Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2021 Issue 1

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Is Your District Providing Religious Instruction During School? Personal Liability Looms

by M. Scott Major

It is not uncommon for school districts to be approached by outside organizations seeking to provide religious instruction to district students. Though teaching about religion is permissible when presented objectively as part of a secular education program, the United States Supreme Court has unequivocally held that religious instruction may not take place on school property during school hours. Courts are especially vigilant in ensuring compliance with the Establishment Clause of the First Amendment to protect students from both overt and subtle religious coercive pressures in public schools or the conveyed message from schools that "religion or a particular religious belief is favored or preferred." Widespread community support notwithstanding, board members and district employees can be held personally liable when the district provides or facilitates religious instruction at school because such actions violate the Establishment Clause and, as such, the civil rights of students.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[1] In the case of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the Supreme Court established a three-prong test to determine if government actions (which include school district practices and policies) violate the Establishment Clause. To pass constitutional muster, an action 1) must

have a legitimate purpose, 2) must have a primary effect that neither advances nor inhibits religion, and 3) must not create an excessive entanglement between church and state. An action's failure under any single prong is a violation.

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But there are other iterations of the *Lemon* test that both the U.S. Supreme Court and lower courts have employed, depending on the facts of an alleged violation. First, under the "endorsement" test, a court will analyze a school district's actions to determine 1) whether the action's purpose is to endorse or disapprove of religion, and 2) whether the effect of that action creates a message of either government endorsement or disapproval. If, to a reasonable observer, a school district's action appears to endorse religion, that action is unconstitutional. Next, under the "coercion test," a violation occurs if a school district's action either 1) provides direct aid to a religion such that it would tend to establish a state church, or 2) coerces people to support or participate in religion against their will.

Any school district practice or policy of providing or facilitating religious instruction on campus during school hours would clearly fail at least one of the *Lemon*, endorsement, or coercion tests. Such practices send a clear message to non-believing students and their parents that they are outsiders and disfavored in the community. Not only that, but school officials can be held personally liable for violating the civil rights of district students in this manner through official practice, policy, or custom, and there are multiple, well-funded organizations devoted to bringing lawsuits against districts on behalf of their members. Therefore, it is incumbent upon board members, not only to protect the rights of students, but also to protect the district and themselves from liability, to ensure that no such practice or policy is effectuated in the district, and, if these are in place, immediately implement appropriate remedial measures to prevent further violations.

If you have questions about how to protect your students' rights and avoid Establishment Clause violations, RFR is here to help. Your RFR attorney can guide you through crafting policies and practices that comply with this and other applicable law.

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1 U.S. Const. amend. I

Technology and School Speech: *Tinker v. Des Moines Independent Community School District* Revisited

by Emily C. Krukowski

In today's society, students have the ability to communicate almost instantaneously with one another through various social media platforms like Facebook, Twitter, Snapchat, and Instagram. While this type of instantaneous communication and technology have been beneficial during the COVID-19 pandemic during the age of virtual learning, social media platforms raise concerns related to public school students' First Amendment rights when these communications are done outside the walls of the school.

The United States Supreme Court's leading decision on student speech is *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). The *Tinker* decision has been a seminal case on public school students' rights to free speech for over fifty-two (52) years. However, with the advent of social media and technology, lower court decisions have indicated that there are issues with *Tinker's* applicability to the ever-changing and ever-evolving communication platforms that students engage in. The United States Supreme Court will have the opportunity to revisit *Tinker* in a Pennsylvania school district's appeal concerning off-campus student speech.

In *B.L. v. Mahanoy Area School District*, 964 F.3d 170 (3d Cir. 2020), the United States Court of Appeals for the Third Circuit had to determine whether a school district violated a student's First Amendment rights when it disciplined the student for posting about the school district's cheer program to a social media account. After a sophomore at the school district's high school failed to make the varsity cheerleading team, the student made several posts to Snapchat. The student first posted a picture of herself and her friend with their middle fingers raised, and included several profanities directed at the school district's cheer program. That post was visible to about 250 of the student's "friends," many of whom were also students at the high school. Later, the student added to the post and stated: "Love how me and [another student] get told we need a year of jv before we make varsity but [*sic*] doesn't matter to anyone else?"

After becoming aware of the social media posts, the cheerleading coaches decided that the student had violated several team rules and school policies. As a result, the coaches removed the student from the team for the year. The student appealed the coaches' decision to the athletic director, principal, superintendent, and school board, which was ultimately upheld. The student then appealed the school district's decision to the United States District Court for the Middle District of Pennsylvania ("District Court"), arguing, among other things, that her First Amendment free speech rights were violated. The District Court rendered a decision in favor of the student, finding

that the school district violated the student's First Amendment rights. The school district appealed to the United States Court of Appeals for the Third Circuit ("Third Circuit").

The Third Circuit held that the student's "snap" was "off campus" speech because it did not occur in a school-sponsored forum and was without the use of school resources. The Third Circuit also held that the student was not subject to discipline under *Tinker* because *Tinker* does not apply to "off campus" speech. The Third Circuit further held that the speech was not particularly threatening or harassing, and thus could not be regulated by the school district. Therefore, the lower District Court's decision was affirmed and upheld.

Following this, the school district appealed to the United States Supreme Court. The United States Supreme Court has decided to hear the appeal and oral arguments will take place on April 28, 2021.

This will be an important decision, and the attorneys at RFR will be monitoring the outcome and will provide an update once the opinion has been rendered. Your RFR attorney will be able to guide you through crafting policies and practices to comply with the United States Supreme Court's

take maximum advantage of the "safe harbor" provided by the rules contained in Circular 21 by using copyrighted works in ways that strictly comply with the applicable guidelines

U.S. Copyright Office Guidelines for Reproduction of Copyrighted Works by Educators

by Adam S. Breipohl

When Congress enacted the U.S. Copyright Act of 1976, it also adopted several pieces of interpretive guidance dealing with issues related to the use/reproduction of copyrighted works by educators and librarians, which were later compiled as a Copyright Office publication known as "Circular 21." This publication, despite being publicly available online,[1] is often overlooked or misunderstood by educators, but its provisions can provide useful guidance regarding best practices related to compliance with copyright law.

The key portions of Circular 21 set forth a series of "safe harbor" rules providing that various uses of copyrighted works are to be considered fair use and cannot give rise to liability for copyright infringement. Of particular interest to educators are a series of rules governing subjects such as making copies of literary works for classroom use, making copies of sheet music, recording student performances of musical/dramatic works, recording broadcast television programs, etc. Because most of these guidelines are very detailed and specifically

tailored to particular types of works, factual scenarios, etc., it is not possible to succinctly summarize their provisions, other than to point out that they typically authorize only those uses that are tailored to be limited in scope and closely related to a pedagogical purpose. However, that same level of specificity makes it significantly easier for teachers or school administrators to determine whether a proposed activity is covered by the relevant safe harbor rule or not.

Of course, the best practice to avoid potential copyright infringement would be for teachers to take maximum advantage of the "safe harbor" provided by the rules contained in Circular 21 by using copyrighted works in ways that strictly comply with the applicable guidelines wherever possible. However, because the rules have not been updated or expanded in many years, they do not address many issues involving newer technologies commonly used in classrooms today. Furthermore, it is important to keep in mind that most of these guidelines provide a minimum "floor" for what is to be definitively considered fair use, not upper limits for fair use that cannot be exceeded without infringing copyright.

For example, if a rule contained in Circular 21 stated that it would be fair use for a teacher to make multiple copies of **one chapter** from a novel for use during class in a given situation, it would not necessarily be impermissible copyright infringement to make copies of **two chapters** from the same book in the same situation. Similarly, even though Circular 21 does not include rules stating when it is permissible for a teacher to play an episode of a cable television show hosted on YouTube in class, that does not mean that doing so cannot be fair use. Either use might or might not still constitute fair use, depending on whether the proposed use of the two chapters satisfied the four-factor analysis used by courts to make fair use determinations, which looks to (1) the purpose and character of the use, (2) the nature of the work, (3) the amount and substantiality of the portion used, and (4) the effect of the use upon the potential market for or value of the work. However, the fair use analysis is a very fact-driven and subjective in nature, and outcomes can be difficult to predict.

While Circular 21 provides useful guidance and helpful safe harbor provisions, there is an inherent element of uncertainty and potential for confusion in this area of the law, which underscores the importance to school districts of having appropriate board policies and other guidelines in place to guide employees who are inevitably called to make judgment calls with regard to fair use issues towards responsible and appropriate uses of copyrighted works.

If districts have questions about compliance issues or best practices with regard to intellectual property issues, RFR is here to help. Your RFR attorney can guide you through crafting policies and practices that comply with applicable law.

[1] Circular 21 can be viewed at the following URL: https://www.copyright.gov/circs/circ21.pdf.

Rosenstein, Fist & Ringold is pleased to announce that Brian J. Kuester, Emily C. Krukowski, and Samanthia S. Marshall have joined the firm.

Brian J. Kuester joins the firm as of counsel. He was admitted to the Oklahoma bar in 2000. His undergraduate degree is from the University of Central Missouri (B.S. 1990), and his law degree is from the University of Tulsa College of Law (J.D., with highest honor, 2000). Prior to joining the firm Mr. Kuester had served as the United States Attorney for the Eastern District of Oklahoma since September 2017. As the district's top federal law enforcement official he led the law enforcement community in preparation for the unprecedented criminal jurisdiction shift ushered in by the U.S. Supreme Court's historic McGirt decision. Mr. Kuester will focus his efforts in the areas of education and municipal law and litigation.

Emily C. Krukowski joins the firm as of counsel. Ms. Krukowski is licensed to practice in Oklahoma and Missouri. Her undergraduate degree is from Marquette University (B.A., magna cum laude, 2011), and her law degree is from the University of Tulsa College of Law (J.D., with highest honor, 2014). While in law school, Ms. Krukowski served on the Tulsa Law Review as an Articles Research Editor and was inducted into the Order of the Curule Chair. Ms. Krukowski is an active member of the Junior League of Tulsa and the Council Oak/Johnson-Sontag Chapter of the American Inns of Court. Ms. Krukowski's practice is focused primarily on research and writing at all stages of litigation in the areas of education, employment, and municipal law.

Samanthia S. Marshall joins the firm as a shareholder and director. She was admitted to the Oklahoma bar in 2009 and previously practiced with the firm from 2009 to 2014. Her undergraduate degree is from the University of Southern California (B.A., cum laude, 2001), and her law degree is from the University of Tulsa College of Law (J.D.,

with highest honor, 2009). While in law school, Ms. Marshall served as the Editor-in-Chief of the Tulsa Law Review. Ms. Marshall has been included in Oklahoma Super Lawyers' list of "Rising Stars" and in Best Lawyers in America. Ms. Marshall is a graduate of Leadership Tulsa, a past president of The Center for Individuals with Physical Challenges, and a former board member for the Tulsa Area Human Resources Association. She concentrates her practice on providing daily guidance and litigation support to educational institutions and on representing both public and private employers in all areas of employment law and litigation.

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Chalkboard is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published monthly through the school year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find Chalkboard to be informative and helpful with the difficult task of operating our educational institutions.

Chalkboard is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

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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