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STUDENT EXPRESSION 2007: WHAT WILL THE SUPREME COURT SAY?**Overview**

Last month (March 2007) the United States Supreme Court heard oral arguments in Morse v. Frederick (2006). A student expression case, Morse involves a public high school student who was disciplined for an act that took place during school hours, but at a privately sponsored, non-school organized event held off-school grounds. In my view, based on the presence of these last two factors, the matter should not have moved past the federal district court. Ironically, this did not happen. Morse v. Frederick not only made its way into a federal district court in Alaska (where the court granted a summary judgment in favor of school officials), it went up on appeal to the United States Court of Appeals for the Ninth Circuit (where the court vacated the judgment and remanded the case). Subsequently certiorari was granted by our nation's highest court, at 127 S.Ct. 722 (2006), where the matter currently awaits a decision. Why?

According to Supreme Court watchers, the Morse case was taken up by the United States Supreme Court because it “[a]sks the Justices to weigh the Court’s famous 1969 ruling that students do not ‘shed their constitutional rights to freedom of speech or expression at the school house gate’ against more recent decisions acknowledging a school system’s ability to create rules that maintain order and protect students from messages deemed harmful.” NSBA Legal Clips (March 2007) In other words, as benign as the facts are, Morse v. Frederick is an important case with serious policy implications for local public school officials.

The purpose of this commentary is threefold. First, three landmark student First Amendment decisions from the United States Supreme Court (having a direct bearing on the Morse decision) will be discussed. Second, the facts in Morse v. Frederick (2006) will be reviewed. Finally, potential implications of the Morse decision for local school board policy formulation and implementation will be suggested.

Student Speech and the First Amendment

In the 1960's, a new breed of more “activist” student began appearing on college campuses and in public middle and secondary schools. As a direct result, federal and state courts were kept busy deciding cases

involving a variety of student First Amendment issues. (e.g., student dress and appearance, assembly and association rights, free speech and press rights, and others).

The Supreme Court Speaks (1969 to 1988). Student First Amendment issues are not new. They always have been and remain ripe for court action. As Russo reminds us, “[e]ducational officials clearly have long had to control student expressive activity that can be disruptive.” Russo (2004)

It was not until 1969, however, in Tinker v. Des Moines, an Iowa case involving student appearance in the form of symbolic expression (wearing protest armbands to school), that the United States Supreme Court clearly and emphatically held that the First Amendment protects student expression in public schools. In an opinion written by Justice Fortas the high court stated that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” Student First Amendment protections will prevail, said the Court, unless school officials can establish “that the students’ activities would materially and substantially disrupt the work and discipline of the school.” Tinker (1969) The Tinker “material and substantial disruption test” focused on the results of student expressive activities and quickly became the primary tool of judicial analysis applied in all manner of public school student expression cases.

Seventeen years later, in Bethel School District v. Fraser (1986), a case involving student verbal speech in a high school auditorium, the United States Supreme Court held, by a vote of 7 to 2, that the First Amendment does not protect students in the use of vulgar and offensive language in public discourse. Moreover, said Chief Justice Burger, “A high school assembly or classroom is no place for sexually explicit monologue directed towards an unsuspecting audience of teenage students.” In his view, the determination of what manner of speech in the classroom or in an assembly is appropriate rests with school officials and not with students. Fraser (1986) Different from the “action-oriented” Tinker test, Fraser focuses on the content of student speech and not its results.

Not long after handing down Fraser, the Supreme Court decided a Missouri case involving a public high school newspaper. The controversy in Hazelwood v. Kuhlmeier (1988) began when a high school principal removed two articles from publication in the school newspaper. The school principal acted because he objected to the content of the articles. Ultimately, by a vote of 5 to 3, the Court held that the principal acted reasonably. Two major reasons were given by Chief Justice Rehnquist. First, a distinction must be made between “symbolic speech,” as protected in Tinker (1969), and “speech sponsored by the school and disseminated under its auspicious.” Second, the principal’s actions were based on “legitimate pedagogical concerns.” Hazelwood (1988)

Thus, between 1969 and 1988, a clear judicial mandate emerged; namely, that public school students shall not be deprived of their First Amendment protections unless school officials can establish legitimate and pedagogically based reasons for infringing on those guarantees. To put it another way, judges from the United States Supreme Court on down made it clear that school officials are not at liberty to censor student expression solely because they consider the content of the expressive activity to be distasteful or inappropriate, or the results to be “potentially disruptive” of school operations. Vacca and Boshier (2003)

Morse v. Frederick (2006): The Facts

In 2002, at Juneau-Douglas High School, Juneau, Alaska, students were allowed to leave the school building during school hours to observe the passing of the Olympic torch parade, an event sponsored by Coca Cola. Situated across the street from the high school as the parade passed, Frederick, a senior at the time, with some

assistance, unfurled a large banner on which appeared the following statement: “Bong Hits 4 Jesus.” Seeing the banner’s statement, Morse, the high school principal, crossed the street, confronted Frederick, confiscated the banner, and “crumpled it.” Subsequently Frederick was suspended from school.

Taking his case into a federal district court, Frederick argued that his expressive act was protected by the First Amendment. Unfurling the banner, he said, was to gain media attention for an ongoing battle between the school principal and him. In essence, he claimed that he was symbolically protesting against the high school administration. School officials argued that the message on the banner was a violation of the school system’s anti-drug policy/educational mission. In their view the banner’s statement promoted drugs. Frederick argued that the statement on the banner was not intended as a pro-drug message.

At trial, a federal district court judge, in what can be characterized as a Fraser (1986) rationale, and convinced that the school board and the principal were covered by the doctrine of qualified immunity, granted summary judgment to the defendants. On appeal, however, the Ninth Circuit Court, mainly relying on Tinker (1969), vacated the judgment and remanded the case back for further proceedings. In the appellate court’s view Frederick’s actions, which occurred off-school grounds at a non-curricular event, did not interfere with the school system’s anti-drug mission. Moreover, the court ruled that principal Morse was not entitled to qualified immunity. Subsequently, the United States Supreme Court granted certiorari, at 127 S.Ct. 722 (2006)

Policy Implications

It is very difficult to predict what the United States Supreme Court will decide and opine in Morse v. Frederick (2007). Unlike Tinker (1969), Fraser (1986), and Hazelwood (1988), the student’s expressive act did not take place on school grounds, at a school sponsored event. Nor did his act disrupt the school’s learning environment. However, in my opinion, based upon the facts of the case and after reading both the trial court’s decision and that of the Ninth Circuit, and given today’s emphasis on protecting students from harm and the learning environment from disruption, I believe that the high court will rely on Fraser’s “school officials and not students decide on what is appropriate speech,” rationale, coupled with Hazelwood’s *reasonable pedagogical concerns doctrine*, to decide in favor of school officials. It must be emphasized that the high school students in attendance at the parade had been released by school officials to attend the parade activity, and some supervision by school personnel was present during the parade. In addition, the parade did occur during the school day and in close proximity to the high school. Thus, to a reasonable observer, that particular portion of the torch parade could have been perceived as school controlled.

Whatever the final decision in Morse v. Frederick, it behooves public school officials to reevaluate existing policies dealing with student expression (both on- and off-school grounds). As Alexander and Alexander remind us, in addition to school officials ensuring that student disciplinary policies and procedures do not violate the First Amendment rights of students, “students themselves must fulfill their obligations to the public school.” Alexander and Alexander (2005)

To achieve a proper balance between student rights and school system disciplinary prerogatives local school officials must be certain that:

- All school system disciplinary policies are intended to: (1) protect the welfare of all students and staff, (2) keep the learning environment safe and free from disruption, and (3) promote and carry out the school system’s educational mission.

- Students and their parents know and understand what is or is not acceptable and appropriate student speech and other expressive acts (as clearly listed and defined in policy).
- Students and parents know and understand that the school board, administrators, teachers, and staff, not students, decide what is or is not acceptable and appropriate speech and other expressive acts in school and at school-sponsored/controlled/promoted functions.
- School officials reserve the prerogative to sanction students whose expressive acts pose harm to students and staff, or promote illegal behavior, or violate school system policies and/or rules, or interfere with the school system's educational mission, whether the acts occur on or off school grounds.
- School officials reserve the prerogative to take appropriate disciplinary action where student off-school property behavior can be perceived (by a reasonable observer) as part of a school sponsored/controlled and or promoted event or activity.

One final thought is in order. The following quotation from the majority opinion in Bethel School District v. Fraser (1986) may set the tone for the Supreme Court's rationale in deciding Morse v. Frederick (2006): "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."

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