

CLIENT NEWS BRIEF

No. 34

September 2009

SCHOOL BOARD CURRICULUM DECISION WITHSTANDS FIRST AMENDMENT CHALLENGE OF POINT OF VIEW DISCRIMINATION

In Esquivel v. San Francisco Unified School District (May 16, 2008) __F.Supp.2d__, the United States District Court for the Northern District of California granted a school district's motion to dismiss a discrimination suit brought by student members of a Junior Reserve Officer's Training Corps ("JROTC") program and their guardians. The JROTC members claimed that violated their First Amendment rights by terminating the JROTC program. The court held that elimination of the program was properly based on pedagogical concerns, and did not constitute a funding decision that discriminated on the basis of viewpoint.

In 2006, San Francisco Unified School District Board ("Board") voted to phase out the JROTC program, which was part of some of its high schools' curriculum. The Board cited multiple reasons for this decision, including a concern of funding disparity between schools resulting from students earning physical education credit in JROTC programs that are half-paid for by the U.S. Army when the programs are not offered in all schools. Other concerns included that army instructors were not credentialed to teach physical education classes offered for credit and that the program constituted a contract with a third party who discriminates on the basis of sexual orientation.

In 2007, the JROTC members filed suit under title 42 of the United States Code, section 1983, and claimed that the Board's decision was based on personal anti-war biases, not on student benefit, and that the Board does not provide a balanced curriculum for students. Essentially, JROTC members claimed that this constituted an ideologically driven attempt to suppress a particular point of view by removing program funding, and therefore constituted impermissible viewpoint discrimination in violation of the First Amendment of the United States Constitution.

The District moved to dismiss the suit, arguing that the First Amendment does not limit the ability of a school district to decide matters of school curriculum. The court agreed, and held that the Board possessed wide discretion in all decisions regarding the selection of courses and programs offered for credit, regardless of possible personal biases. Further, the court found that all decisions regarding whether to offer a particular program or course are based on viewpoint and/or content, due to financial and temporal considerations. As a result, as elected

representatives for a governmental agency, the Board may make changes to the course and program offerings to promote a particular policy.

Although viewpoint discrimination in a public forum may be impermissible where an agency makes funding decisions, a public forum is not created by a school board's decision to eliminate an optional education program offered for academic credit. Because the JROTC program was offered for credit, the Board had discretion regarding what community values to promote and pursue, and the court did not need to determine if community values were better served by replacing the JROTC program with a program promoting non-violence. However, the court did state that if the course had been required to graduate, the outcome *may* have been different, implying that the court may have reviewed the content of a course where credit was required for graduation.

The court's holding reinforces a school board's powers to determine the direction and focus of a school district's curriculum and insulates the school board's decisions from unnecessary and intrusive judicial oversight. The court stated that the proper course for a dissatisfied public would be to vote "in new Board members to better reflect community values" instead of "com[ing] to this court, which is institutionally incompetent to weigh competing community values to determine which should prevail." In essence, the Esquivel decision demonstrates that the First Amendment may not be used by an individual or group to force their viewpoints on an elected body.

If you have any questions regarding the Esquivel decision, or First Amendment free speech laws in general, do not hesitate to contact one of our seven statewide offices.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.



*Written by Stephanie Jung (sjung@lozanosmith.com) and Sloan Simmons (ssimmons@lozanosmith.com).
Stephanie is an associate in our Fresno office. Sloan is an associate in our Sacramento office
and co-chair of our Student Practice Group.*

©2009 Lozano Smith