



School Law Update May 2008

Court Upholds Board Policy Prohibiting Faculty Participation in Student-Initiated Prayer

Borden v. East Brunswick Board of Education

United States Court of Appeals for the Third Circuit, decided April 15, 2008

New Jersey has once again served as a testing ground for the tension between public employees' constitutional rights and the obligations imposed on their employers, including boards of education, by the Establishment Clause of the First Amendment. In the recent case of *Borden v. East Brunswick Board of Education*, the Third Circuit Court of Appeals considered a high school football coach's asserted constitutional right to participate in pre-game prayer activities with his team, and concluded that the prohibition of those activities by the East Brunswick Board of Education did not violate his rights, and in fact were required in order to avoid a violation of the Establishment Clause.¹

The Court's decision turns on the specific facts of the case - the coach's 23-year history of leading his team in pre-game prayers - so its specific holding, that the prohibition of faculty participation in prayer activities at school-sponsored events was required by the Establishment Clause, might not apply in other school districts with different circumstances. School officials should be sure to consult their legal advisors when confronted with issues in this complex and often controversial area of the law. But the Court's rulings on the coach's rights to freedom of speech, academic freedom, freedom of association and due process, and its discussion of the requirements of the Establishment Clause in public schools, are noteworthy.²

Factual Background

For 23 seasons, the head football coach at East Brunswick High School had two pre-game traditions. First, a prayer was recited at the pre-game pasta dinner attended by players, their parents, guests and cheerleaders. The prayer was led by a local minister for many years, later written by the minister but read by a student, and in recent years read by the coach himself. Second, the team engaged in a locker room ritual just before game time, in which the coach and his assistants gathered the players, asked them to "take a knee," and then discussed game tactics and

strategy before the coach led a prayer which began, "Dear lord, please guide us today in our quest in our game, our championship."

In fall 2005, after the superintendent received several complaints from parents, the coach was told not to lead the team in prayer. He responded that he did not do so, referring to the football tradition of "taking a knee." He continued the pre-game rituals but instructed players that they could wait in the restroom until they were over if they were uncomfortable. The superintendent then sent a memo to the coach with "guidelines for faculty participation in student prayer," which provided in part that "[n]either the school district nor any representative of the school district . . . may constitutionally lead, initiate, mandate, or otherwise coerce, directly or indirectly, student prayer at any time in any school-sponsored setting, including classes, practices, pep rallies, team meetings, or athletic events".³

The coach resigned upon receiving this memo, then rescinded his resignation and complied with the guidelines but filed suit, claiming the guidelines were overly broad and vague and they violated his rights to freedom of speech, academic freedom, freedom of association, and due process. Prior to the 2006 football season, he asked the team co-captains to poll the players to ask whether they wanted to continue the tradition of praying at the team dinner and in the locker room. The co-captains did so, and responded that the players had voted to continue the pre-meal and pre-game prayer. Since then the coach has continued the prayer rituals but has not said the prayers himself. Instead, he has bowed his head silently during the pre-meal prayer and bowed on one knee silently during the locker room prayer.

In response to the coach's complaint, the board of education defended its guidelines on the ground that they were necessary to avoid a violation of the Establishment Clause of the United States Constitution. The trial court disagreed, and ruled that the guidelines violated the coach's constitutional rights. The Court of Appeals reversed the trial court decision, rejecting the coach's constitutional claims and ruling that in light of the history and context of the coach's participation in the prayer activities, his conduct violated the Establishment Clause.

Freedom of Speech - The coach's bowing his head and taking a knee are not protected by the First Amendment, because they do not amount to speech on a matter of public concern.

Addressing the coach's claim that his free speech rights had been violated, the Court referred to the well established two-prong test for determining whether the First Amendment protects a public employee's speech or expression: first, the Court must determine whether the employee is speaking on a matter of public concern; second, if he or she is, the Court must balance the employee's interest, as a citizen, in commenting on matters of public concern against the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees.

The Court found that it need not reach the second prong of the test, as the coach's "silent acts of expression" did not pertain to matters of public concern. The coach asserted two interests served by his acts: "providing the team with feelings of unity and increasing team morale" and "respecting the players' prayers." These were private concerns, the Court found, since the coach was not making a public issue of the need for team morale. Merely trying to bolster the team does not amount to a matter of public concern.

The Court also noted that the coach's acts occurred in "private settings," the "invitation-only dinner" and the locker room, and that they were "meant for the consumption of the football team only." For these reasons as well, it found that the coach's acts were not matters of public concern requiring the Court to balance his interests with those of his employer.

Thus, while different facts might lead to different results, the lesson of the Court's free speech ruling appears to be that actions taken in relatively private settings - the locker room, the classroom, a club meeting or an invitation-only school-sponsored event (as distinguished from a public meeting of the board of education), intended to boost student morale or otherwise affect students (rather than to raise a policy issue with the administration or board of education) may not invoke an employee's right to freedom of speech.

Academic Freedom - The educational institution, and not the individual teacher, has a right to academic freedom.

The coach asserted that his acts of bowing his head and taking a knee were tools to teach his students respect and good moral character. He argued that the "right to academic freedom" afforded him the right to exercise his professional judgment in teaching these values to his players. The Court soundly rejected this view, stating that "a teacher's in-class conduct is not protected speech." It explained:

[T]he teacher is acting as the educational institution's proxy during his or her in-class conduct, and the educational institution, not the individual teacher, has the final determination in how to teach the students.

Educational institutions have "four essential freedoms" that constitute academic freedom: the right to choose who may teach, what may be taught, how it shall be taught, and who may be admitted to study (the last applying to selective programs). Since the coach here admitted, by his argument, that his "coaching methods" were pedagogic, the Court found that "he is acting as a proxy for the School District, and the School District may choose how its students are taught and what its students are taught." The board of education had the right to determine that the coach's teaching methods were inappropriate, and to adopt its guidelines based on this determination; the coach had no right to disregard those guidelines based on his asserted "academic freedom."

As a result of this ruling, it is clear that claims of "academic freedom" should be of no avail to employees who use

pedagogic methods.

Freedom of Association - A coach has no constitutionally protected right to "associate" with his players.

The coach claimed the board's guidelines violated his First Amendment right to freedom of association by infringing on his "right to associate with his players by forcibly segregating [him], both physically and mentally, from his players while they engage in the important team act of saying pre-game prayers." The Court also rejected this claim, stating that the kinds of relationships that the Supreme Court has found to be protected by the First Amendment right to freedom of association "require a closeness that is not present between a high school football coach and his team." Quoting a 1984 Supreme Court decision, it stated:

We have no doubt that football coaches have a special relationship with the players on their team. However, the relationship is typically not so close as to involve "not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life."

Those relationships that have been found to involve "distinctively personal aspects of one's life," and therefore warrant constitutional protection, include marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives. Since the player-coach relationship simply does not involve the same degree of closeness and personal interest, the Court ruled that the board's guidelines did not interfere with any right to freedom of association held by the coach.

The Court did not explicitly exclude all school-related relationships from the right to freedom of association. However, its narrow definition of the kinds of relationships warranting First Amendment protection would seem to preclude any student-teacher relationship from receiving such protection.

Establishment Clause - The coach's actions violate the Establishment Clause, because a reasonable observer familiar with the history and context would perceive his actions to be a government endorsement of religion.

On the issue of whether the coach's acts of bowing his head and taking a knee during student-led prayers violated the Establishment Clause of the First Amendment, the Court employed the "endorsement test" established in prior case law. This test applies, the Court explained, in cases involving a public employee engaging in some fashion in the religious activity of students. The relevant question under this test is "whether a reasonable observer familiar with the history and context of the [religious] display would perceive the display as a government endorsement of religion."

The history and context here would cause a reasonable observer familiar with that history and context - the coach's long involvement as a participant, organizer, and leader in the prayer activities - to believe that he was, in

fact, endorsing religion, the Court found. The history would support a reasonable inference that his conduct was intended to "preserve a popular state-sponsored religious practice," participation in the pre-meal and pre-game prayers, consistent with the team's long-standing tradition but now prohibited by the district's guidelines.

The coach claimed he did not intend his actions to be an endorsement of religion. He intended merely to show respect for his team; he said, moreover, taking a knee is "merely a gesture" in the "land of football" (the Court's words). In response to this contention, the Court stated:

[A]lthough taking a knee in a huddle to discuss strategy is a gesture well known to football gurus as being part of the game, Borden said a prayer while taking a knee with his team for over twenty-three years. Based on this undisputed history, a reasonable EBHS player would conclude that Borden is endorsing religion if he continues to take a knee while his team prays.

Moreover, the Court explained, the inquiry is not whether the coach intended to endorse religion, but whether a reasonable observer, with knowledge of the history and context of his actions, would conclude that he is doing so. Bowing one's head and taking a knee while a team is engaged in reflection or prayer could, in a different case, be merely a sign of respect rather than an endorsement of religion. The Court explained the difference:

f a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment of reflection or prayer, we would likely reach a different conclusion because the same history and context of endorsing religion would not be present.

Thus, history and context are important.

Due Process - Since the board's guidelines did not infringe on any fundamental right held by the coach, they did not violate his right to due process of law.

If the coach had prevailed in his argument that the board's guidelines were overly broad or void for vagueness, he would have proven a violation of his rights under the Due Process Clause of the Fourteenth Amendment. Having failed to do so, he needed to show that the guidelines infringed a "fundamental right," the Court stated, in order to prove that they violated his right to due process of law.

The coach claimed the school district had "intruded upon his privacy, thoughts, autonomy, desires and wishes," and that these were fundamental rights. He further claimed that the prohibition against his bowing his head and taking a knee "degraded him as a person and humiliated him in front of his team." Even assuming these claims were true, the Court found no due process violation, as they did not outweigh the district's interest in avoiding an Establishment Clause violation. The Court stated:

However impassioned his arguments may be, they lack any basis in the law. Borden has no interest - privacy, liberty, or otherwise - in behavior that violates the Establishment Clause.

The lesson on this issue appears to be that a board of education's interest in avoiding a violation of the Establishment Clause is strong enough to justify intrusion into employees' private affairs and infringements of rights that they consider quite serious. The limits of this ruling - what degree of intrusion or infringement may be held to violate a fundamental right held by an employee, and whether such intrusion or infringement may be justified by the board's interest in avoiding an Establishment Clause violation - will have to await another case.

Conclusion

Clearly, the Court took seriously the district's obligation to comply with the Establishment Clause, and it navigated carefully between that obligation and the coach's constitutional rights. After rejecting his claims based on freedom of speech, academic freedom, and freedom of association, the Court ruled, ultimately, that any other "fundamental right" asserted by the coach could not overcome the prohibition of the Establishment Clause. In light of his long history of leading his players in prayer, allowing the coach to continue to bow his head or "take a knee" while his players prayed would be viewed by a reasonable observer as an endorsement of religion, which is prohibited.

What the Court did not hold may be as significant as what it did, for purposes of offering guidance to school districts. The Court did not address the permissibility of student-led prayer at school-sponsored events where there is no faculty participation and no suggestion of endorsement. Depending on the circumstances, student prayer or religious expression may or may not be permissible; decisions in other cases have been very fact-specific. And the Court did not say public school employees must have no involvement at all in religious activities, regardless of the context. How much involvement they may have will depend on the nature of the activities, and how they would be interpreted by a reasonable observer. Silent acts of respect may be permissible, but if there is any indication that an employee is participating in prayers or other religious activities at school-sponsored events, their actions should raise Establishment Clause concerns. If a reasonable observer familiar with the history and context could infer that the employee's conduct is an endorsement of the religious activity, the conduct probably violates the Establishment Clause.

Endnotes

1 Unless reversed by the United States Supreme Court, the Court of Appeals' decision will be binding on courts, and school districts, in New Jersey (as well as in Pennsylvania, Delaware and the Virgin Islands). The coach has a right to petition the Supreme Court for review of the decision, and that Court may decide, in its discretion, to grant or deny the petition.

2 The Court's discussion of legal issues relating to overbreadth, vagueness and mootness are also interesting, but are not addressed in this School Law Update.

3 The guidelines, which were drafted by the board attorney and stated that they were not "exhaustive or final," were as follows:

1. Students have a constitutional right to engage in prayer on school property, at school events, and even during the course of the school day, provided that:

A. The activity is truly student initiated; and

B. The prayer activity does not interfere with the normal operations of the school district. This would mean that, for example, if a student or a group of students wish to engage in a prayer before or after their meal in the cafeteria during their lunch period they would have a right to do so, provided that the activity in which they are engaged does not disrupt the normal operation and decorum of the other students eating in the cafeteria. Also, if student athletes on their own decide to hold a prayer huddle before a game, after a game, or during half-time, they have a right to do so.

2. Neither the school district nor any representative of the school district (teacher, coach, administrator, board member, etc.) may constitutionally encourage, lead, initiate, mandate, or otherwise coerce, directly or indirectly, student prayer at any time in any school-sponsored setting, including classes, practices, pep rallies, team meetings, or athletic events.

3. Representatives of the school district, as referenced above, cannot participate in student-initiated prayer. That very issue was decided by the Fifth Circuit Court of Appeals in a decision cited with approval by the United States Supreme Court and is, therefore, the operative law of the land at this time. To quote the Court, 'If while acting in their official capacities (school district) employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion,' and such conduct was prohibited.

4. In addition to the endorsement test, the Supreme Court has established two other tests, the Lemon test and the coercion test, for determining whether conduct violates the Establishment Clause. The Lemon test, based on the Supreme Court's 1971 decision in *Lemon v. Kurtzman*, involves a three-prong inquiry: whether the conduct at issue has a secular purpose, whether its primary effect either advances or inhibits religion, and whether it fosters excessive entanglement with the exercise of religion. The coercion test looks at whether the government is coercing anyone to support or participate in religion or its exercise. One judge, in a concurring opinion in the *East Brunswick* case, found that the coach's prayer rituals raised a serious issue under the coercion test as well as the endorsement test. That issue, in his view, was that "a non-religious student or one who adheres to a minority religion might feel subtle (albeit unintentional) coercion to participate in the ritual despite disagreement or discomfort with it." He noted the Supreme Court's observation, in the case of *Santa Fe Indep. Sch. Dist. v. Doe*, that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools." He also rejected the argument that the coach's actions were permissible because the prayers were "student-initiated" beginning in 2006, and approved by a vote of the players. Even if the coach did not intentionally pressure his players into voting in favor of the prayers or manipulate the outcome of the vote, "no high school athlete would want to disappoint the coach," the judge said; and the Supreme Court also has ruled that "fundamental rights [such as freedom from religious coercion] may not be submitted to vote; they depend on the outcome of no elections."

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