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***ETHICS AND THE PROTECTION OF STUDENTS' RIGHTS
CROSSING THE VIRTUAL LINE***

MAURICIO CADAVID

California State University San Bernardino

Abstract

This paper presents five California court cases that deal with the First, Fourth and Fourteenth Amendment of the U.S. Constitution and how they relate to the protection of students' rights. It frames the cases around the two lenses of ethical standards presented by the California Professional Standards for Educational Leaders, and the National Education Association and the California Teachers Association Code of Ethics. The paper also presents the author's interpretations of the relationships of the chosen cases to previous landmark cases that place the current court decisions in a more understandable context. The paper ends with an analysis of the impact of the before mentioned court rulings on the practice of ethical behavior of school administrators.

Keywords: Educational Politics, Legislative Action, Educational Change, Student's Rights, Ethics

Introduction

When does a student's freedom of speech end and a school's jurisdiction begin? When does a school counselor's concern about a student's well-being crosses the line of

professionalism to sexual harassment? When does a U.S. flag on a student's t-shirt go from being fashionable to making a political statement? How does a school determine what and when an extracurricular school activity becomes grounds for justifying randomized student drug tests? These are some of the questions that come to mind when analyzing the court cases presented in this paper.

Looking at past court rulings that went in favor of students can serve as a good starting point to recognizing that most often than not, school administrators, educators, and even school districts seem to present certain disregard for students' rights. According to Cambron-McCabe, McCarthy and Thomas (2009), there is a constant struggle between students who want to test their limits of expression and administrators who want to enforce rules in favor of appropriate school environments. This struggle has prompted both the schools and the courts to take a closer look at how the interpretation of certain constitutional amendments affects court rulings.

For instance, in cases that deal with out-of school activities, such as blogging or using Facebook to complain about school personnel, the courts have looked at how the school are interpreting and enforcing the First Amendment. For instance, the recent California case of *Fleener v. Clovis Unified School District* (2011), the California court relied on the previous ruling of *Dominger v. Niehoff* (2009), and *Evans v. Bayer* (2010), in which both courts ruled that for as long as student does not use a school computer, school resources, be on school facilities, and performs the activity during non-school hours, the school itself does not have jurisdiction over the student and therefore cannot curtail its freedom of expression.

Similar cases dealing with the exercise of the First Amendment right to freedom of speech is *Dariano v. Morgan Hill Unified School District* (2011) in which students were suspended for wearing emblematic t-shirt with the flag of the United States of America. Schools officials considered that the students were making a political statement for wearing patriotic t-shirt when the school was celebrating another country's holiday. What the school did not remember is that in *Tinker v. Des Moines Independent Community School District* (1969), the Supreme Court had stipulated that students were able to exercise their expression for as long as their practice did not "materially and substantially interfere with [...]" the proper operation of the school (Cambron-McCabe, McCarthy & Thomas, p. 100, 2009; *Tinker v. Des Moines Independent Community School District*, 1969)

It is with this idea of students' rights, from the protection and exercise of the First Amendment (freedom of speech), to the Fourth Amendment (search and seizure), and ending with the Fourteenth Amendment (right to due process), that the five cases presented here were analyzed.

Background

It could be argued that the first impressions of studying court cases in which students or parents are suing teachers, principals, counselors, or school district personnel, are about students or parents breaking the law, and school personnel over imposing it. In reality, the cases become more than just breaking or imposing a law or policy. Court cases dealing with students and schools are about human beings being mistreated by the system, and getting punished by challenging it. The following five court cases represent a small sample of the several ways in which students' rights are constantly violated by educators, school administrators, school staff, and even school district personnel.

Each case deals directly with use and abuse of school administration power over students. The first case deals with a student being punished for using of Facebook to criticize the school principal. The student's activities occurred outside school property, and during non-school hours, yet, the student was overly punished and expelled from school. The second case explores the stalking and sexually abusive relationship of a school counselor with a female student. This case also demonstrates the districts lack of commitment to protecting the student's rights. The next case is an interesting court case in which a school district enacts a policy that mandates random drug tests for all students who participate in extracurricular competitive activities. This case, which deals directly with the Fourteenth Amendment, is of particular importance since the court makes it very clear that its responsibility is not to judge on whether a policy is appropriate or not, but on whether the policy is constitutional or not.

The fourth case demonstrates the difference in interpretations of the constitutional right to freedom of speech by school administrators and the court. It also sheds light on the delicate balance of a student's conscious or subconscious understanding of his right of freedom of speech, as it directly relates to the Tinker ruling of 1969. The last case is an appeal by the Compton Unified School District to the superior court of a previous decision that went in favor

of a student who was not properly identified as a disabled student under the IDEA clause of “child find”. This case demonstrates once again how poor interpretation of policies and laws, as well as lack of dedication of administrators to the protection of students’ rights, can lead to detrimental relationships between students and schools.

All the cases here briefed, are also analyzed under the two California organizations that look at both the professional standards for educational leaders and the educators’ code of ethics. The California Professional Standards for Educational Leaders (CPSELs) is divided into six different standards that range from student progress and success, to the professional’s responsibility to the field and to himself (acsa.org, 2011). For the purpose of analyzing the court cases, standard five, which deals directly with ethical practices, will be used. In addition, some of the cases will also be looked at under the National Education Association (NEA) and the California Teacher Association (CTA) code of ethics. The NAE/CTA code of ethics is divided into two principles; principle one deals with the educator’s commitment to the student, and principle two deals with the educator’s commitment to the profession (nea.org, 2011). The analysis of the court cases will be done using the ethical responsibilities and expectations of the educator for the commitment of students under principle one.

Case Briefs

Case One, Citation

Jacob, Ted and Mary Fleener versus Clovis Unified School District, Clovis West High School, Benjamin Drati and Gregory Bass. Superior Court of California, case number 11CECG01450, found at <http://www.courthousenews.com/2011/05/10/FaceSchool.pdf>

Issue

Jacob Fleener, a student at Clovis West High School, was suspended for fifteen days for using Facebook outside school to make fun of the school’s principal. Jacob also claims that there was unnecessary force used by district police which went into his classroom and arrested him in front of his peers. Mr. and Mrs. Fleener, Jacobs parents, claim that after the school district and the District Attorney (DA) Office determined that Jacob had not committed a crime and was

cleared to return to school, school officials continued to harass Jacob by publicly assert that Jacob had committed the crimes, which included identity theft and cyber-bullying.

Facts

Jacob was removed from class by an officer and a school official and taken to the school's resource center. Once there, the officer began to question Jacob without having read his rights. Jacob's cell phone was taken by the officer, and although later returned to Jacob, the phone was on, indicating that perhaps the officer had unlawfully seized and searched it. Jacob was never told he was under arrest, although a juvenile investigation report demonstrated that in deed paperwork had been filed where stated that Jacob had been considered under arrest during the questioning. When Jacob's parent picked him up, a letter was given to him that stated that Jacob was suspended for five days and that a transfer had been issued for Jacob to attend an alternative education institution.

During Jacob's suspension, his parents met with several district employees as well as the DA Office to clarify that his arrest, suspension and transfer were unconstitutional, and that based on proof they had obtained, the whole incident was in violation of Jacob's rights, as well as state and federal law. After all charges were cleared by the district and the DA, Jacob returned to school, but his file was not cleared; including his purported arrest. Due to Jacob's absence of about fifteen day, and his record not being cleared, he experienced student and teacher reluctance to assist him and therefore his social and academic life suffered. The Fleeners have tried all they can, and are suing the district and the school for violation of article one of the California constitution for the right of education, the right to free speech, due process, intentional infliction of emotional distress, negligent infliction of emotional distress and slander.

Court Finding

At this time there is no court finding because the claim was submitted on May two, two thousand and eleven.

Reasoning

This case presents an important aspect of due process and free speech as it relates to limitation and boundaries of what constitutes school jurisdiction. The Fleener's claim is that

Jacob was not in school property, did not use school property, and did not use school time to perform the activity. Therefore, the school and the principal did not have jurisdictional right to suspend Jacob, or to deny him education during fifteen days.

Code of Ethics

This case is relevant under the CPSELs and the NEA/CTA code of ethics in that the school administrator failed to protect Jacob's rights. Under the CPSEL, standard five, section two, the responsibility of a school administrator is to "protect the rights and confidentiality of students and staff" (acsa.org, 2011). In this case, the administrator failed to protect Jacob's rights and confidentiality of records by preventing him from attending class for fifteen days; according to the CPSEL standard, this is a violation of the student's right to education. With regards to the NEA/CTA code of ethics, under principle one, which is the educators' commitment to the student, the administrator's actions intentionally exposed Jacob to embarrassment and disparagement. In this case, the educator violated section five of principle one which states that an educator "shall not intentionally expose the student to embarrassment or disparagement" (nea.org, 2011).

Case Two, Citation

Lilah versus Anthony Smith, William Huyett and Berkeley Unified School District. Superior Court of California, Northern District, case number V-11-11860, found at: <http://www.courthousenews.com/2011/04/20/Berkeley.pdf>

Issue

Lilah, a student in Berkeley High School, in Berkeley California, claims that a school counselor sexually harassed her by making both physical and verbal advances at her. Although the counselor was placed on leave, and the school district's law firm that conducted the investigation sided with Lilah, the district did not provide any sort of reprimand, or any issue of a restraining order against the counselor even though the investigation revealed that the counselor had engaged in stalking behavior.

Facts

Lilah reports that counselor Smith repeatedly sought to monitor her on a daily basis, sometimes coming to get from class, or sending a student proctor to call for her and send her to his office. Lilah also reports that every single encounter with the counselor resulted in sexually directed actions or comments that made her extremely uncomfortable. During the school year, Smith would literally follow her throughout the day, and in many occasions even wait for her outside her classrooms to open the doors for her. Lilah also reported that during their often ‘small-talk’ sessions Smith had with her, he would make comments of wanting to share his feelings toward her outside of school.

Despite several attempts by Lilah’s parents to talk to the district Assistant Superintendent about the possibility to remove Smith from the school, the Assistant Superintendent simply provided them with verbal assurance that Smith would not be in contact with Lilah. In a letter later sent to the parents, the Assistant Superintendent stated that the issue against Smith was really a matter of Lilah’s feeling of insecurity, and therefore, there was no need to remove Smith from the school. The District’s Superintendent later followed with another letter stating that Smith’s actions were neither severe nor pervasive, and therefore, it did not warrant a removal or transfer.

Court Finding

At this time there is no court finding because the claim was submitted on April eighteen, two thousand and eleven.

Reasoning

This case demonstrates the overwhelming power of school administrators, as well as perhaps the lack of concern by the district’s Superintendent and Assistant Superintendent when it comes to students’ accusations of school staff misbehavior. At times it could be considered that student complaints should always be taken seriously, but this case demonstrates that even after presenting the student’s written records of every sexual advanced by the counselor, the administrators still consider the student as acting under a perception of feelings and not logic.

Code of Ethics

This case also represents a clear violation of both the CPSEL and NAE/CTA code of ethics. From an administrative perspective, the counselor, and the two superintendents violated the ethical standard of modeling personal and professional ethics and integrity toward their profession and the student as established by section one of standard five of the CPSEL code of ethics (acsa.org, 2011). With regards to the NAE/CTA code of ethics, it is clear that the counselor primarily failed to protect the student from conditions of harm to health and safety, by creating an offensive, intimidating and hostile environment; as it is established section four of the commitment to the student (nea.org, 2011).

Case Three, Citation

Brown versus Shasta Union High School District (SUHSD). Superior Court of the State of California, case number 164933, found at: http://www.aclunc.org/news/press_releases/asset_upload_file310_8148.pdf

Facts

Students in the Shasta Union High School District are concerned that a policy for random drug testing of students who participate in extracurricular competitive activities is unconstitutional. Several students have already complained to the district that they have been randomly pulled out of in the middle of class to provide urine samples. In many cases, students are being prevented from participating in some activities, while allowed in others, which has created turmoil and confusion among all students in the district. Students claim that the “Policy”, as it has been called, is vague in its explanation of what constitutes ‘competitive’ versus ‘non-competitive’ extracurricular activities. On the other hand, the SUHSD claims that the Policy was drafted under the umbrella of federal law cases that support random drug testing, and that it is not in violation of the California’s Constitution’s right to privacy and its search and seizure provisions.

Court Finding

The court made it very clear that policymaking it is not the purview of the court, as it is a separate branch of government that does not venture into policymaking or legislation. Therefore,

the court does not have the power to approve or ban a policy, unless the precedents of such policy are in direct opposition to constitutional rights. Because of this, the court cannot bar or allow students from participating in extracurricular activities that are deemed by the school and school district as competitive. This means that court would not make a ruling on the Policy itself but on how it relates to the California Constitution under article 1 that protects the right of privacy, the right to be free of unreasonable searches and seizures, and protection against denial of equal opportunity. Having said this, the Court granted preliminary injunction. It also added that defendants (SUSHD) are enjoined from enforcing the Policy pending trial on the merits. Trial has not occurred.

Reasoning

The Court believes that it is a worthy and commendable cause that the district is trying to enforce a drug free policy for all students participating in extracurricular activities. However, the court found that some of the premises of the Policy violate the California Constitution as students are required to provide urine samples when they least expect them. In addition, the Court believes that further clarification needs to be made as to how the district would determine what activities are considered competitive and which are not in order to abide by the constitution's protection of equal access.

Code of Ethics

This is an interesting case to look at under the ethic's code lens. The district drafted a Policy that sounds like an honorable attempt at protecting students from using drugs, yet, in the end, the Policy is a legal document that provides schools officials to search and seize students whenever they believe is necessary. In addition, the Policy does not clearly define what a competitive activity is; therefore, it can ban a student who plays the flute in the band for using drugs, but not ban the student from participating in a school play since the play is not considered a competition. This is in violation of section one of the NAE/CTA commitment to the student code of ethics in that it reasonably restrains the student from independent action in the pursuit of learning (nea.org, 2011). It also violates the students' right for a safe learning environment by intentionally exposing the student to embarrassment and disparagement as it would expose students to being pulled out of class in front of his/her peers in order to perform a drug test. This

violates section five, under principle one of the educator's commitment to the student (nea.org, 2011). Finally, and perhaps the most important violation of the NAE/CTA code of ethics in this case, is the violation of section seven of principle one in which the counselor used a professional relationship, that of a school counselor and a student, for private advantage (nea.org, 2011).

Case Four, Citation

Dariano versus Morgan Hill Unified School District. United States District Court for the Northern District of California. Case number C 10-02745 JW, found at: <http://www.scribd.com/doc/49465094/Dariano-v-MHUSD-Opn-2011>

Issue

Three students at Live Oak High School (LOSH) were suspended from school for wearing t-shirts with the American flag during Cinco de Mayo celebration. The administrators' justifications for putting the students in detention and later suspending them was that they were following a district policy on inappropriate clothing. The administrators suspended two out of the three students because they refused to take the shirts off, or to wear them inside out.

Facts

Three students in LOSH were sent to the principal's office for wearing t-shirts with the American flag on a Cinco de Mayo day. Two students were suspended, and one student was permitted to go back to class because his t-shirt did not contain a purely pro-America message. Parents were called to come and pick up their kids and when they arrived, demanded to speak with the principal who justified his actions as following Morgan Hill Unified School District policy on wearing inappropriate and patriotic clothing to school. When the district Superintendent learned of the situation, a public apology was issued to the students and the parents as it was confirmed that the district did not have such policy. Both the assistant principal and the principal left their employment with the district.

The parents decided to file a suit alleging violation of their freedom of speech, due process, and equal protection. The district filed a motion to dismiss the suit for lack of subject matter jurisdiction.

Court Finding

The district court denied the defendant's motion towards the actions taking in favor of the student who was allowed to go back to class. The court however, granted the motion to the defendants against the parents' claims that were independent from those made by the students.

Reasoning

The court considered the fact that the Superintendent made a public apology and disavowed the assistant principal and the principal's claims of the existence of a district policy on wearing patriotic clothing. Because the two principals resigned after the comments by the Superintendent, the court denied the motion by the district to moot the suit on the grounds that the defendants were no longer part of the district. The court ruled that there were no violations on the Eleventh Amendment as it did not apply against the two principals. The court also ruled in favor of the student who was sent to class on the grounds that he was threatened with enforcement of a policy that did not exist and detained.

Code of Ethics

This case is another example of the educator's failure, through the school principals, to protect students from embarrassment and disparagement as stipulated by section five of the NEA/CTA code of ethics. In addition, and differently from the previous three cases already discussed, this case also points out the educator's unreasonable denial of access to student's varying points of view; in other words, violating section two of the NEA/CTA code of ethics' commitment to the student. Lastly, and perhaps a bit stretched, is the issue of the principals violating their commitment to the students of truthfulness and honesty by leading the students and the parents to believe that their actions were justified by a district policy that did not exist, as it is established by section three of the NEA/CTA code of ethics which declares that an educator "shall not deliberately suppress or distort subject matter relevant to the student's progress" (nea.org, 2011).

Case Five, Citation

Compton Unified School District versus Starvenia “Addison.” United States Court of Appeals for the Ninth Circuit, California. Case number 07-55751 D.C. No. CV-06-04717-AHM, found at: <http://www.ca9.uscourts.gov/datastore/opinions/2010/03/22/07-55751.pdf>

Issue

The Compton USD is seeking appeal to the court’s decision granting judgment on the favor of Starvenia Addison (“Addison”) for the claim that the school district failed to identify her disabilities.

Facts

The Compton Unified School District (CUSD) appealed the ruling of the Ninth Circuit court of the case on CUSD v. Addison in which the court ruled in favor of Addison by finding CUSD in poor judgment of IDEA and failing to recognize Addison’s disabilities under the IDEA code of “child find”. Based on the IDEA, children with disabilities have access to a free appropriate public education. Additionally, IDEA provides federal funds to assist state and local agencies in educating children with disabilities. In order for states to receive funding, they must establish policies and procedures of ensuring that all children be identified – this obligation is known as the “child find” requirement.

CUSD brought the case to the appeals court on the grounds that the IDEA had been misinterpreted, and that there were provisions that protected the CUSD against the claims brought forth by Addison’s mother. The CUSD provided several arguments that contested the interpretation of the language in the IDEA, as well as codes that actually protected them and justified their actions; such as the case of choosing not to act against identifying Addison’s disabilities.

Court Finding

The court found that the arguments provided by CUSD were unfounded. Additionally, the court deemed that it could not rule in favor of CUSD because there was lack of procedural documentations submitted with the claim. The court also found that the CUSD argument against parents’ rights to complain directly to court about school violations is clearly allowable under the IDEA. Finally, the court rejected CUSD argument that IDEA covered their failing to take action.

The judges' final ruling was that there was not sufficient provision of records and therefore a decision could not be done. The judge dissented.

Reasoning

The Compton USD wanted the previous case to be reversed in their favor. However, the court (judge) decided that there was not sufficient statutory evidence to rule in their favor. In other words, Addison's mother had the right to take the CUSD to court for their lack of finding that her child was disabled, and therefore in need of free assistance. The CSUD countered the initial ruling by arguing that they had done what was under the IDEA protocol, and therefore they did not violate anything.

Code of Ethics

This last case perhaps exemplifies the delicate balance that educators need to have between student's rights and ethical responsibilities. Strictly related to the NAE/CTA code of ethics, the educators, administrators and even the CUSD violated several ethical codes under principle one of the commitment to the student. The first violation deals with section one in that the educators prevented Addison from independent actions in pursuit of learning by not identifying her as a disabled student who needed extra attention to learn. Additionally, the school administrators violated section four by not making reasonable efforts to protect Addison from conditions harmful to learning as they did not provide a safe learning environment in which Addison, a disabled student, could learn.

In addition to NAE/CTA code of ethics violations, school administrators and personnel from the district violated several standards from the CPSEL. These standards include section one, in which administrators should have modeled personal and professional ethics, integrity, justice and fairness toward Addison and her disability. Section two of the standards relates to the obligation of administrators to protect students' rights. In this case, the administrators failed to protect Addison's rights under the IDEA law for equal opportunities for disabled students by failing to recognize her disabilities under the IDEA clause of "child find". Furthermore, when the district decided appeal the original court ruling, these administrators violated section four of the CPSEL standard five by failing to communicate decisions based on relevant data and research. As it was discovered by the court, the school district failed to provide relevance evidence in their

favor, and thus demonstrating their poor leadership, poor management practices, and lack of equitable education for Addison.

Conclusion

Whether school officials consider their power of authority as a an extension of the law, or their position of power as a shield of virtue, the truth of the matter is that when it comes to protecting students' rights, some schools officials consider themselves impervious of any wrong doing. The cases here presented are a small sample of how vulnerable students are to educators' malpractices. This is not to say that all students' actions are excused from judgment and consequences. But it is evident that students are subjected to engage in a power-relationship with their school officials in which the outcome usually is against them. Nevertheless, the courts seem to have become more aware of this school abuses, and have begun to consider students as human beings. In other words, the executive power of the law is slowly beginning to move the balance of justice in favor of the vulnerable population – students.

Of equal importance to all administrators is the inherent responsibility of being just and protecting students and themselves. Becoming more knowledgeable and aware of court decisions that deal with school malpractice and favor students is a crucial step in becoming a leader. Now more than ever there seems to be an increased need to truly understand the First, Fourth and Fourteenth Amendments as they apply directly to school law, leadership and management. As Cambron-McCabe, McCarthy and Thomas assert, “the collision of individual and governmental interests in the school context has generated a growing body of First Amendment litigations” (p.94, 2009).

Finally, it is of fundamental importance to recognize the impact of ethical decisions on how each school situation is handled. For instance, all the cases presented here may seem to differ from each other in a legalistic way. But when an ethical lens is applied, it becomes clear that in each case, administrators placed students in uncomfortable, unsafe, and at times embarrassing environments. Consequently, by making the schools an unwanted place for students to be, administrators deliberately created a hostile environment that hindered the students' willingness and motivation to learn. In conclusion, students' rights are not only protected by law, but nestled in the bosom of ethical behavior.

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