Days later, after one of the stolen items was found at the student's school and seen in his possession, a police officer took the student from his classroom to a closed-door conference room where he and a school administrator questioned the student for at least 30 minutes. Before beginning, they did not give the student a *Miranda* warning (the right to remain silent after being detained and subject to custodial interrogation) or the opportunity to call his legal guardian or tell him he was free to leave the room. The student confessed to committing the acts and also prepared a written statement. Subsequently, the student was charged with breaking and entering and larceny. The student's attorney moved to suppress his statement and the evidence derived from it, arguing that the student's statement was involuntary and that the student had been interrogated in a custodial setting without being afforded a *Miranda* warning.

The case was eventually granted review by the United States Supreme Court. In a split 5-4 ruling, the Supreme Court held that juveniles enjoy expanded *Miranda* protection and that a police officer must consider a suspect's age when deciding whether to provide a *Miranda* warning. In reaching this decision, the court reemphasized that the test for providing a *Miranda* warning is whether or not a reasonable person, under the particular circumstances of his case, would feel free to leave when questioned by police authority and noted that "common sense reality is that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."

Although school resource officers (SROs) are trained by local police departments, in light of this decision, it will be important for school administrators to have dialogue with SROs on their campuses to make sure the SROs are aware of this recent precedent and continue to follow appropriate procedures regarding student arrests and interrogations that take place on school grounds.

United States Supreme Court Limits Public Employee Protections Under the Petition Clause

On June 20, 2011, in *Duryea v. Guarnieri*, the United States Supreme Court reversed a decision by the United States Court of Appeals for the Third Circuit on the Petition Clause of the First Amendment of the United States Constitution. Contrary to the majority position that the "petition" must address a matter of public concern, the Third Circuit had held that a public employee who petitions the government through the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity even if the petition concerns solely a matter of private concern.

As background, the First Amendment encompasses many important rights such as freedom of speech and freedom of religion. The Constitution also protects the right to "petition the Government for a redress of grievances" through the Petition Clause. Petitioning the government is a form of expression. Under the Speech Clause, to show that an employer interfered with an employee's rights, the employee usually must show that his speech was on a matter of "public concern." The issue in *Guarnieri* was whether this same limitation applies to grievances brought by public employees under the Petition Clause.

In this case, Guarnieri, a police chief, filed a union grievance challenging his termination. After being reinstated to his job, he filed a second grievance over multiple directives from the borough council found to be vague, contrary to the collective-bargaining agreement, or interfering with the mayor's authority. Guarnieri then filed a 42 U.S.C. § 1983 lawsuit against the defendant, Borough of Duryea, Pennsylvania Council, alleging that his first grievance was a petition of the Government and the subsequent directives were retaliation for the petition. Later, Guarnieri amended his complaint to include a denial of overtime pay, and alleged that the lawsuit was a petition and the denial of overtime was retaliation for filing the suit. At trial, the jury awarded Guarnieri compensatory and punitive damages, as well as attorneys' fees. On appeal, the Third Circuit affirmed the award of compensatory damages, stating that the Petition Clause may be used in public employee retaliation cases even if the grievances and lawsuits giving rise to the alleged retaliation involved matters of private concern.

The United States Supreme Court reversed, finding that in the public employment setting, the Petition Clause is no broader in scope than the Speech Clause and its public concern requirement. The Supreme Court found that petitions, such as a

grievance, raise only an issue of private concern. In that situation, the public employee acts not as a citizen but as someone who is complaining to his or her employer. Consequently, the Supreme Court remanded the case back to the lower court to make a determination about whether the matter was one of public concern.

The Supreme Court's decision in this matter confirms that in order for employees to receive the protections of the Petition Clause, they must be able to show that they are raising matters of public concern and not simply complaining about their own private issues.

Announcement

We are very pleased to announce that Dwayne T. Mazyck has joined the firm as an Associate. He was admitted to the South Carolina bar in 2002. Dwayne received a B.S. degree in Biology, with a minor in Psychology, (1996) and a M.A. degree in Education (1999) from the University of South Carolina. He received his J.D. degree from the University of South Carolina School of Law in 2002.