Expanding student speech rights open school doors to “culture wars”

By Bruce W. Smith

“Sticks and stones will break my bones, but words will never hurt me.” So my mother – like many mothers – would say when I was a boy to either soothe my wounded feelings or to prevent me from retaliating against a sibling or other child who had made a nasty remark.

I don’t know whether parents are still using the phrase, but school administrators and lawyers know that the aphorism no longer rings true. More and more, verbal “conduct” is regulated by federal and state laws, and schools in particular are being charged with increasing responsibility to control the speech of children through enforcement of statutes and policies regarding sexual harassment, disability harassment, sexual orientation harassment and bullying.

The trouble with regulating student speech is that freedom of speech is protected by the First Amendment to the U.S. Constitution. The U.S. Supreme Court ruled in Tinker v. Des Moines¹ that students’ constitutional rights do not stop at the school house gate, and that schools – as agents of the state – could not abridge students’ free speech rights. But not all student speech is protected. Since Tinker was decided in 1969, courts have been struggling to sort out which speech is protected and which is not. The struggle continues.

This problem has not become any easier, especially in light of two observable trends: first, an increasingly aggressive stance by partisans in the “culture wars” to have their views on issues like religion, abortion and homosexuality expressed in the schools, and, second, an increase in anti-bullying and harassment laws and policies that require schools to censor certain forms of speech. This article, after briefly summarizing the Supreme Court cases on student speech, will review recent cases arising from the culture wars. A second part dealing with First Amendment implications of bullying and harassment rules will follow in the next edition of the School Law Advisory.

First, let’s be clear on what student speech is not protected by the First Amendment:

- Tinker held that student speech that disrupts or is likely to disrupt the operations of the school or that interferes with the rights of others is not protected.
- In Bethel v. Fraser,² the Supreme Court held that vulgar, offensive speech could be restricted.
· In Hazelwood v. Kuhlmeier, the Supreme Court held that student speech in a school program (in that case, a school sponsored student newspaper) was not protected.

Hazelwood, which was the last U.S. Supreme Court case to address student expression, was decided in 1986. Other courts, however, have been busy with this issue in the past 20 years. Some of those cases are discussed below.

Bong hits 4 Jesus

The Supreme Court is now on the brink of deciding another student First Amendment case. In Frederick v. Morse, a high school in Juneau, Alaska released students from classes to watch the Winter Olympics Torch relay pass by on a road by the high school. Joseph Frederick, a senior at the school, as the Court of Appeals wryly put it, “never made it to school that morning because he got stuck in the snow in his driveway, but he made it to the sidewalk, across from the school, where the torch would pass by.”

Young Joseph proceeded, with the help of others, to hold up a banner saying, “Bong Hits 4 Jesus.” The high school principal raced across the street, pulled down the banner and suspended Joseph from school. Joseph filed suit, claiming that his free speech rights had been violated, and the federal Court of Appeals for the Ninth Circuit ruled in his favor. The court noted that the banner did not cause any disruption and that it was not “plainly offensive,” stating, “The phrase ‘Bong Hits 4 Jesus’ may be funny, stupid, or insulting, depending on one’s point of view, but it is not ‘plainly offensive’ in the way sexual innuendo is.” Rather, speech about marijuana use was more akin to the “political viewpoint” speech in Tinker, especially since the question of marijuana legalization had been the subject of repeated state referenda and a recent controversial court decision in Alaska.

The school appealed to the U.S. Supreme Court, and is being represented there by Kenneth Starr, who argues that the school had every right to censor the banner because it promoted drug use. Interestingly, religious conservative groups are supporting the student in the case because they believe that protecting student First Amendment rights will help them to get their message into the schools.

Advocates on issues such as abortion, homosexuality and religion are trying to reach the hearts and minds of children, and school is where they find them. Far from being a haven from the most bitterly contested social issues in this country, schools are more and more becoming a forum for those issues. And what makes that possible is the application of the First Amendment to the public schools. This has made for some strange bedfellows, and even some unexpected reversals of field, in the area of First
Amendment law. Liberals have traditionally been strong supporters of the First Amendment and free speech, while conservatives traditionally supported the authority of school officials. Now, as in the Frederick case, we see religious conservatives fighting hard for student free speech rights; and we see some liberals trying to suppress speech – such as condemnation of homosexuality – when they think it is inappropriate.

Homosexuality and gay rights


A middle school student wore a t-shirt to school with the words:

- **Shirt Front**
  - INTOLERANT
  - Jesus said . . .
  - I am the way, the truth and the life.
  - John 14:6

- **Shirt Back**
  - Homosexuality is a sin!
  - Islam is a lie!
  - Abortion is murder!
  - Some issues are just black and white!

When the student was ordered not to wear the shirt, he filed suit in federal court, which ruled that since the shirt did not cause any disruption, the school had violated his free speech rights.

_Harper v. Power Unified School Dist._ (9th Cir. 2006).

The School’s Gay Straight Alliance held a Day of Silence in 2003 to teach tolerance of others, particularly those of a different sexual orientation. Before the Day of Silence, there was a series of incidents and altercations on campus resulting from anti-homosexual comments made by students. A week after, students had a “straight pride day” at which they wore a t-shirt with derogatory remarks about homosexuals.

In 2004, a student named Tyler Harper wore a T-shirt saying “I will not accept what God has condemned” on the front and “Homosexuality is Shameful, Romans 1:27” on the back. Administrators, recalling the previous year’s disruption, said that the shirt was inflammatory and could be disruptive, and the Principal told him not to wear it. Harper filed suit in federal court, but unlike young Mr. Nixon, he lost. The Ninth Circuit Court of Appeals (which also decided the Frederick case discussed above) ruled that Tyler’s t-shirt “infringed the rights of others.” The court’s rationale bears quoting at some length:
We conclude that Harper’s wearing of his T-shirt collides with the rights of other students in the most fundamental way.

Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As Tinker clearly states, students have the right to “be secure and to be let alone.” Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.

Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn. The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development. Indeed, studies demonstrate that academic underachievement, truancy, and dropout are prevalent among homosexual youth and are the probable consequences of violence and verbal and physical abuse at school.

The court concluded that there was no need to consider whether the t-shirt was disruptive because it interfered with the rights of others. The Supreme Court recently vacated the Harper decision on appeal due to mootness (which has nothing to do with the merits of the case). While the decision is not binding in the Ninth Circuit for that reason, it is still a published decision that will carry weight in other courts. Zamecnik v. Indian Prairie School District 7 (N.D.Ill. 2007).

This is a case where a federal court followed Harper despite its mootness. The school refused to permit students to wear t-shirts saying, “Be Happy, Not Gay.” Following the rationale of Harper, the court found school officials have a legitimate pedagogical interest in promoting tolerance toward, and respect for, diverse groups of students by protecting gay students from physical and psychological harm. While conceding that the students were restricted from expressing opposing views, the court concluded that the restriction only prohibited derogatory messages. An opposing viewpoint still could be expressed in a positive, non-derogatory manner, and in this sense the restriction was viewpoint neutral. Even if the policy were considered viewpoint discrimination favoring tolerance, promoting tolerance “could be taken as a reasonable promotion of the school’s basic educational mission.”

It is difficult to reconcile the Nixon case with the Harper and Zamecnik cases. The Ninth Circuit in Harper zeroed in specifically on how anti-gay speech could be harmful to students who are known or perceived to be gay, while the court in Nixon made no mention of the impact or the potential impact of the student’s T-shirt. What is interesting about the Harper and Zamecnik decisions is that the courts did not make any findings that the anti-homosexuality message had actually harmed any students, but based their decisions on the conclusion that such messages tend to be harmful to minority students. The Harper and Zamecnik decisions clearly support suppression of “hate speech,” but it is by no means clear that the Ninth Circuit’s views, which are perceived to be more liberal than most other courts, will hold sway elsewhere in the nation.


In this case that arose in New Hampshire, a student was told he could not wear a shoulder patch of a swastika with a “No” symbol superimposed on it, which the student called a “tolerance patch.” The court upheld the school’s decision based on recent tensions in the school between a group of gay students and a rival group, known by students as “the rednecks.” There had been extensive threatening and taunting among the groups. The redneck group was known to taunt the gay students by making the Nazi salute...
and saying, “Seig Heil.” The school decided that the student’s patch was deliberately intended to taunt the “rednecks,” and that disruption was likely to result. The court agreed. The decision was appealed, but it was mooted by the student’s graduation.

Distribution of materials


An eighth grade student was prohibited from distributing an anti-abortion flyer in the hallways outside of classrooms during school. The school had a policy restricting student distribution of literature to a table at lunch and student bulletin boards. The court ruled that the school’s policy was unconstitutionally broad because there was no evidence that the student’s distribution of flyers in the hallways caused any disruption. Thus her speech was protected under *Tinker*.

*Raker v. Frederick County Public Schools*¹⁰ (W.D.Va. 2007).

A 12th grade student wanted to distributed anti-abortion literature during the school day, but school policy restricted student distribution of literature to before and after the school day. This court reached the same conclusion as the Michigan court, holding that the policy was unconstitutionally broad. The court said that the school’s interest in eliminating hallway congestion and preventing littering might justify a more narrowly tailored prohibition, but that the school’s policy was not narrowly tailored, as it swept broadly over all forms of non-curricular literature, irrespective of size, quantity, and manner of distribution.¹¹

The recent decisions concerning distribution of literature call into question assumptions schools have made that “time, place and manner” restrictions on student distribution will be upheld. The trend in the court cases is that students are free to distribute literature outside of the classroom at any time as long as it does not interfere with the operation of the school. In light of this trend, schools are well-advised to review their existing policies governing distribution of materials and consider updating them in light of the recent cases.

Conclusion

The recent cases reviewed in Part One of this article generally favor student speech rights and seem to open the door wider to expression of views on controversial social issues in the schools. In Part Two, it will be seen that the trend in favor of student speech rights seems to continue, but the future of student speech may depend to a significant extent on the Supreme Court’s decision in the “bong hits 4 Jesus case,” which should be decided before the next edition of School Law Advisory goes to press.

Endnotes

4. 439 F.3d 1114 (9th Cir. 2006).