Court Hands School A Victory On Issue Of Student Sexuality

Insights
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Issues of student sexuality have been emerging in private schools for the last five years or so. Questions abound regarding student sexual-orientation rights in religious and non-religious schools, regarding the rights of students to create gay and lesbian school clubs, and regarding the propriety of administrators' disclosure of student same-sex relationships to parents. In some situations, private schools have been sued for taking strong action where the administration determined that students who are engaging in same-sex relationships have violated the school's religious principles.

The law in California was unsettled on this issue until recently. The California Supreme Court has finally provided private religious schools in California some concrete guidance in this area. While binding precedent only in that state, California decisions are often harbingers of trends elsewhere. *Jane Doe v. California Lutheran High School Association*

The Court's Ruling
The Unruh Civil Rights Act requires that all persons within the State of California be provided the same services in all "business establishments" regardless of sex, race, color, religion, ancestry, national origin, disability, or medical condition. Through case law, California courts have also added marital status and sexual orientation to the class of persons to be protected.

In the *California Lutheran High School Association* case, the parents of two female students who were expelled on the ground that they had a homosexual relationship sued California Lutheran High School (the School), a private religious institution. The School's basis for the expulsion was that such a relationship was expressly forbidden under the School's "Christian Conduct" rule. The students alleged that the School discriminated against them based on sexual orientation, in violation of the Unruh Civil Rights Act.

The School initially moved to dismiss the lawsuit, but both the trial court and the California Supreme Court refused to dismiss the case outright. This ruling, understandably, caused some amount of concern for religious schools in California. But after engaging in depositions and discovery, the School filed a motion for summary judgment asking the court again to dismiss the lawsuit on the basis that the school was not a "business establishment" covered by the Unruh Civil Rights Act. The trial court granted the School's motion and the students appealed.

In January of this year, the California Court of Appeal agreed with the trial court and upheld the dismissal of the case. The appellate court analyzed two prior cases decided by the California Supreme Court that addressed the meaning of the term "business establishment" within the Unruh Civil Rights Act. First, the court looked to *Warfield v. Peninsula Golf & Country Club*, which held that a member-owned nonprofit golf and country club that derived "a significant amount of revenue, as well as indirect financial benefit, from the use of its facilities, and the purchase of goods and services on its premises, by persons who are *not* members of the club" and where "such `business transactions' with nonmembers are conducted on a regular and repeated basis and constitute an integral part of the club's operations" is a business establishment within the meaning of the Unruh Civil Rights Act.

On the other hand, in *Curran v. Mount Diablo Council of the Boy Scouts,* the California Supreme Court held that "a charitable, expressive, and social organization, like the Boy Scouts, whose formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members" is not a business establishment within the meaning of the Unruh Civil Rights Act with regard to its membership decisions. The court in *Curran* also observed that the Boy Scouts was an organization whose primary function was the inculcation of a specific set of values to its members, and its recreational facilities and activities were complementary to the organization's primary purpose.

By relying upon *Curran*, the appellate court in *California Lutheran High School Association* determined that the School was, like the Boy Scouts, "an expressive social organization whose primary function is the inculcation of values in its youth members" and held that the School was *not* a business establishment within the Unruh Civil Rights Act. That meant that the School was free to require students to adhere to its Lutheran values, which are "the very heart of the reason for the existence of the school."

On April 29 the California Supreme Court declined the request to review the Court of Appeal's holding effectively ending the primary litigation. However, because the mother of one of the students in the *California Lutheran High School Association* decision had a separate lawsuit alleging other claims, the debate on this issue is far from over.

Unanswered Questions

One area of the decision that will likely require some further court or legislative clarification is an issue dealing with what appears to be the limitations of the holding. In analyzing the business-establishment issue, the Court noted that like the Boy Scouts in *Curran*, the School "could be a business, and therefore prohibited from discriminating, with respect to its *nonmember* transactions, yet *not* be a business, and hence *not* be prohibited from discriminating, with respect to its *membership* decisions."It is not entirely clear where the line is drawn in the distinction between member and non-member transactions.

One would certainly assume that this means that the School can discriminate (and is not covered by

the Unruh Act) when it is making decisions about membership (i.e., admission, enrollment at school, adhering to school policies and guidelines that address core religious issues, discipline, and expulsion). On the other hand, if the School is engaging in transactions with non-members (one would assume that means persons not enrolled as students) that do not appear to be intimately related to its core religious activities (i.e., selling t-shirts at a football game), it cannot discriminate in such transactions.

What Should Administrators Do?

The debate over what protections should be granted to same-sex relationships in employment and student relationships will continue in California and elsewhere. Based on this positive ruling for religious schools in California, religious schools everywhere should look closely at their policies to ensure that the school's religious mission, values, and guidelines are clearly established.

Teachers should be required to utilize religious principles and instruction within all class subjects. Religious symbols, dress, celebrations, songs, attendance at chapel or similar services, etc. should be specified in school policies and made a regular and obvious practice. School contracts should make clear that the employee is required to adhere to the school's religious guidelines and to be a role model. Student handbooks and student contracts must make these principles, practices, and expectations clear as well. Schools should also ensure that they have proof that the student and parent have received and understand their obligation to adhere to the School's policies.

The more that the school makes its mission, values, principles, and expectations clear to everyone visiting, attending, or considering attending the school, the easier it will be for the school to establish that its admissions and expulsion decisions, when based on religion, should not be subject to question under the Unruh Act.

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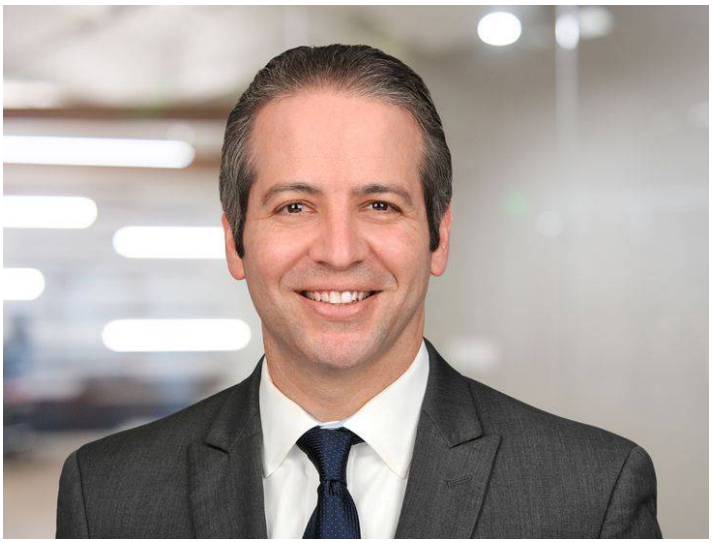

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