The DBYD Difference
January 2009

By Brian Jason Ford, Esquire
888.362.DBYD | bjford@dbyd.com

Each month, The DBYD Difference offers insight and the latest news in school law. January was a huge month in the world of school law. Important cases were released at the end of the month. So, we are glad to release January 2009 edition of The DBYD Difference this first week of February, featuring a round up of some recent (and recently available) cases.

From the U.S. Supreme Court

Now and then, the Supreme Court is remarkable for what it does not do. Though it is seldom highlighted in civics classes, the Supreme Court has broad discretion to accept and reject cases. Most federal lawsuits start in a federal district court. People who lose in federal district court appeal to federal circuit courts. People who lose in federal circuit courts appeal to the United States Supreme Court – but the Supreme Court can say no. Before the Supreme Court hears a case, someone must explain to the Court why it should bother to question the lower court's holding. The document arguing that the Court should hear an appeal is called a Petition for a Writ of Certiorari. The Supreme Court either agrees to hear the appeal by "granting cert" or (more often than not) rejects the appeal by "denying cert." Denying cert is the Supreme Court's way of saying "too bad so sad – your case is over." The Supreme Court recently denied cert in a case brought by parents of home-schooled children who challenged the record-keeping component of Pennsylvania's home-school regulations. Under those regulations, parents must document the instruction that their children receive. The parents in this case, called *Combs v. Homer-Center School District*, claimed that the record-keeping requirement violated their religious beliefs. The Third Circuit held that the regulations are reasonable because they "ensure children taught in home education programs demonstrate progress," and, therefore, trump the parents' religious beliefs. The parents appealed to the Supreme Court, and the Court denied cert. As a result, Combs is not the law of the land – but it is the law of Pennsylvania, New Jersey, Delaware and the U.S. Virgin Islands (a.k.a. the Third Circuit). You can read the case here: http://tinyurl.com/ccdkfs

Can parents of students with disabilities obtain tuition reimbursement for unilateral private school placements if the children in question have never received special education from their public schools? The U.S. Supreme Court tried and failed to answer that question in 2007. Then, Justice Kennedy recused himself to avoid a conflict, and the court split 4-4. Now, the same question is back before the Court, and Justice Kennedy (so far) is in the mix. The name of the case is *Forrest Grove School District v. T.A.*, and The DBYD Difference will have more to say about it when the Court makes a decision. For now, you can read the school district's Petition for a Writ of Certiorari here: http://tinyurl.com/ccqcoe

The High Court also agreed to hear a controversial case, called *Stafford Unified School District v. Redding*, questioning whether individual school administrators can be held liable for ordering a strip search of a student suspected of distributing prescription medication in school. In 2003, a middle school student was accused of distributing prescription strength ibuprofen in school. After her backpack was searched, she had to remove her pants and shirt, and lift her bra and the waistband of her underpants. No drugs were found. The student sued, claiming that the search violated her Fourth Amendment rights to be free from unreasonable search and seizures. The student argued that the accusation against her (made by another student who was caught with drugs) did not give rise to reasonable suspicion. She also sued for damages against the individual administrator who ordered the search. Individual administrators are usually immune from such lawsuits, but, in this case, a lower court held that the administrator's actions violated clearly-established laws against searching students without reasonable suspicion. Again, there will be more to say about this when the Supreme Court rules – likely in July. You can read the school district's Petition for a Writ of Certiorari here: http://tinyurl.com/bww9wg

Stafford v. Redding comes hot on the heals of *Pearson v. Callahan*, a case that makes it much easier for government actors (including educators) to claim immunity from lawsuits challenging their official actions. The Court decided *Peason* on January 21, effectively overturning a prior case called *Saucier v. Katz*. Under *Saucier* (the OLD rule), courts had to decide whether the Constitution was violated before considering whether governments/school districts/police departments were entitled to qualified immunity. Under *Pearson* (the NEW rule) judges can decide whether a school administrator is entitled to qualified immunity before dissecting the alleged constitutional violations. Now, school administrators should not have to expend considerable time and resources arguing about whether a law is clearly established before asking a court to consider immunity. You can read this surprisingly exciting decision – complete with meth labs and undercover cops – here: http://tinyurl.com/bf63yx

From Pennsylvania

Although its relationship to education law is tangential, those of us who work with students with mental disabilities may be curious about a recent Pennsylvania death penalty case. On January 28, the Pennsylvania Supreme Court held that a murderer with a full scale IQ of 61-71 is subject to the death penalty because he does not meet the legal definition of mentally retarded. Of particular note is that courts look for a diagnosis prior to a person's 18th birthday when deciding if a person is mentally retarded for purposes of criminal law. You can read the horrific details here: http://tinyurl.com/atrl94

From Elsewhere

A California state court held that a private, Lutheran school was allowed to dismiss two students for being a lesbian couple. The students argued that they were protected by California law, but the court held that the California law applied to businesses – and that the Lutheran school was not a business. There are some cases in Pennsylvania indicating that antidiscrimination laws do not apply to Quaker schools. As an aside, "evidence" of the relationship was uncovered on MySpace. Read about the online profiles and the school's Christian Conduct rule here: http://tinyurl.com/an85qs

The U.S. Court of Appeals for the Eighth Circuit determined that it was okay for school districts to prohibit students from wearing the confederate flag. A school district in Missouri sent a high school student home when he came to school in "clothing depicting the Confederate flag symbol." The student claimed this violated his first amendment rights.

Not so, said the Court, in a case called *B.W.A v. Farmington R-7 School District*. There had been a string of racial incidents at the high school in question, and the school administration reasonably determined that the flag would spark "racially motivated violence, racial tension, and other altercations directly related to adverse race relations in the community and the school." This, according to the Court, put the school district on the right side of *Tinker* – a case discussed in the December 2008 edition of The DBYD Difference. *Tinker* will appear again whenever the Third Circuit decides *Layshock v. Hermitage School District* – the much anticipated case about student discipline and MySpace profiles. Until then, you can read about the effect of confederate flags on race relations here: http://tinyurl.com/ah97cd

And Finally…

A court in Wisconsin held that cheerleading is a contact sport. Therefore, schools cannot be sued for accidental injuries. You can read about what happens when a "post-to-hands" stunt goes wrong here: http://tinyurl.com/cxomdh