3rd Circuit: Parent Can't Read Bible to Son's Public School Class

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In the court battles over prayer in school, the cutting-edge cases are increasingly coming from the kindergarten classrooms.

The latest such case, *Busch v. Marple Newtown School District*, attracted six friend-of-the-court briefs when it went before the 3rd U.S. Circuit Court of Appeals and resulted in a 48-page decision with all three judges on the panel weighing in.

Voting 2-1, the court rejected the claims of the mother of a kindergarten student who said public school officials violated her First Amendment rights when they prohibited her from reading verses from the Bible -- which she said was her son Wesley's favorite book -- during a program called "All About Me" week.

Writing for the court, 3rd Circuit Chief Judge Anthony J. Scirica said "parents of public school kindergarten students may reasonably expect their children will not become captive audiences to an adult's reading of religious texts."

When parents participate in an elementary school's curricular activities, Scirica said, school officials have the right to require that the parents refrain from promoting specific messages in class.

"Parents, much like teachers, are typically held in high regard and viewed as authoritative by young children. By inviting participation in curricular activities, educators do not cede control over the message and content of the subject matter presented in the classroom," Scirica wrote.

Educators must be free to involve parents in the educational process, Scirica said, but "these efforts could be jeopardized if parents -- once invited into the classroom to share details about their family experience as part of 'show and tell' activities -- could express any message of their choosing."

According to court papers, students in Wesley Busch's class were given a chance to share information about themselves, first by bringing in a poster that illustrated their interests and later by having their parents come in to read from their favorite books.

Wesley made a poster with his mother that included photographs of himself with his hamster and with his family, as well as a picture of his church captioned: "I love to go to the House of the Lord."

Donna Busch testified that Wesley asked her to read from the Bible and that she chose to read Psalm 118, which begins: "Give thanks unto the Lord, for he is good; because his mercy endures forever," but that the teacher and principal prohibited her from doing so.

Scirica said he recognized that there is a "tension" between the rights of individuals to identify and practice their religion, on the one hand, and the duty of school officials to avoid entanglements with religion on the other.

But Scirica said the courts must ultimately side with school officials who strive to avoid violating the Establishment Clause.

"Elementary school administrators and teachers should be given latitude within a range of reasonableness related to preserving the school's educational goals," Scirica wrote.

TOO YOUNG FOR SPEECH RIGHTS?

In a concurring opinion, Judge Maryanne Trump Barry said she found the case "unsettling" because the courts have not yet figured out how to carve out an exception for the youngest students who cannot be expected to understand the complexities of a constitutional question.

Barry noted that the 3rd Circuit has already said school children are sometimes so young that they cannot be said to have First Amendment rights but has never drawn a bright line to define the age when free speech rights take hold.

But Barry insisted that the line must be drawn higher than kindergarten age.

"Children of kindergarten age are simply too young and the responsibilities of their teachers too special to elevate to a constitutional dispute cognizable in federal court any disagreement over what a child can and cannot say and can and cannot do and what a classmate can and cannot be subjected to by that child or his or her champion," Barry wrote.

In dissent, Judge Thomas M. Hardiman said he believed school officials engaged in "viewpoint discrimination" to prohibit speech that was clearly "personal" to an individual student and his parent.

"The majority's desire to protect young children from potentially influential speech in the classroom is understandable. But that goal, however admirable, does not allow the government to offer a student and his parents the opportunity to express something about themselves, except what is most important to them," Hardiman wrote.

The disagreement among the judges showed that the case is on the cutting-edge in school-prayer litigation and may explain why the appeal generated so much outside interest.

The plaintiffs were supported by an amicus brief filed by the Alliance Defense Fund and the Pennsylvania Family Institute.

Supporting the school district were five amicus briefs from the Anti-Defamation League; the American Jewish Congress; the Jewish Social Policy Action Network; Americans United for Separation of Church and State; and the Pennsylvania School Boards Association and the National School Boards Association.

The ruling is a victory for attorney Mark A. Sereni of DiOrio & Sereni in Media, Pa., who argued the case for the Marple Newtown School District and was joined on the brief by attorneys Ellis H. Katz and Jonathan P. Riba of Sweet Stevens Tucker & Katz in New Britain, Pa.

Plaintiff Donna Kay Busch was represented in the appeal by attorneys Jason P. Gosselin, J. Freedley Hunsicker Jr., Jarrod D. Shaw and Katherine L. Villanueva of Drinker Biddle & Reath.

In an interview, Gosselin said, "We're going to take a good, hard look at the decision" before deciding whether to pursue any further appeals.

But Gosselin also said the case presents important questions about how the courts should analyze such cases and whether school officials are ever allowed to engage in so-called viewpoint discrimination. On that issue, Gosselin said, the federal appellate courts have split.

Such disagreement among the intermediate courts can provide the impetus for the U.S. Supreme Court to take up the case.

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