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Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

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STUDENT SPEECH AND EXPRESSION 2004

Overview

Sixty years ago, the United States Supreme Court stressed the important role played by boards of education in preparing this country's children for citizenship. "Educating the young for citizenship," said Justice Jackson "is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source...." Highlighted in the Court's list of fundamental freedoms to nurture (and protect from government encroachment) was "free speech." In this case students *passively* refused to salute our nation's flag. West Virginia State Board v Barnette (1943)

The Tinker Standard. While the early 1960's produced a line of court decisions treating student protest activities on college campuses (see, e.g., Dixon v Alabama State Board, 1961) it was not until 1969 that the Supreme Court expended First Amendment free speech rights and protections to public elementary and secondary school students. The case, Tinker v Des Moines (1969), involved the discipline of several students who wore black armbands (symbolic speech) to protest the war in Vietnam. In the words of Justice Fortas, student disciplinary rules are necessary to the operation of a school. However, "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." Absent a *reasonable forecast* that student expression will "materially and substantially interfere with or disrupt" the requirement of appropriate discipline in the operation of the school, or will interfere with the work or impinge on the rights of other students, official prohibitions of student expression cannot be sustained. Tinker v Des Moines (1969)

Immediate Impact. The Tinker decision ushered in an era in which the rights of students to freely express themselves would be greatly expanded, while the policy-making authority of local school boards and the disciplinary authority of public school administrators were substantially limited. Because the "material and substantial disruption" standard focused on a linking of school policies and regulations to foreseeable results, judges required public school officials to have, as a precondition of taking action, more than a "mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint." Ironically, Justice Black

in his dissenting opinion predicted that the day would come when school officials lose control of student discipline, and judges assume greater responsibility for running the public schools. Tinker v Des Moines (1969)

Student Speech and Expression Post-Tinker. The period of the 1970's and 1980's produced a line of cases involving challenges to dress codes, hairstyle regulations and publications. Suffice it to say, the courts were busy applying Tinker's dictum that students do not shed "their constitutional rights to freedom of speech or expression at the schoolhouse gate"

In Crossen v Fatsi (1970), for example, a federal district court in Connecticut heard a challenge to a public school system's dress code. The code required that all students be neatly dressed and groomed, maintain standards of modesty and good taste conducive to an educational atmosphere, and refrain from wearing "extreme" styles of clothing. Applying Tinker, the court declared the student dress code unconstitutional. First, the wording of the requirement was too vague and overbroad, and too imprecise to be enforceable. In the court's words, "It leaves to the arbitrary whim of the principal, what in fact constitutes extreme fashion or style in the matter of personal grooming..." Second, a student dress code should be reasonably designed "to avoid the disruption of the classroom atmosphere and decorum, prevent disruption among students, avoid the distraction of other pupils or interference with the educational process of the school."

Two years later, in Massie v Henry (1972), students in a North Carolina public school system successfully challenged a "grooming/hair length policy." In reversing the decision of federal district court judge who had ruled in favor of the school system, the United States Court of Appeals for the Fourth Circuit placed squarely on the shoulders of public school officials the burden of establishing the necessity of infringing upon a student's expression rights. To the Court, there must be sufficient proof that the necessity of enforcing the school system's regulation outweighs the protection of student First Amendment rights. In this case there was no evidence shown of any "disruptive effect" caused by the students hair length or style.

In Bishop v Cermenaro (1973), a federal district court judge ruled that public school officials must show a "countervailing interest" sufficient to justify intrusion into student First Amendment expression rights. Absent a compelling reason for implementing a student dress code, the code failed to pass constitutional muster.

Jacobs v Board of School Commissioners (1974) involved the application of the Tinker test to student publications. The United States Court of Appeals for the Seventh Circuit made it clear that the occasional presence of "earthy words" in a student publication cannot be found to be likely to cause "substantial and material disruption of the educational objectives of the school."

In Board of Education v Pico (1982), the United States Supreme Court extended First Amendment protections to the rights of public school students in fostering self-expression for purposes of debate, discussion, and the dissemination of ideas. While the high court made it clear that school officials do not relinquish their legal authority to establish and control the school curriculum (including the selection of books for the school library), the Court also made it clear that this authority must operate within the bounds of the First Amendment and must be balanced with the rights of students. Student First Amendment rights, opined Justice Brennan, "must be construed in light of the special characteristics of the school environment."

As the above court decisions demonstrate, the post-Tinker period (1970 through 1985) saw an expansion of student First Amendment speech and expression protections, and lawyers cautioned local school boards and public school administrators to act with extreme caution. Suffice it to say, this era has been accurately

characterized as a time when public school administrators “were reluctant to act on matters of student expression for fear of being sued.” Vacca and Bosher (2003)

The Pendulum Swings. Judicial analysis in the mid-1980s began to move away from total reliance on the Tinker’s “material and substantial disruption” standard. In two decisions from the Supreme Court, content-oriented tests of appropriateness, offensiveness, vulgarity, and obscenity emerged as viable concepts to probe in student related situations. What is or is not *appropriate* and *suitable* student speech and other expressive activities within the “unique environment” of a school became a primary question, and whether or not a school maintained a “limited open forum” for student speech and expression became a matter to be determined on a case-by-case basis. Vacca and Bosher (2003)

Fraser plus Hazelwood: A Focus On Content. While Tinker made it clear that the *appropriateness* of student speech and expression is evaluated by results and not by content, Bethel School District v Fraser (1986) focused on the content of a student’s words and not solely on results. Fraser, a student, made a campaign speech on behalf of his friend. The speech, which took place in the high school auditorium, was filled with sexual innuendo. Fraser was ultimately suspended from school. He took his case into federal district court where, relying on the Tinker test, he prevailed.

On appeal to the United States Court of Appeals for the Ninth Circuit, the district court was overturned. In the appellate court’s view, school officials were justified in disciplining Fraser because his speech contained language that was indecent.

Ultimately the United States Supreme Court ruled 7 to 2 in favor of the school district. It is significant that the Court did not treat Fraser’s language as obscene; rather, it characterized his words as “vulgar and offensive” and therefore applied a lesser standard of review. The First Amendment, stated the majority, does not protect students in the use of vulgar and offensive language in public discourse. The majority saw as important the duty of educators to nurture civility in our future citizens. It therefore follows that “[t]he determination of what manner of speech in the classroom or assembly is inappropriate properly rests with the school board.” Bethel School District v Fraser (1986)

Two years later, the Supreme Court decided Hazelwood v Kuhlmeier (1988). This case involved a student newspaper produced in a public school journalism class. The high school principal had refused to allow the publication of two student authored articles in the school newspaper. By a vote of 5 to 3 the Court ruled in favor of the school district. High school principals, said the majority, exercise broad authority and discretion to judge the appropriateness of the content of student expressive acts that “bear the imprimatur of the school.” As such, “[t]he standard articulated in Tinker need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.” The Court cautioned, however, that such decisions must be based on “reasonable pedagogical concerns” and not on “personal taste.”

Student Speech and Expression in the 1990’s. As public school systems moved into and through the decade of the 1990’s it was apparent that the courts had created a balance between student freedoms of speech and expression (separating the private speech and expression of students from that which can be considered school-sponsored), and the disciplinary authority of school officials. At the same time, however, courts consistently held that school officials possessed authority to control student speech and expression within the unique forum (*i.e.*, limited purpose forum) of a public school. More specifically, school policies and rules may limit student speech and other expressive acts that (1) disrupt the educational environment, or (2) interfere with the teaching and learning processes, or (3) interfere with the educational opportunities of other students, or (4) are vulgar,

offensive, or obscene, or (5) carry the school's official imprimatur. However, educational policy-makers and school administrators were consistently cautioned by their legal advisors to proceed with care, especially where disciplinary actions are based on *content* rather than on disruptive *results*. (Vacca and Hudgins, 1994)

Emerging Issues

The decade of the 1990's produced new forms of student speech and expression. As a result, several issues emerged and the courts remained busy. What follows are ten examples of issue producing situations from the last decade:

- Students argued for their First Amendment right to freely express their religious beliefs and views in school buildings, in classrooms, on school property, at graduation ceremonies, and at school sponsored athletic events.
- Members of student-initiated, non-curricular Bible clubs argued that their First Amendment expression rights were infringed when school officials denied their club access to the school's forum.
- Students claimed that the First Amendment was abridged when school system policies did not allow them to wear hats, sunglasses, and items of jewelry while in school.
- Students relied on the First Amendment's free speech guarantee to challenge disciplinary actions taken against them for violating school system "civility, anti-bias motivated, anti-hate speech" policies.
- Students claimed that their First Amendment rights were violated when disciplined for using popular "slang" words and phrases, or for "heckling," or "taunting," or "teasing" other students, or for dressing in certain "in" fashions and styles.
- Students argued First Amendment violations when disciplined solely because they expressed views and opinions that ran counter to those of school system board members and administrators.
- Students claimed First Amendment protection when disciplined for wearing T-shirts, buttons, hats, and flags bearing commercial, political, cultural, and historical messages.
- Students relied on the First Amendment to challenge school board policies that limit or forbid distribution of publications and other literature on school grounds, without prior approval of the school principal.
- Students relied on the First Amendment to challenge disciplinary actions taken for violating school system policies dealing with the use of school computers, personal computers, pagers, cell phones, picture-taking telephones, and other new forms of technology.
- Students claimed abridgement of the First Amendment when not allowed to use the school's public address system and bulletin boards to disseminate information to their fellow students.

Case Law

Decided during the 2000 term of the United States Supreme Court, a case out of Texas required the Court to decide the constitutionality of student led prayers before football games. In Doe v Santa Fe I.S.D. (2000), the Court held that a school system policy that allowed students to deliver "non-proselytizing invocations and messages" at the beginning of high school football games violated the First Amendment. The school board had argued that allowing students to lead the crowd in a pre-game prayer over the stadium public address system turned over control of the prayer to the students and thus became an exercise of "private speech." The high court disagreed with that position and said that a student-led prayer delivered over the school system's public address system, under the supervision of school system teachers, is "not private speech."

The United States Court of Appeals for the Sixth Circuit held in an Ohio case that school administrators acted reasonable in prohibiting students from wearing “Marilyn Manson T-shirts” while in school. The school system had a policy that specifically addressed students wearing clothing bearing offensive illustrations and slogans. Using that policy, a principal told a student to either turn the T-shirt inside out, or go home and change to another shirt and come back to school, or leave the building and be considered a truant. Subsequently the student alleged, among other things, that the principal, the school board, and other school officials violated the First Amendment by engaging in “viewpoint discrimination.” Relying on Fraser and Hazelwood, and not on the Tinker standard, the Sixth Circuit firmly stated that school officials possess the authority to determine what is or is not appropriate speech and expression within the school. Boroff v Van Wert City School Board, 2000)

Killion v Franklin Regional School District (2001) involved a challenge to the suspension of a high school student who had created and e-mailed to friends a “top-ten faculty list.” The student created the list on his home computer. School officials considered the language used to be abusive, lewd, and vulgar. A federal district court ruled in the student’s favor. The list was created off school grounds on the student’s computer, and there was no evidence that the list had caused actual disruption of or interference with school activities. For more recent cases involving students and computers, see J.S. v Bethlehem Area School District (2002), and Flaherty v Keystone Oaks School District (2003).

In 2002, the United States Court of Appeals for the Third Circuit heard a case involving a challenge to a school system’s racial harassment policy. The policy prohibited any written material that creates “ill will” among the student body. The policy was intended to prevent disruption. The case was brought on behalf of students who claimed a violation of their free speech when they were prohibited from wearing “Jeff Foxworthy T-shirts.” More specifically, school officials focused their attention on the use of the term “redneck jokes.” Even though most recent court decisions (post-Columbine) have upheld school board policies intended to promote student safety and prevent school disruption, the Third Circuit in this case found fault with the *application* of the harassment policy to these particular T-shirts. School officials failed to show a direct connection between use of the term “redneck” and school disruption. Warren Hills Regional Board v Sypniewski (3rd Cir. 2002)

Lassonde v Pleasanton Unified School District (2003), involved a student’s high school graduation speech. A review of the student’s proposed speech revealed the inclusion of several “religiously oriented” references. Fearing possible Establishment Clause problems, school officials asked the student to delete the “proselytizing and sectarian” references from the speech, but said they would allow the inclusion of references “to God” as they relate to the student’s personal beliefs. School officials also allowed the student to announce that his speech had been involuntarily changed, but that copies of his unaltered speech would be available at the conclusion of the graduation ceremony. The Court considered the actions of school officials to be both reasonable and well within the bounds of the First Amendment. (It should be noted that the United States Supreme Court recently denied review in the case.)

Walz v Egg Harbor Township (2003), involved a challenge to a school system’s policy that forbade the distribution of “religiously, politically, or commercially oriented items” in school classrooms and while classes were in session. An elementary school parent who was denied permission to distribute pencils and candy canes bearing religious messages during class time (at a time during which seasonal parties were being held) challenged the policy. School officials were willing to accommodate the parent by allowing distribution of the items in a hallway, as students left their classrooms. Agreeing with the lower court, the Third Circuit held that school officials acted reasonably. School officials had a valid educational purpose and were well within their authority to regulate curricular activities involving “impressionable age elementary school children.”

Policy Implications

In 2004, student speech and expression remain fertile areas for potential litigation. Because student speech and expression are forms of student conduct, the possibility for misconduct (and a corresponding need for school principals to take immediate disciplinary action) is certain. As the above case law examples demonstrate, First Amendment protections apply to public school students. It therefore follows that educational policy makers must carefully craft policies treating student speech and expression; policies that recognize and foster student rights but, at the same time, grant school administrators and teachers the prerogative to: (1) protect the educational environment from disruption, and (2) keep everyone (students, teachers, staff, and administrators) secure and safe from harm.

What follow are *five suggestions* for school officials to consider as they review current policy statements and draft new ones. School system policies must make it clear that:

- The school board recognizes, respects, and protects the First Amendment rights of students including, but not limited to, the rights of students to express their personal views on matters of public concern, and to receive and disseminate information.
- The terms “student speech” and “student expressive activities” include, but are not limited to, student writings, verbal statements, dress and attire, grooming, and assembly.
- School officials possess the authority to reasonably regulate the time, place, and manner of all student speech and expressive activities occurring in or on school property (including school computers and other forms of technology), and at school sponsored events
- Principals, assistant principals, and classroom teachers possess authority to discipline students when their speech or expression materially and substantially disrupts the educational environment; or threatens others; or poses harm to themselves or others; or interferes with the educational opportunities of other students; or prevents teachers and other staff members from doing their work.
- School officials possess the authority and discretion to: (1) evaluate the content of student speech and other expressive acts exercised inside school, at school- sponsored functions, or as part of a curriculum-related matter; and (2) determine whether the content and method of delivery of such acts is vulgar, offensive, or otherwise inappropriate, or advertises, promotes and encourages illegal and/or harmful activity.

Finally, school policies must be written in clear and easily understood language so as to pass constitutional muster if and when they are subjected to First Amendment scrutiny.

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Richard S. Vacca
Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author.