# Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2019 Issue 7



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## Shoes and Shirts Required:

### Addressing the Recent 10th Circuit Decision on Toplessness

*by Haley A. Drusen*

RFR has received a number of questions from school districts about the recent federal court decision regarding female toplessness. *Free the Nipple-Fort Collins v. City of Fort Collins* was decided by the Tenth Circuit[1] in February 2019. In a 2-1 decision, the court held that a preliminary injunction[2] was properly granted to prevent enforcing a public nudity ordinance that prohibited female toplessness. The City of Fort Collins, the Appellant in the case, subsequently announced that it would not appeal the decision to the Supreme Court. With that decision, the *Free the Nipple* opinion became the final judgment in the case. Though it is unknown at this time to what extent future courts will hold this decision is binding when deciding the constitutionality of other ordinances and state laws, we are encouraging districts to adopt policies and practices that require both genders to wear clothing that covers their chests on district grounds so as to avoid potential challenges to gender specific prohibitions on toplessness.

*Free the Nipple-Fort Collins v. City of Fort Collins,* 916 F.3d 792 (10th Cir. 2019) concerned a city ordinance that forbade any female ten (10) years of age or older from "knowingly appear[ing] in any public place with her breast exposed below the top of the areola and nipple" while located in a public place or while on private property where she could be viewed from a distance by another person on ground level public property without taking extraordinary steps. The ordinance had an exception that excluded breastfeeding from this prohibition. Women in violation of this ordinance

would be guilty of a misdemeanor and subject to a fine of up to $2,650 or 180 days in jail, or both.

After Fort Collins adopted this ordinance, it was immediately challenged by the "Free the Nipple—Fort Collins" organization, along with two individual plaintiffs. These plaintiffs asked for a preliminary injunction to prevent the City from enforcing the ordinance. They argued that the ordinance was unconstitutional because it treated women's toplessness different from men's toplessness. The Plaintiffs were successful in getting a preliminary injunction from the federal District Court of Colorado. The City appealed that decision to the Tenth Circuit Court of Appeals.

**violation of this ordinance would be guilty of a misdemeanor & subject to a fine of up to $2,650 or 180 days in jail, or both.**

The Tenth Circuit upheld the preliminary injunction. In doing so, the majority found that the Plaintiffs were likely to succeed in their argument that the ordinance violated the Constitution's equal protection provisions. The court stated that the City did not present sufficient reasons for enacting an ordinance that only affected one gender. The Court held that because the Plaintiffs in the case met all of the preliminary injunction elements, the preliminary injunction was appropriately granted. Rather than ask the United States Supreme Court to review that decision, Fort Collins decided to repeal the ordinance.

Typically, rulings by the Tenth Circuit concerning constitutional provisions are binding on all states within the Circuit. However, because this case involved a ruling on a constitutional provision in the context of a preliminary injunction, different opinions have emerged as to whether it is currently binding in Oklahoma. Though state officials, including Oklahoma Attorney General Mike Hunter, have expressed doubt that this ruling extends to state laws and local ordinances other than the Fort Collins ordinance at issue, given the legal uncertainty surrounding the application of the case, RFR recommends that districts enforce dress code provisions that require everyone—regardless of gender—be clothed in a manner so that their chest is covered. In this litigious climate, RFR believes that adopting—and enforcing—this policy regardless of gender provides districts with the best way to avoid any potential litigation.

In addition to enforcing this dress code for students during school hours (which would include prohibiting "shirts v. skins" games in athletics and physical education classes), districts should consider placing signs on the entrances to buildings (including any outdoor sports areas) that patrons and

students frequent that indicate that both shoes and shirts are required for admittance. School districts should also enforce these regulations with patrons—which would include prohibiting male patrons who wish to attend any sporting events shirtless (whether or not they have "go team" painted on themselves in lieu of a shirt).

*If you have questions about how this ruling may affect your district or about dress code requirements in general, RFR is here to help. Your RFR attorney can guide you through crafting legally appropriate dress code policies and practices.*

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[1] The Tenth Circuit Court of Appeals is the federal appeals court with jurisdiction over Oklahoma, Kansas, New Mexico, Colorado, Utah, and Wyoming.

[2] A preliminary injunction is an injunction that is issued before the full resolution of a matter in a permanent injunction.

## Distribution of Religious Materials at School

*by Adam Breipohl*

Oklahoma school districts are often approached by groups that wish to distribute religious materials to students, the most prominent being the Gideons, a Christian organization whose primary activity is distributing free copies of the Bible in various locations. School districts must be aware that allowing distribution of religious materials at school is a problematic practice from the standpoint of compliance with the Establishment Clause of the United States constitution, although it can be permissible under certain limited circumstances.

The constitutionality of this practice rests upon a three-prong test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which asks whether a school practice or policy (1) has a legitimate secular purpose; (2) has a primary effect of neither advancing nor inhibiting religion; and (3) does not foster an excessive entanglement between the District and religion. Distribution of Gideon Bibles to students does not have a secular purpose, clearly advances religion, and at least arguably excessively entangles government with religion; as a result, it runs a high risk of violating the Establishment Clause.

However, at least one court has upheld the right to distribute Bibles at the secondary level. *Peck v. Upshur County Board of Education*, 155 F.3d 274 (4th Cir. 1998). In order to maximize the chance that a distribution of religious materials would withstand a lawsuit challenging its constitutionality, the following procedures based on those upheld in the *Peck* case should be followed:

1. Religious groups should be allowed one (1) day per school year to distribute materials to students in the 7th to 12th grade only. Such groups must appear at school prior to the start of school and place the materials on a table in the school lobby at a location determined by the building principal. The groups must be off the site at least 30 minutes prior to school starting.

2. The materials may be left on the table the entire school day. A sign should be placed on the table including a message to the effect of, "Any student may take a free Bible, compliments of the Gideons."

3. The district should not distribute any information in classrooms or make any announcement of any kind about the upcoming distribution. No volunteer or school employee should sit at the table or in any way encourage any student to take, or not take, the materials.

4. After the end of the school day, groups distributing materials must come and pick up any materials that are left.

5. All groups wishing to distribute religious materials at school should be given a copy of these ground rules and should be told that their failure to abide by them may result in the denial of the privilege of distributing anywhere in the district in the future.

It is important to note that the *Peck* court's opinion dealt only with the issue of making religious materials available in a secondary school, and the court cautioned that its decision may not apply to younger students because elementary school children are less able to discern whether the distribution is a school-sponsored activity or not. For that reason, if a school district is going to allow the distribution of religious materials, the best practice is to limit the distribution to the secondary (grades 7-12) level.

Finally, school districts should be aware that under the First Amendment, a government entity that offers members of the public a forum in which to engage in protected speech activities may not discriminate between speakers wishing to avail themselves of that forum based on the speakers' viewpoints. For that reason, school districts must consider the possibility that allowing distribution of materials by one outside group could lead to a situation where the district has no choice but to allow the same access to another group that wishes to distribute materials expressing views that would be much less palatable to the community.

*If districts have questions about distribution of materials by outside groups, RFR is here to help. Your RFR attorney can guide you through crafting policies and practices that comply with the Establishment Clause and other applicable law.*

## OSEP Clarifies that Parent Consent Is Not Required Prior to Conducting Postsecondary Transition Assessments

*by Cheryl A. Dixon*

On February 22, 2019, the Office of Special Education Programs ("OSEP") issued *Letter to Olex*, which clarified that school districts are generally not required to obtain signed parent consent prior to conducting postsecondary transition assessments under the Individuals with Disabilities Education Act ("IDEA"). OSEP noted that a state may choose to require consent pursuant to state law. OSEP pointed out that if a state did require parent consent, the state would need to make sure each

school district had certain procedures in place to ensure the lack of consent did not result in a failure to provide the student a free appropriate public education ("FAPE"). Additionally, as part of the transition assessment process, if an IEP team determines it needs additional data to address a student's special education or related service needs, then parent consent would be required before conducting the reevaluation.

At issue in Letter to Olex were competency-based transition assessments that are administered to all transition aged students – both with and without disabilities – by a Michigan school district on a yearly basis. Consistent with 34 C.F.R. § 300.300(d)(1)(ii), such assessments did not require parent consent. OSEP stated that it is its position that the IDEA does not require a school district to obtain parent consent before conducting assessments, unless the assessments are part of an initial evaluation or reevaluation. Additionally, OSEP stated that:

> [W]e believe that generally, parental consent is not required prior to conducting an age appropriate transition assessment because the purpose of the assessment is to develop appropriate postsecondary IEP goals and not to determine whether a child has or continued to have a disability, and the nature and extent of the special education and related services that the child needs.

Of course, parent and student participation is necessary in writing a student's transition plan. However, parent consent is not generally required to conduct transition assessments. If you have any questions about transition plans or any special education question, please contact your school district's attorney.


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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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