Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2014 Issue 4

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Recent Development: *Town of Greece v. Gallaway*

by Jerry A. Richardson

The United States Supreme Court recently ruled that opening town council meetings with a prayer does not violate the Establishment Clause of the First Amendment. In *Town of Greece v. Galloway,* the Court rejected a challenge to the town's practice of inviting members of local religious communities to give a brief prayer at the beginning of meetings. Although the town council did not limit the opportunity to give a prayer to members of any specific religion or belief system, the overwhelming majority of prayers offered were Christian in nature. Some citizens of the town filed suit seeking to stop the prayers, arguing that the prayers were unconstitutional because they promoted one religion – Christianity – to the exclusion of all others and contending that the setting and nature of the town council meetings coerced nonadherents to participate in the prayers in order not to offend the council members.

Relying on *Marsh v. Chambers*, 463 U.S. 783 (1983), a decision that held that the Nebraska Legislature could open its sessions with a prayer delivered by a chaplain paid by state funds, the Court held that having a prayer before a town council meeting is permissible because the First Amendment allows legislative bodies to begin their sessions with a prayer. The Court recognized that this practice lends solemnity to the occasion and "invites lawmakers to reflect upon the shared ideals and common ends before they embark on the fractious business of governing." Because the Greece town council did not discriminate against other religions, the fact that most of the prayers offered were Christian did not make the practice unconstitutional. "So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing."

The Court also rejected the argument that the prayers were coercive, noting that the community members in attendance at the meetings were not subjected to the same kind of control and coercion that public school students faced in *Lee v. Weisman*, 505 U.S. 577 (1992), when prayer was included in a graduation ceremony. The Court explained that unlike students at a graduation ceremony, members of the public are free to leave the town council meeting room before or during the prayer, arrive at the meeting after the prayer is over, or make the members of the town council aware of their disagreement with opening the meetings with a prayer. The Court emphasized that most people in attendance at a town council meeting are "mature adults" who, unlike public school students, are not likely to be susceptible to "religious indoctrination or peer pressure."

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The fact that the Court specifically distinguished the situation in *Town of Greece v. Galloway* from that of *Lee v. Weisman* is of particular significance to a question the Court has not yet addressed: is prayer at school board meetings permissible as a legislative prayer under *Marsh v. Chambers*, or is it prayer in a school setting that is prohibited by *Lee v. Weisman*? Because the United States Court of Appeals for the Tenth Circuit, which is the federal appeals court that hears federal court cases arising in Oklahoma, has not ruled on this question, there is no controlling precedent in Oklahoma on this question. However, the federal appeals courts that have passed on this issue have held that because school board meetings are school events, prayer at school board meetings is not permissible. *Doe v. Indian River School District*, 653 F.3d 256 (3rd Cir. 2011) (holding that prayer at school board meetings is governed by "school prayer" case law rather than "legislative prayer" case law and is therefore prohibited), and *Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir. 1999) (same).

Nothing in the Supreme Court's recent decision in *Town of Greece v. Galloway* calls these cases into question. To the contrary, the Court in *Town of Greece* clearly signaled that one factor in its decision to apply the "legislative prayer" rule from *Marsh v. Chambers* is the fact that the audience hearing the prayers at town council meetings consists primarily of adults. In summarizing its decision, the Court noted that "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith" (emphasis added).

Although *Town of Greece v. Galloway* establishes that the First Amendment does not prohibit certain bodies of local government from opening their meetings with legislative prayers, provided there is no discrimination in favor of or against any particular religion, boards of education should not assume that this decision applies in the school setting or authorizes prayer at school board meetings.

Contracting with Native American Tribes

by Kelsey K. Bardwell

Contracting with Native American tribes is more complex than contracting with non-tribal parties. Primarily, this is due to the fact that federally-recognized Native American tribes enjoy sovereign immunity from suit.

A tribe is subject to suit only when: (1) the U.S. Congress has authorized a suit to go forward; and (2) the tribe has waived sovereign immunity. Such immunity includes immunity from suit on contracts for governmental or commercial purposes, and is not contingent on whether such contracts were created on or off tribal lands. Tribal sovereign immunity is a matter of federal law and cannot be diminished by state law. School districts must take into consideration the effect of tribal sovereign immunity when contracting with Native American tribes. In the event of a breach of contract by a Native American tribe, the district may not be able to enforce the terms of the agreement by bringing a lawsuit against such tribe, unless the tribe expressly and unequivocally waives its sovereign immunity.

Including a simple waiver clause may not be enough to effect an actual waiver of sovereign immunity. Native American tribes have laws and procedures which must be followed in order for such immunity to be "expressly and unequivocally" waived. For example, if a tribe's constitution states that any waiver of sovereign immunity must receive consent by the tribe's business committee, a waiver that has not been approved by the tribe's business committee would be ineffective. Regardless of the waiver in the contract, the Oklahoma Supreme Court has held that "[t]ribal law controls the way sovereign immunity can be waived by the tribe."[i] Therefore, if the tribe's individual laws and procedures to waive sovereign immunity have not been followed, the tribe has not expressly and unequivocally waived sovereign immunity based solely on a waiver of immunity clause in a contract. If you would like additional information on this subject, please contact your school district's attorney.

[i] *Dilliner v. Seneca-Cayuga Tribe of Oklahoma,* 258 P.3d 516 (2011).

Support Employees and Due Process Protections

by Staci L. Roberds

Under Oklahoma law, if a support employee meets certain statutory requirements, he or she shall only be suspended, demoted, terminated, or nonreemployed by a school district for cause. To be entitled to due process protections, including notice and a hearing before the board of education prior to any suspension, demotion, termination, or nonreemployment by a school district, a support employee must have been employed by the school district for more than one year and must meet the statutory definition of a support employee.

Oklahoma law specifically defines a support employee of a school district in the following manner: (i) the employee must be a full-time employee

of a school district (full-time status is determined by the standard period of labor which is customarily understood to constitute full-time employment for the type of services performed by the employee, e.g., an employee who drives a bus route in the morning and afternoon); (ii) the employee must be employed a minimum of one hundred seventy-two (172) days; and (iii) the services provided by the employee are necessary for the efficient and satisfactory functioning of a school district and cannot include services that are performed by professional educators or licensed teachers. The statute explicitly excludes adult education instructors or adult coordinators employed by technology center school districts from the definition of support employee.

In light of these statutory requirements, a school district should specifically set forth in a support employee's contract the number of days of employment. Such an explanation in the contract language could make the difference between whether an employee meets the statutory definition of a support employee and is therefore entitled to due process prior to suspension, demotion, termination, or non-reemployment by a school district.

Addressing the "Bully" Who is a Student with a Disability

by Cheryl A. Dixon

While "Dear Colleague" Letters issued by the United States Department of Education's Office of Special Education Programs (OSEP) concerning bullying and students with disabilities have focused largely on the rights of victims, there are situations in which school districts must consider the implications of a student's bullying behavior when the "bully" himself is a student with a disability.

Incidents of bullying could implicate the school district's Child Find duties. In several cases, hearing officers have found that incidents of bullying and harassment can be sufficient notice to a school district that the student perpetrating the bullying, or the student being bullied, might be a student with a disability and in need of special education and related services, thereby triggering the school district's IDEA Child Find obligations.

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The implementing regulations of the IDEA provide that if a student's behavior impedes the student's learning or that of others, the student's IEP team must consider the use of positive behavioral interventions and supports and other strategies to address that behavior. As such, if a student who engaged in bullying behavior is a student with a disability,

the IEP team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior. A school district may also violate the IDEA if it fails to reevaluate a student with a disability whose bullying behavior indicates that the student may have an additional disability. Additionally, as OSEP's August 20, 2013 "Dear Colleague" Letter states, if "the student who engaged in the bullying behavior is a student with a disability, … the IEP Team and other school personnel should consider examining the environment in which the bullying occurred to determine if changes to the environment are warranted."

Regardless of whether a student with a disability is demonstrating bullying behavior or is the target of bullying, the student's IEP team needs to be involved to properly address the behavior and any effects of the behavior.

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

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