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THE DBYD DIFFERENCE – EDUCATION LAW
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Important Education Law Update!

Supreme Court Refuses to Hear Appeals in Two Free Speech Cases

School districts should examine their policies, practices

On March 2, 2009, the U.S. Supreme Court refused to hear appeals in two education law cases. The Court's refusal is viewed by some as a tacit approval of the lower courts' decisions. As a technical matter, both lower decisions stand. One of those decisions now sets the law of the land in the Third Circuit (PA, NJ, DE and the U.S. Virgin Islands).

The first case, called Borden v. School District of the Township of East Brunswick, is the Third Circuit case. Borden was a football coach in a New Jersey school district. For years, Borden ran pre-game meetings and dined with the players at team dinners. Both events typically included a *player-led* prayer. Borden always requested that all of the players bow their heads during the dinner prayer and take a knee at the meeting prayer. In 2005, the school district passed a policy that Borden could not participate in student-led prayer, but did not clarify whether he could bow his head or take a knee along with the players. Borden sued, alleging that the school district violated his right to free speech. After some preliminary victories, Borden ultimately lost his case in the Third Circuit. Not only did the Third Circuit conclude that the school district's policy was constitutional, but it went further to hold that Borden's conduct, if allowed to continue, would violate the Establishment Clause of the U.S. Constitution. Thus, the school district was not simply permitted to implement its policy, but the school district was affirmatively obligated to prevent Borden's conduct. This case should prompt all school districts in the Third Circuit to review their prayer policies and carefully examine how those policies work in practice.

The second case, Lowry v. Watson Chapel School District, deals with students who protested their school's dress code by wearing black armbands similar to those worn by students protesting the Vietnam War in the landmark case Tinker v. Des Moines Independent Community School District. *Tinker* is frequently quoted for its famous phrase that teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In *Tinker*, the Supreme Court decided that students do have a right to free speech, particularly when that speech is in the context of a

political protest. In Lowry, the school district attempted to argue that *Tinker* applies only to the big issues. In their eyes, protesting the Vietnam War is very different than protesting a school dress code. The U.S. Court of Appeals for the 8th Circuit disagreed, holding that the importance of the issue being protested is not relevant to the constitutional analysis. The Supreme Court's refusal to hear the school district's appeal lets the 8th Circuit decision stand. Again, this is not a national precedent, but school districts are now on notice that they must proceed with extreme caution when restricting student speech connected to protests – no matter how big or small the protested issue.

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