Legal Corner

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Free Speech in School: Rights of Students

1. What was the high water mark for students' First Amendment rights?

In 1969, the baby boomers were protesting the war in Vietnam and the United States Supreme Court stated that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*[1]

The administrators had prohibited students from wearing black armbands to protest the Vietnam War. The court held that administrators may suppress speech only if it substantially disrupts or interferes with the work of the school or other students' rights. A remote apprehension of a disturbance or undifferentiated fear is not sufficient to justify suppression of student speech.

[1] 393 U.S. 503, 506, 89 S. Ct. 733, 736 (1969).

2. What other guidance have courts provided to determine whether speech is disruptive?

This so-called *Tinker* standard has been applied in a number of other cases that have helped to define permissible areas of student speech. In *Chandler v. McMinnville Sch. Dist.,*[2] the court of appeals permitted students to wear "scab" buttons to protest replacement teachers hired during a strike because there was no proof that the speech inherently disrupted school activities. In *Chalifoux v. New Caney Independent Sch. Dist.,*[3] the U.S. district court held that a school could not prohibit a Catholic high school student from wearing a rosary even though the rosary was also an identifying symbol for a gang. The school did not produce evidence that anyone misidentified the student as a gang member or that she attracted the attention of other students. Accordingly, there was insufficient evidence of an actual disruption at school to justify infringing on religiously motivated speech. In *Clark v. Dallas Independent Sch. Dist.*,[4] a school district contended that students distributing religious tracts on school grounds created a substantial disruption. The court held, however, that objections of other students, without more, were insufficient to suppress the expression.

[2] 978 F.2d 524 (9th Cir. 1992).

[3] 976 F. Supp. 659 (S.D. Tex. 1997).

[4] 806 F. Supp. 116 (N.D. Tex. 1992).

3. Have the courts ever allowed a school district to suppress student speech under the *Tinker* standard?

One case that permitted suppression of student expression under the *Tinker* standard is *West v. Darby Unified Sch. Dist. No. 260.*[5] In *West*, a middle school student was disciplined for drawing a Confederate flag during class. School district policy prohibited racial harassment, including the use of racial or derogatory slurs. This policy was uniformly enforced without giving preference to one viewpoint over another. Importantly, a few years earlier the school had experienced a series of racial incidents, including hostile confrontations and a fight, some of which were connected to the Confederate flag. The court upheld the district's suppression of student speech. Under the holding in *West*, therefore, a well-founded expectation of disruption based on past incidents arising out of similar speech passes constitutional muster.

[5] 206 F.3d 135 (10th Cir.), *cert. denied*, 531 U.S. 825 (2000).

4. Has the high water mark receded since Tinker?

Yes. Since *Tinker*, the United States Supreme Court has empowered administrators to act to restrict student speech when that speech is vulgar or part of school sponsored activities. The cases are *Bethel School District No. 403 v. Fraser*[6] and *Hazelwood School District v. Kulhmeier.*[7]

[6] 478 U.S. 675, 106 S. Ct. 3159 (1986).

[7] 484 U.S. 260, 108 S. Ct. 562 (1988).

5. How has the Supreme Court restricted a student's right to be vulgar?

In *Fraser*, the Supreme Court held that the First Amendment does not protect in-school speech that is lewd, vulgar, indecent or plainly offensive. *Fraser* involved a student who was suspended after making a student council nominating speech before the entire student body. The speech was described as an "elaborate, graphic and explicit sexual metaphor." Suppressing this type of speech is permitted because it addresses the manner and mode of expression, not its content or viewpoint. Moreover, the court recognized that the function of schools includes educating students in the "shared values of a civilized social order" and schools may properly determine that such lessons cannot be conveyed where lewd and vulgar speech is permitted.

In the recent case of *Wildman v. Marshalltown S.D.,*[8] the court of appeals upheld a school district's removal of a student from the basketball team for a letter she wrote to her teammates complaining of the "bullshit" that the coach had given the team members and suggesting that they give back some of the same. When she refused to apologize for writing the letter, she was removed from the team for the remainder of the year. No other discipline was imposed. In the student's subsequent claim alleging a violation of her free speech rights, the court applied the *Fraser* analysis. However, there are some distinctions in *Wildman* that justified a lesser standard of what constitutes "vulgar" than applied in *Fraser*. The team handbook permitted discipline of student athletes for disrespect and insubordination at the discretion of the coach. Moreover, the discipline affected the student's participation in sports, but not her participation in the classroom. Where the discipline does not affect a student's constitutional rights, such as the right to an education, school districts may have greater discretion in regulating speech.

[8] 249 F.3d 768 (8th Cir. 2001).

6. What authority does the school district have to regulate what students say in school publications without infringing on students' rights?

In *Kuhlmeier*, the Supreme Court upheld a school district's deletion of student articles from a school newspaper that was prepared as part of an advanced journalism class. One article dealt with teen pregnancy and the other presented a negative view of divorced parents. The principal feared that the pregnant teens could be identified and that the divorced parents should have been provided an opportunity to respond (because their son was identified by name). The court recognized that the school district was faced with legitimate concerns about privacy. The court held that schools may exercise editorial control over style and content of student speech in school-sponsored expressive activities where the school official's actions are reasonably related to legitimate pedagogical concerns.

7. What constitutes a "school-sponsored expressive activity"?

These include school-sponsored publications, theatrical productions and other expressive activities that students or parents might view as the school's own speech. However, school sponsorship is not lightly presumed. For example, in *Burch v. Barker,*[9] the court ruled that an underground student newspaper distributed on school grounds could not reasonably be viewed as school-sponsored.

[9] 861 F.2d 1149 (9th Cir. 1988).

8. Does choice of dress regulated by a dress code qualify as protected speech?

Depends. As explained in *Canady v. Bossier Parish School Board,*[10] words printed on clothing qualify as protected pure speech. However, the choice to wear particular clothing as a symbol is protected as expressive speech only if the message is understood by those intended to view the clothing. The court asked this question and then "skirted" the answer. A future case may decide that dress codes are not speech.

[10] 240 F.3d 437 (5th Cir. 2001).

9. What restrictions on dress have been permitted?

Clothing with lewd, vulgar and offensive words or images can be prohibited under *Fraser* to the same extent as lewd, vulgar and offensive spoken or written speech. For example, in *Boroff v. Van Wert,*[11] the court of appeals held that a student's free speech rights were not infringed when he was disciplined for wearing T-shirts of the rock group Marilyn Manson in violation of the dress and grooming policy prohibition against clothing with "offensive illustrations." Applying the *Fraser* standard, the court held that the shirts could be prohibited and noted that this action was appropriate in light of the fact that the group advocates "disruptive and demoralizing values which are inconsistent with … education."

[11] 220 F.3d 465 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 1355 (2001).

10. What restrictions of dress have been prohibited by the courts?

Restrictions on expressive clothing that is not lewd/vulgar/offensive or that is not school-sponsored will be struck down if the *Tinker* standard is not satisfied, that is, if there is no substantial disruption. In *Castorina v. Madison County School Board,*[12] two students were disciplined for wearing T-shirts bearing an image of the Confederate flag and the phrase "Southern Thunder" in violation of the dress code prohibition on clothing with "illegal, immoral or racist implications." The court determined that the discipline violated the students' free speech rights because the policy was not uniformly enforced (students were not disciplined for wearing "Malcolm X" T-shirts), the clothing expressed "Southern pride," and no disruption or unrest was caused by the clothing. *But compare* the Confederate flag case in Question # 3 on page 37.

[12] 246 F.3d 536 (6th Cir. 2001).

11. Do school uniform policies violate students' free speech rights?

No. Courts addressing this issue have expressed doubt that free speech rights are even involved when students are required to wear uniforms or a prescribed dress, like khakis and blue shirts. However, assuming that they are, courts have upheld them after applying a different standard than those outlined in *Tinker*, *Fraser* and *Kuhlmeier*.

12. By what standard are school uniform policies measured?

Canady, *Littlefield v. Forney Independent School District,*[13] and the Pennsylvania case of *Greco v. Mount Carmel School District*[14] applied the following test to determine the constitutionality of school uniforms: whether an important or substantial government interest is served; whether that interest is unrelated to the suppression of student expression; and whether restrictions on the First Amendment are incidental, that is, no more than necessary to facilitate the governmental interest. Promoting discipline, encouraging nonviolent behavior, improving test scores, improving self-image and addressing economic disparities are important governmental interests served by school uniform policies. These interests are unrelated to suppression of speech and have only incidental restrictions on First Amendment rights.

[13] 268 F.3d 275 (5th Cir. 2001).

[14] 39 SLIE No. 20 (M.D. Pa. 2001).

13. When does an anti-harassment policy infringe on free speech rights?

In *Saxe v. State College Area School District,*[15] the Third Circuit Court of Appeals held that an anti-harassment policy infringes on free speech rights if it prohibits speech that is neither vulgar, school-sponsored nor disruptive but which may be intended to harass another even if the speech does not have such a harassing effect. The

court reminded the school district that the First Amendment was intended to protect core religious and political speech that is negative, including derogatory speech about another's racial customs, religious beliefs, language, sexual orientation and values. Therefore, in response to a challenge brought by members of a Christian group which believed it had an obligation to speak out about the sin of homosexuality, the court struck down an anti-harassment policy that prohibited harassment based on "other personal characteristics" — such as clothing, physical appearance and values — which had the "purpose or effect" of substantially interfering with a student's education. In short, the court concluded that the policy regulated speech based on its content and viewpoint. The policy did not accurately mirror the antidiscrimination laws under which harassment falls.

[15] 240 F.3d 200 (3d Cir. 2001).

14. How does a district construct an anti-harassment policy to avoid a free speech challenge?

Limit the policy to those characteristics that are protected by anti- discrimination laws: race, color, sex, ethnicity/national origin, religion, disability and sexual orientation. (Note that discrimination based on sexual orientation is prohibited by Chapter 4 of the PDE regulations.) Discipline only when the conduct has the effect of substantially disrupting or interfering with a student's education, not merely the purpose of causing disruption. Address inappropriate conduct that is not based on a protected category through other policies – such as bullying, stalking, terroristic threats – and student codes of conduct. Finally, remember that non-expressive physical conduct is not within the scope of the First Amendment

15. When can material in an off-campus web site lead to disciplinary consequences?

An off-campus student web site may result in discipline if the district can connect the off-campus activity to an on-campus reaction of disruption. Such on-campus reaction could include other students calling up the web sit from school; the creator using computer equipment at school to create the web site; students talking about it to the detriment of their class work; and other students changing on-campus behavior as a result of the web site.

16. Have the Pennsylvania courts permitted discipline for a student's web site?

Yes. In *J.S. v. Bethlehem School District*,[16] a student, *J.S.* developed a web site, which among other things, included the following: claimed the principal was having sex with another principal; made crude remarks about the algebra teacher; used the "f" word frequently; asked the question, "why should she die?"; solicited $20 contributions for a hit man to kill her; and presented a graphic diagram of her head cut off and blood dripping from her neck. The district presented *Tinker* evidence that the web site substantially and materially interfered with the school community. The threatened teacher was so mentally distraught that she missed over a year of employment. (The jury actually awarded the algebra teacher $500,000 in damages in a separate civil suit for invasion of her privacy.)

[16] 754 A.2d 412 (Pa. Cmwlth. Ct. 2000), appeal granted, 771 A.2d 1290 (Pa. 2001)

17. Is a threat made by a student protected by the First Amendment?

A "true threat" is speech without First Amendment protection. The courts have applied an objective test in determining a threat: whether a reasonable person would foresee that the statement would be interpreted by the hearer as a serious expression of the intent to harm or assault. The judges look at the entire factual context, including surrounding events and the reaction of listeners. A practice pointer derived from the dissenting opinion in the Commonwealth Court relates to the district's reaction to the threat. In *J.S.*, the district took no disciplinary action until three months after the misconduct and required no psychological evaluation as a condition for readmission following the threats. The dissent, based on the District's reaction, presumed that administrators perceived no real threat to safety.

18. Is there a rule of thumb with regard to off-campus web sites?

Edward Dardin, Sr., staff attorney for the National School Boards Association, has identified three types of web sites: 1) offensive, obnoxious and insulting; 2) the same, plus some **veiled threat** of violence or destruction of property; and 3) outright blatant threat. He recommends that the following district responses are appropriate.

- To category 3, if disruptive impact on learning, then discipline.

- To category 2, hold a parent/teacher conference, make obscenity-shy Internet Service Providers aware of the site. The site *may* violate the ISP's terms of service.
- To category 1, develop a thick skin.

19. How does the rule apply to existing case law?

The following web sites were protected by the First Amendment:

• A web site called the principal an "asshole," and listed reasons why the school was

"f——d." When the ACLU backed the student in his lawsuit, the principal testified he disciplined the student because he was upset. There was no proof of any disruption to the school community. *Beussink v. Woodland R-IV.*[17]

• A second site, where the student pasted a head shot of the assistant principal onto an image of Marge Simpson having sex with Homer and also presented a crude satire of the same principal gobbling Viagra and sodomizing a pig, did not justify discipline. *Beidler v. North Thurston Sch. Dist.*[18]

• A third web site of mock obituaries of classmates and an invitation to suggest who should "die" or receive a new mock obituary did not justify disci-pline. *Emmett v. Kent Sch. Dist. No. 415.*[19]

• A "Top-Ten List" on high school athletic director's appearance and sexual abilities brought to school by a classmate was held to be protected free speech even though the athletic director was upset. *Killion v. Franklin Regional Sch. Dist.*[20]

17 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

18 No. 99-00236 (Wash. Super. Ct. July 18, 2000).

19 92 F. Supp. 2d (W.D. Va. 2000).

20 136 F. Supp. 2d 446 (W.D. Pa. 2001).

Final Word

You may wish to visit the Student Press Law Center web site that advises students of their First Amendment rights in school: www.splc.org■

Note: This article is an adaptation and update of Donna and Ann's presentation on Oct. 30, 2001 at the State Principals' Conference in Pittsburgh.