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STUDENT SPEECH AND EXPRESSION 2008: A NEW STANDARD APPLIED

Overview

On June 25, 2007, the United States Supreme Court decided (by a vote of 5 to 4) Morse v. Frederick (2007). In Morse the high court ruled that school officials may restrict student speech that they, public school officials, “reasonably view as promoting illegal drug use.” In my view Morse v. Frederick (2007), better known as the “Bong Hits 4 Jesus” banner case, holds the potential to become a landmark decision in First Amendment law as applied to public schools, thus halting a seemingly lock-step reliance of past federal courts on Tinker v. Des Moines (1969) and the “material and substantial disruption standard.” Stated another way, the Supreme Court has created a more flexible standard for lower courts to apply in resolving future student First Amendment speech and expression issues; a standard that favors public school officials.

The purpose of the commentary is threefold. First, the main points of the Supreme Court’s rationale will be briefly reiterated and summarized. Second, in an effort to up-date and extend a previous student speech and expression commentary in this CEPI series (September 2007), a selection of recent cases in which Morse v. Frederick (2007) is applied will be briefly discussed. Finally, implications for local school board policy will be proposed for consideration.

Morse v. Frederick (2007) Revisited

Last year I devoted an issue of the **CEPI Education Law Newsletter** (vol.6, no.1) to a discussion of the potential impact of the Supreme Court’s rationale in Morse v. Frederick (2007) on local school board policy. In that piece I combined the essence of Chief Justice Roberts’ opinion with similarities found in the concurring opinions and summarized the Court’s rationale in upholding the disciplinary authority of the school principal. Within that set of opinions the following *ten points* were emphasized as consistent among the Justices:

- Public school officials may regulate student speech “even though the government could not censor similar speech outside the school.”
- The constitutional rights of students are not automatically coextensive with those of adults in other settings.

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- The constitutional rights of children are different in public schools from elsewhere.
- Tinker v. Des Moines (1969) is not absolute and it is not the only standard to apply in student speech cases.
- The First Amendment does not require school officials to tolerate student speech and expression that contribute to the dangers of illegal activity
- The matter of determining the appropriateness of student speech and the regulation of student speech are in the hands of school officials not students.
- Because there are “special needs” and “special characteristics” in the school environment, school officials must have greater authority to intervene “before actual violence erupts.”
- School officials must act where student speech presents a threat to student safety.
- The inquiry to apply in student speech cases is one of “reasonableness.”
- School officials can restrict student speech and expression where the location of the student act is perceived by a reasonable observer to be a school sanctioned event.

Summary. In effect, while the Supreme Court neither ignores nor negates Tinker v. De Moines (1969) it does, however, lay a foundation for public school officials and administrators to proactively do what has to be done and not wait until something happens before they act. In place of the action-oriented “material and substantial disruption” standard, the Court suggests a viable alternative for lower courts to apply; a standard of analysis that focuses on the content of and not solely on the results (i.e., impact) of student speech and expression. In doing so the Court narrows the scope of student speech and expression rights while extending and strengthening the discretionary authority of public school officials when it characterizes public school administrators as “reasonable observers” empowered to take “reasonable steps” to “safeguard those entrusted to their care.” This content-oriented judicial analysis is consistent with and rooted in such prior landmark decisions as Bethel School District v. Fraser (1986) and Hazelwood v. Kuhlmeier (1988), from the Burger and Rehnquist eras.

Post-Morse v. Frederick Case Law Examples

A review of recent case law involving student speech and expression issues reveals that some lower courts are beginning to apply a Morse v. Frederick rationale in resolving the First Amendment dispute. Three examples follow.

In Biom v. Fulton County School District (decided July 31, 2007) the United States Court of Appeals for the Eighth Circuit upheld a local Georgia school district’s suspension of a high school student because of a narrative that she wrote in her notebook describing the shooting of her mathematics teacher. In this case the appellate court characterized her written narrative as something that “reasonably could be perceived as a threat of school violence....” Moreover, said the Court, school officials had to do something. What if they did nothing and the student carried out the shooting of the teacher? Also citing and applying Tinker v. Des Moines (1969) the Court opined that in this particular situation the student’s narrative, which other students had seen, “was reasonably likely to further cause a material and substantial disruption....”

This past November (2007) the United States Court of Appeals for the Fifth Circuit decided a First Amendment speech case involving a public high school student who was disciplined for entries that he had made in his personal journal. In Ponce v. Socorro I.S.D. (5th Cir. 2007) disciplinary action was taken when a teacher brought the student’s narrative (describing such things as organizing an extremist group at the school, acts of brutality to specific students, etc.) to the attention of an assistant principal, who then summoned the student to the office where he examined the student’s journal. The assistant principal telephoned the student’s mother and let her know the situation. Subsequently, he then read the journal in its entirety and determined that the

student's statements posed a threat to the safety of all the students in the school. Ultimately, he suspended the student from school and recommended that the student be placed in an alternative school.

Following their unsuccessful attempts to appeal the disciplinary action through the school system's appeals process, parents went into a federal district court where they sought a preliminary injunction. Relying on Tinker v. Des Moines (1969), the district court ruled in the parents' favor. In the court's opinion the evidence presented by school officials did not demonstrate that any material and substantial disruption occurred in the school because of the journal writings.

On appeal, the Fifth Circuit Court, relying on Morse v. Frederick (2007), vacated and remanded the case back to the lower court. Focusing on the content of the student's narrative the Fifth Circuit granted school administrators the discretion to decide what is or is not "a threat" to student safety. And, said the Court, "threatening language" is not protected by the First Amendment.

That same year the United States Circuit Court of Appeals for the Second Circuit decided Wisniewski v. Board of Education (2nd Cir. 2007). While the appellate court did not specifically rely on Morse v. Frederick (2007), it nonetheless is interesting to note its Morse-like interpretation of the Tinker test. In the Court's view, to take disciplinary action a school administrator only needs to have evidence that leads to a "reasonable forecast" of material and substantial disruption.

In my view the Second Circuit's decision in Wisniewski does not negate the relevance of Tinker; rather, it reiterates and emphasizes some often overlooked *content-oriented* portions of Justice Fortas' opinion. Forty years ago, Justice Fortas made it clear that public school officials must be able to show that their prohibition of student expression "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpleasant view." To successfully withstand a First Amendment constitutional challenge, he cautioned, school officials must have "reason to anticipate" that specific acts of student expression "would substantially interfere with the work of the school or impinge upon the rights of other students." Tinker v. Des Moines (1969)

Implications for Policy

In 2008, the responsibilities of school officials and administrators for student and staff safety and security are of paramount importance as students, parents, and other community members insist that school officials take action long before violence erupts and something tragic happens (e.g., recent school and college shooting rampages). Across the United States public school officials are expected to "nip in the bud" an increased use of computers and other technologies to readily communicate threats, hate filled messages, acts of harassment and bullying, and to lessen the presence of dangerous students and trespassers on school grounds. As a result, current and future school officials and administrators must be more proactive than ever before. In today's school and college environments the pressure is on school officials, administrators, counselors, and classroom teachers to be alert and to gather more and more information in an effort to "reasonably anticipate" and prevent problems long before they spring up.

While it may be too early to reach a definite conclusion, it is my view, however, for reasons stated in the above commentary, that student First Amendment speech and expression rights (along with individual privacy expectations) in public schools and colleges will be narrowed and the disciplinary authority of public school officials broadened (along with the prerogatives to gain immediate access to information once considered

confidential). The more flexible standard of judicial analysis set forth in Morse v. Frederick (2007) represents a major step in that direction.

In 2008, it behooves local school boards to make it clear in policy that;

- While the Board respects student First Amendment speech and expression rights, it retains the prerogative to restrict and otherwise limit student speech and expression (verbal, written, and symbolic) on school grounds and at school sanctioned and/or sponsored activities that is obscene, threatening, harassing, and/or encourages any other illegal activity or violation of school system policies.
- School system building-level administrators possess the discretionary authority to determine the appropriateness of student speech and expression (verbal, written, and symbolic) on school grounds and at school sanctioned and/or sponsored activities, and are empowered to take immediate action to: (a) protect the security and safety of all students and staff, (b) intervene before violence erupts, and (c) keep the school's learning environment free from disruption.

Resources Cited

Bethel School District v. Fraser, 478 U.S. 675 (1986)

Biom v. Fulton County School District, 494 F.3d 978 (11th Cir. 2007)

Hazelwood v. Kuhlmeier, 108 S.Ct. 562 (1988)

Morse v. Frederick, 127 S.Ct. 2618 (2007)

Ponce v. Socorro I.S.D., 508 F.3d 765 (5th Cir. 2007)

Tinker v. Des Moines, 393 U.S. 503 (1969)

Wisniewski v. Board of Education, 494 F.3d 34 (2nd Cir. 2007)

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