DOCUMENT RESUME

ED 344 302 EA 023 869

AUTHOR Sneed, Maree; Knevila, Kelly
TITLE "Hazelwood v. Kuhlmeier": Closing "Tinker's" Schoolhouse Gate.
PUB DATE Nov 88
NOTE 8p.
PUB TYPE Reports - Descriptive (141) -- Viewpoints (Opinion/Position Papers, Essays, etc.) (120) -- Journal Articles (080)
JOURNAL CIT Inquiry & Analysis; p1-6 Nov 1988

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Board of Education Policy; *Court Litigation; Elementary Secondary Education; Federal Courts; *Freedom of Speech; Public Schools; *Student Rights
IDENTIFIERS *First Amendment; Hazelwood School District v Kuhlmeier; *Supreme Court

ABSTRACT

The resolution of free speech issues in the public school context has, until recently, involved a precarious balancing between the First Amendment rights of students and teachers and the role of public schools in inculcating students with fundamental values. This year, in "Hazelwood School District v. Kuhlmeier," the Supreme Court struck this balance in favor of school administrators. Now especially where curriculum decisions are at issue, courts will give school administrators wide discretion. Before embarking on an analysis of the "Hazelwood" decision and its implications, this article examines several of the Supreme Court cases that preceded, and to varying degrees foreshadowed, the Court's decision in "Hazelwood." (104 footnotes) (MLF)

INSIDE:
- Case Notes
- Supreme Court News
- Index 1980—July 1988

Inquiry & Analysis

of the NSBA Council of School Attorneys

November 1988

FEATURE

Hazelwood v. Kuhlmeier: Closing *Tinker*'s Schoolhouse Gate

By: Maree Sneed and Kelly Knevila[1]
Hogan and Hartson
Washington, D.C.

Inquiry & Analysis

of the NSBA Council of School Attorneys

FEATURE

November 1988

Hazelwood v. Kuhlmeier: Closing *Tinker*'s Schoolhouse Gate

By: Maree Sneed and Kelly Knevila[1]
Hogan and Hartson
Washington, D.C.

The resolution of free speech issues in the public school context has, until recently, involved a precarious balancing between the First Amendment rights of students and teachers, on the one hand, and the role of public schools in inculcating students with fundamental values on the other. While it is settled doctrine that the constitutional rights of students are not automatically coextensive with the rights of adults,[2] the Court has been divided on the exact nature and extent of those rights. This year, in *Hazelwood School District v. Kuhlmeier*,[3] the Supreme Court struck this balance in favor of school administrators. After *Hazelwood*, especially where curriculum decisions are at issue, courts will give school administrators wide discretion in carrying out their inculcative function. Although the post-*Hazelwood* "balance" is no longer precarious, because there are many complex issues in this delicate area of First Amendment law that are yet to be addressed, schools should continue to shape their policies and decisions with caution.

Pre-Hazelwood Cases

Before embarking on an analysis of the *Hazelwood* decision and its implications, this article will examine several of the Supreme Court cases which preceded, and to varying degrees foreshadowed, the Court's decision in *Hazelwood*. The most famous Supreme Court case which addresses the issue of a student's First Amendment right to free speech in a public school context is *Tinker v. Des Moines Independent Community School District*.[4] In *Tinker*, the Court upheld the right of several students to wear black armbands during school as a protest of the United States' policy in Vietnam.[5] The Court held that the wearing of the armbands was "closely akin to 'pure speech' " and as such was protected by the First Amendment.[6] Because there was no evidence that the students' conduct threatened to interfere materially or substantially with the operation of the school or to collide with the rights of others,[7] the Court concluded that by suspending the students for refusing to remove the armbands, the school had violated the students' right to free speech.[8]

Although the Supreme Court continues to cite *Tinker* for the broad proposition that "students [and] teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[9] it is apparent that the First Amendment rights that once followed Tinker through the schoolhouse gate are more frequently being shut out by the judiciary's recognition of the school's need for discretion in carrying out its inculcative function. To be certain, the Court has not overruled *Tinker*, and, if again faced with the same fact pattern, would, albeit with less sweeping language, reach the same conclusion. Nonetheless, the Court's subsequent decisions have drastically narrowed *Tinker*'s scope.

The narrowing of *Tinker* was foreshadowed by the Court's heated debate in *Board of Education v. Pico*.[10] In *Pico*, the Court addressed the First Amendment implications of a school board's decision to remove several books from the school's library. The sharply divided Court struggled to determine the appropriate width of *Tinker*'s schoolhouse gate. A plurality of four Justices agreed that while school boards could remove books from the school library because the books were "pervasively vulgar" or educationally unsuitable,[11] they could not do so "simply because they dislike the ideas contained in those books."[12] Thus, the plurality implicitly held that federal courts could review a school board's decision in order to determine whether it was impermissibly motivated.[13]

---

[1] Maree Sneed is an attorney at Hogan & Hartson. Kelly Knevila was a summer associate at Hogan & Hartson and is a third year law student at Georgetown University Law Center.

[2] *See, e.g.*, New Jersey v. T. L. O., 469 U.S. 325, 341, 348 (1985).

[3] 108 S. Ct. 562 (1988).

[4] 393 U.S. 503 (1969).

[5] *Id.* at 514.

[6] *Id.* at 505-06.

[7] *Id.* at 513.

[8] *Id.* at 514.

[9] *Id.* at 506.

[10] 457 U.S. 853 (1982).

[11] *Id.* at 871 (opinion of Brennan, J.).

[12] *Id.* at 872.

[13] *Id.* at 871.

INQUIRY & ANALYSIS is a bi-monthly publication of the NSBA Council of School Attorneys, 1680 Duke Street, Alexandria, Virginia 22314. David M. Pedersen, Council Chairman; Leonard Rovins, NSBA President; Thomas A. Shannon, NSBA Executive Director; August W. Steinhilber, Associate Executive Director and General Counsel; Gwendolyn H. Gregory, Deputy General Counsel; Susan R. Butler, Director, Administration; Naomi E. Gittens, Staff Attorney and Editor; and Geoffrey W. Gray, Law Clerk. I&A is a membership service of the Council or can be purchased by subscription for $30/6 issues

The four dissenters argued, *inter alia*, that because an elected school board was charged with the inculcation of fundamental values, it "must express its views on the subjects which are taught to its students."[14] According to the dissenters, the board members were elected by the community to inculcate students with the values of the community and thus, the Court's role in reviewing such decisions was severely limited. Justice White cast the deciding vote in concurring with the plurality that the case should be remanded because there remained a genuine issue of material fact.[15]

In the interim between *Pico* and *Hazelwood*, a majority of the Court found some common ground in *Bethel School District v. Fraser*.[16] The central issue in *Bethel* was "whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly."[17] Three members of the Court joined Chief Justice Burger's majority opinion which held that the school did not violate the First Amendment by punishing the student for his speech because, unlike the sanctions imposed in *Tinker*, the punishment was unrelated to the content of the speech.[18] Thus, the Court found that the school district had the authority to punish Fraser because the manner of his speech was disruptive and contrary to the fundamental values which the school sought to promote.[19] Justice Brennan concurred with the majority opinion but emphasized that the majority's "holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly."[20] Justice Blackmun concurred in the result,[21] and Justices Marshall and Stevens filed dissenting opinions.[22]

After *Bethel*, the vast majority of lower court cases have upheld the decisions of school boards and administrators against First Amendment free speech challenges. Many of these cases do not lend themselves to the content-neutral rationale used by the Court in *Bethel*. Rather, lower courts have relied on *Bethel* as a general statement of the Court's desire to give school authorities almost unlimited discretion in matters that they properly may believe is part of their important inculcative mission. As with other areas of First Amendment law, lower courts have used a variety of approaches.

Ordinarily, when a free speech case involves conduct, as did the *Tinker* case, the court must first determine whether the conduct is "speech" in the First Amendment sense. In making this determination courts generally use a test with both an objective and subjective component. They ask whether the actor intended that his conduct convey a message and whether the message would be understood as such by the intended recipient.[23] Several post-*Bethel* cases have upheld the decisions of school authorities against First Amendment challenge by finding that the conduct or expression at issue in the case was not "speech." These cases demonstrate that, contrary to Justice Brennan's attempt to narrow the Court's holding, lower courts have read *Bethel* broadly.

One district court upheld against First Amendment challenge a school board's rule prohibiting the wearing of earrings by all male students. In *Olesen v. Board of Education*,[24] the school board's rule was part of a policy developed to help reduce the presence and influence of gangs in its schools.[25] Olesen denied any affiliation with a gang and contended that his earring was an expression of his individuality, and as such, should be protected.[26] The court referred to the subjective/objective test for deciding when conduct is speech,[27] but concluded, without explanation or analysis, that Olesen's individuality message was not protected by the First Amendment.[28] The court read *Bethel* broadly, stating that "[t]he direction and manner of [the students' instruction in individual rights] rests with the Board, not the federal court."[29]

Similarly, in *Gano v. School District*,[30] another district court relied on *Bethel* to bolster a shaky First Amendment analysis. In *Gano*, a student asked the court to enjoin school administrators from punishing him for wearing a T-shirt which was printed with a caricature of three school administrators depicted as drunk on school grounds.[31] The court denied the injunction because the plaintiff had not articulated a protectable expression.[32]

In attempting to reconcile *Tinker* and *Bethel*, the *Gano* court explained: "[t]o understand these cases, one must first understand that discipline and debate are equally effective teaching tools."[33] Because the T-shirt was "clearly offensive" and the school was statutorily charged with instructing students about the "effects of alcohol," the court concluded that "[t]his case appears to clearly fall within the *Bethel* precedent."[34] Unlike the *Bethel* administrator's objection to Fraser's manner of expressing his views, the school administrators' objection to Gano's T-shirt was based on the message, not the manner. Thus, the *Gano* court's assertion that its case "appears to clearly fall within the *Bethel* precedent," is a broad reading of *Bethel*.

In yet another post-*Bethel* case, *Fowler v. Board of Education*,[35] a lower court found that the expression at issue was not protected by the First Amendment. The issue in *Fowler* was whether a school board deprived a teacher of her First Amendment rights by firing her for showing *Pink Floyd—The Wall*, an "R" rated film, to her class. The teacher had shown the movie as part of the students' free day and had not previewed or explained the movie.[36] Thus, the court concluded that the showing of the movie was not "expression" protected by the First Amendment because it did not meet the subjective component

[14] *Id.* at 889 (Burger, C.J., dissenting) (emphasis in the original).

[15] *Id.* at 883.

[16] 106 S. Ct. 3159 (1986).

[17] *Id.* at 3162.

[18] *Id.* at 3166.

[19] *Id.* at 3165.

[20] *Id.* at 3168 (Brennan, J., concurring).

[21] *Id.* at 3167.

[22] *Id.* at 3168, 3169.

[23] *See, e.g.*, Spence v. Washington, 418 U.S. 405, 410-11 (1974).

[24] 676 F. Supp. 820 (N.D. Ill. 1987).

[25] *Id.* at 822.

[26] *Id.*

[27] *See supra* note 23 and accompanying text.

[28] *Olesen*, 676 F. Supp. at 822.

[29] *Id.*

[30] 674 F. Supp. 796 (D. Idaho 1987).

[31] *Id.* at 797.

[32] *Id.* at 798.

[33] *Id.*

[34] *Id.* at 798-99.

[35] 819 F.2d 657 (6th Cir.), *cert. denied*, 108 S. Ct. 502 (1987).

[36] *Id.* at 663.

of the *Spence* test—it was not "communicative in nature."[37] In dicta, the court cited *Bethel* to explain that teachers are "[t]he single most important element of this inculcative process."[38] The court further explained that the position of teachers as role models in this process is one of the "special circumstances" that courts must consider in analyzing First Amendment cases.[39] Although this reading of *Bethel* goes beyond the content-neutral analysis, the court did not rely on its broad reading of *Bethel*, as had the courts in *Olesen* and *Gano*, to bolster an incomplete First Amendment analysis.[40]

Once a court has determined that the conduct or expression at issue is protected by the First Amendment, a court may employ different modes of analysis, depending on the facts of the case. The court may look to the school's motive in prohibiting or punishing the protected speech. For example, in *Bell v. U-32 Board of Education*,[41] the court found that, although constitutional rights were implicated by a school board's decision not to allow the production of a controversial student play, it was not unconstitutional because the board's decision was motivated by its concern that the play was inappropriate for children in a school context.[42] The play, "Runaways," addressed such issues as drug abuse, alcoholism, rape, prostitution and child abuse.

The court based its holding, in part, on the board's "duty to determine what, according to societal values, is inappropriate for students."[43] This analysis of the board's motivation in light of its duty to inculcate students with values is similar to the *Bethel* court's approach. Unlike *Bethel*, where the board was concerned with the manner—not the content—of the student's speech, in *Bell* the court explicitly noted that the board's decision was content-based.[44] Content-based decisions are not *per se* unconstitutional; such decisions do, however, raise greater suspicion than content-neutral decisions and must comport with the board's inculcative function.[45]

In some cases, courts look to the type of forum in which the speech occurs. There are three categories of forums in First Amendment analysis: quintessential or traditional public forums;[46] government-created or government-designated public forums;[47] and nonpublic forums.[48]

In *Tinker* and *Bethel*, the Court did not analyze the forum status of public schools. Relying in part on language in *Tinker* that described the classroom as "peculiarly the 'marketplace of ideas,' "[49] at least one lower court since *Bethel* has held that a public high school was a limited public forum.[50] In *Thompson v. Waynesboro Area School District*,[51] the principal suspended several junior high students for refusing to comply with school regulations requiring predistribution review as well as time, place and manner restrictions in connection with the distribution of a religious newspaper. After finding that the distribution of the newspaper was "speech" protected by the First Amendment and that the public school was a limited public forum, the *Thompson* court looked to whether the principal had a constitutionally-valid reason for imposing the distribution restrictions.[52] The court held that the principal would not be violating the establishment clause of the First Amendment by permitting distribution of the religious newspaper "according to reasonable time, place and manner restrictions as those restrictions are enforced with respect to the other activities which take place in the school's limited open forum."[53]

In Bystrom v. Fridley High School,[54] an underground newspaper case, a court determined that prior restraint was not "unconstitutional *per se* in this limited area."[55] The *Bystrom* court undertook a detailed examination of a school district's written policy on the distribution of unofficial written material on school premises and upheld all but one provision of the district's guidelines.[56] Initially, the court noted that the language of many of the guidelines was not specific. The court reasoned that there were at least four reasons for allowing these general guidelines: (1) the subject matter required such generality; (2) the guidelines did not include criminal sanctions; (3) addressees of the guidelines were minors; and (4) there was a substantial community interest in promoting traditional values.[57]

---

[37] *Id.* at 664.

[38] *Id.* at 661.

[39] *Id.*

[40] *See also* Martin v. Parrish, 805 F.2d 583, 584-85 (5th Cir. 1986) (holding that college professor's excessive use of profanity to "motivate" his students is not communicative in nature and therefore not protected by the First Amendment).

[41] 630 F. Supp. 939 (D. Vt. 1986).

[42] *Id.* at 943-45.

[43] *Id.* at 944.

[44] *Id.* at 943.

[45] *Id.* at 943-45.

[46] The quintessential public forum includes those places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 515 (1939). Free speech is guaranteed in this setting and any content-based restriction must be narrowly-drawn and supported by a compelling state interest. Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983). Noncontent-based time, place, and manner restrictions are allowed if they are narrowly tailored to serve an important governmental function and there are "ample alternative channels of communication." *Id.*

[47] A government-created public forum is a public area which the government has intentionally designated as open for public discourse. Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 802 (1985). The government is not required to create public forums but once created, it must comport with the same standards generally applicable to quintessential forums. *Perry*, 460 U.S. at 45-46. The government may create a limited public forum if the limitation is consistent with the purpose for which it was created. *See* Widmar v. Vincent, 454 U.S. 263, 267 (1981) (university facilities open to student groups must be open to all student groups). In the public school context, at least one court, post-*Bethel* has held that the school created a limited public forum. *See infra* note 50 and accompanying text.

[48] Nonpublic forums include all public property which has not by tradition or designation been opened for public discourse. *Perry*, 460 U.S. at 46. In this setting, government does not violate the First Amendment unless its restrictions are unreasonable or designed to suppress the expression simply because the government is opposed to it. *Id.*

[49] *Tinker*, 393 U.S. at 512 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

[50] *See* Thompson v. Waynesboro Area School District, 673 F. Supp. 1379, 1385-87 (M.D. Pa. 1987).

[51] *Id.*

[52] *Id.* at 1387.

[53] *Id.* at 1389.

[54] 822 F.2d 747 (8th Cir. 1987).

[55] *Id.* at 749.

[56] *Id.* at 755.

[57] *Id.* at 750-51.

The court upheld a section of the school district's guidelines that defined and prohibited material that is "obscene to minors" because the definition was "a virtual restatement of the Supreme Court's own holdings" on the subject.[58] Based on *Bethel*, the court also upheld a section that barred "pervasively indecent or vulgar" material, despite the fact that the court agreed with the plaintiffs that the language was vague and overbroad.[59] The court also upheld a third guideline that prohibited the advertising of "any product or service not permitted to minors by law."[60] Finally, based on *Tinker*, the court approved a fourth guideline that allowed the school to censor any material that "presents a clear and present likelihood that . . . it will cause a material and substantial disruption of the proper and orderly operation and discipline of the school or school activities . . . ."[61]

Relying on its opinion in *Kuhlmeier v. Hazelwood School District*,[62] the *Bystrom* court invalidated only one guideline; this guideline prohibited the distribution of any written material that "invades the privacy of another person or endangers the health or safety of another person . . . ."[63] In *Kuhlmeier*, the Eighth Circuit had held that "only when publication . . . could result in tort liability for the school,"[64] could the school prohibit publication "as invasive of the rights of others."[65] Because there was no state common law tort for invasion of privacy, the *Bystrom* court concluded that the school could not base its guideline on the invasion of the privacy of others.[66]

Aside from a few exceptions, the cases discussed above demonstrate that lower courts have given an expansive reading to the Supreme Court's *Bethel* decision. Although Justice Brennan's concurrence urged that *Bethel* be limited to the narrow factual setting before the Court, lower courts have relied on the majority's more sweeping "inculcation of fundamental values" language to uphold the vast majority of school district decisions under First Amendment challenge. If there was any doubt about whether this broad reading of *Bethel* was the correct reading, the Court in *Hazelwood v. Kuhlmeier*[67] resolved the issue.

Analysis of Hazelwood

Hazelwood raised the question of whether school officials violated the First Amendment rights of students by deleting two pages of the school-sponsored student newspaper, which was a product of their efforts in a school journalism course.[68] The school provided the majority of the financial support for the paper's publication. The student staff was supervised by the journalism teacher who submitted each edition to the principal for review prior to publication.[69] After reviewing the May 13, 1983 edition, the principal decided that two articles, one on teenage pregnancy at Hazelwood and the other on the effects of divorce on students, should not be published.[70] Believing that there was no time to otherwise remedy the problems inherent in the two articles, the principal decided to delete the two pages on which they appeared, thus deleting other nonobjectionable articles.[71]

The Supreme Court predictably started its analysis by citing *Tinker* for the basic proposition that "[s]tudents. . .do not 'shed their constitutional rights to freedom of speech . . .at the schoolhouse gate.' "[72] The Court then qualified this proposition by citing *Bethel* in its broader sense: "A school need not tolerate student speech that is inconsistent with its 'basic educational mission.' "[73]

The Court determined that the school had not intentionally created a public forum by creating a school newspaper because it was a laboratory situation, part of the students' course curriculum closely supervised by the faculty member.[74] Speech within the nonpublic forum could thus be regulated in any reasonable manner.[75]

The Court distinguished *Tinker* by establishing two categories of speech in the public school context. When the speech "happens to occur on the school premises," the school is merely being asked to tolerate a student's personal expression and the *Tinker* standard applies.[76] When the speech occurs in the context of school-sponsored curriculum or extra-curricular activities, the school is being asked to promote speech and thus may regulate or punish speech "so long as [the school's] actions are reasonably related to legitimate pedagogical concerns."[77] Apparently the *Bethel* standard, in its broad sense, applies to this category of speech. The speech will fall into the latter category "so long as [the activities] are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[78]

Within the second "promotion" category, a school may "disassociate itself" for almost any reason, including speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[79] Moreover, the school may reject speech because it promotes conduct "inconsistent with 'the shared values of a civilized social order.' "[80] This includes speech which could "reasonably be perceived to advocate drug or alcohol use, irresponsible sex . . .[or] any position other than neutrality on matters of political controversy."[81]

Applying this standard to the facts of the *Hazelwood* case, the Court concluded that the principal's conduct was reasonable under the circumstances. The principal believed that the pregnancy article was inappropriate for a school newspaper

[58] *Id.* at 752.

[59] *Id.*

[60] *Id* at 753.

[61] *Id.* at 754.

[62] 795 F.2d 1368 (8th Cir. 1986), *rev'd on other grounds*, 108 S. Ct. 562 (1988).

[63] *Bystrom*, 822 F.2d at 753.

[64] *Kuhlmeier*, 795 F.2d at 1376.

[65] *Bystrom*, 822 F.2d at 754.

[66] *Id.*

[67] 108 S. Ct. 562 (1988).

[68] *Id.* at 565.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 566.

[72] *Id.* at 567.

[73] *Id.*

[74] *Id.* at 568.

[75] *Id.* at 569.

[76] *Id.*

[77] *Id.* at 569-71.

[78] *Id.* at 570.

[79] *Id.*

[80] *Id.* (citing *Bethel*, 106 S. Ct. at 3165).

[81] *Id.*

and its intended audience.[82] Additionally, he was of the opinion that the divorce article, in which a student sharply criticized her father for not spending more time with his family, violated journalistic notions of fairness because the newspaper did not give the girl's father an opportunity to respond.[83] The journalism class was, in part, designed to teach these notions of journalistic fairness. These reasons were reasonably related to legitimate pedagogical concerns.

The *Hazelwood* decision clarified the respective roles of *Tinker* and *Bethel*, but left many questions unanswered. The court of appeals in *Hazelwood* had determined that, in keeping with the language in *Tinker* which allowed school officials to punish or bar speech which invaded the rights of others, only speech that would subject the school to tort liablility for such an invasion could be constitutionally censored.[84] *Hazelwood* did not decide this issue because it did not apply the *Tinker* standard.[85]

In a footnote in *Hazelwood*, the Court rejected the students' argument that the school must have a written policy in order to exercise prepublication control.[86] The Court expressly did not decide whether such written regulations are required when the school seeks to censor material that is not school-sponsored.[87] Similarly, the Court declined to decide whether the substantial deference that must be accorded to the decisions of educators at the primary and secondary level must also be accorded to educators at the college and university level.[88]

A more fundamental question left unanswered by *Hazelwood* concerns when speech falls into the mere toleration category requiring application of the *Tinker* standard, and when it is more properly a question of school-sponsorship, thus lending itself to the more deferential *Hazelwood-Bethel* analysis. The only guidance given by the Court indicates that the speech will be considered part of the school-sponsored category if it occurs in the context of those "activities [that] may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[89] While this is somewhat helpful, there will be borderline cases that will not easily fall into one category or the other. For instance, initially it would seem that the regulation of the students' clothing would be a matter of toleration, closely analogous to *Tinker*, but a dress code regulation that prohibited the wearing of T-shirts that promote alcohol consumption might reasonably be related to a legitimate pedagogical goal.

The Aftermath of Hazelwood

A court confronted with the question as to whether a dress code regulation that prohibited the wearing of T-shirts that promoted alcohol consumption would probably be able to avoid the issue by holding that the expression is not "speech" in the First Amendment sense. This was the approach taken by the court in *Olesen v. Board of Education*,[90] when confronted with Olesen's claim that he was expressing his "individuality" by wearing the prohibited earring.[91] The *Olesen* court held that this message was not protected by the First Amendment.[92] Under the standard test for protected speech,[93] however, if the court concludes that "individuality" is a protected message, the court will be faced with the problem of deciding into which category the speech falls. Although most people would agree that the school's interest in combating its gang problem was more weighty than the student's desire to wear an earring, it is doubtful that the earring would qualify as a substantial or material disruption under the *Tinker* standard. It is this type of definitional problem that remains unanswered by the Court's decision in *Hazelwood*.

Similarly, the *Hazelwood* decision does not indicate what the appropriate standard of review will be in cases where the school evidences a clear intent to create a limited public forum. According to the Court's prior cases, if a limited public forum is created, the government must demonstrate that any content-based restrictions are narrowly-drawn and supported by a compelling state interest unless they are necessitated by the nature and purpose of the forum.[94] According to *Hazelwood*, the appropriate First Amendment standard is whether the restriction is "reasonably related to legitimate pedagogical concerns."[95]

This forum question is most likely to arise in the context of school activity periods. If a school opens its facilities to all student clubs or groups, according to the Court's prior public forum cases, the school creates a limited public forum and cannot exclude like groups without a compelling state interest.[96] *Hazelwood* does not tell us whether this type of case will continue to be analyzed in this manner, essentially the *Tinker* standard, or whether lower courts should treat it as a school-sponsored activity. Obviously, the answer to this question would often determine the outcome of the case.

At least two federal courts have interpreted the *Hazelwood* decision. One case, *Mergens v. Board of Education*,[97] flirted with the above unanswered issue. The *Mergens* court was confronted with the question of whether a school must allow a group of students to form and operate a religious club.[98] The court implicitly recognized the difficulty in reconciling *Hazelwood* and the Court's earlier public forum cases. It explained: "[i]t is clear from *Widmar* that religious speech is afforded the same protection as the political speech shielded, in an educational setting, in *Tinker*. It is equally clear, however, that in such a setting, reasonable regulations compatible with the mission of the institution may be applied."[99] Ultimately, the court

[82] *Id.* at 571-72.

[83] *Id.* at 572 & n. 8.

[84] *Kuhlmeier*, 795 F.2d at 1376.

[85] *Hazelwood*, 108 S. Ct. at 570-71 n. 5.

[86] *Id.* at 571 n. 6.

[87] *Id.*

[88] *Id.* at 571 n. 7.

[89] *Id.* at 570.

[90] 676 F. Supp. 820 (N.D. Ill. 1987).

[91] *Id.* at 822.

[92] *Id.*

[93] *See supra* note 23 and accompanying text.

[94] *See* discussion *supra* p. 3.

[95] *Hazelwood*, 108 S.Ct. at 571.

[96] *See* Widmar v. Vincent, 454 U.S. 263, 267 (1981) ("Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups.").

[97] No. 85-0-426, slip op. (D. Neb. Feb. 2, 1988).

[98] *Id.* at 1-2. The case was complicated by the Equal Access Act issues. *Id.* at 7.

[99] Id. at 5-6 (citing *Hazelwood*).

avoided this tough issue by finding that the school had not created a limited open forum.[100]

Another federal case that interpreted *Hazelwood*, *Virgil v. School Board of Columbia County*,[101] clearly fits into the school-sponsored category. *Virgil* addressed the constitutionality of a school board's decision to discontinue the use of a textbook after one student's parents filed a formal complaint.[102] The court found that the school board's decision was based on "its own restrictive views of the appropriate values to which . . . students should be exposed."[103] This content-based reason was held to be permissible under the *Hazelwood* standard.[104]

These two cases do not shed much light on the issues left unresolved after *Hazelwood*. The vast majority of cases, however, will easily fall within one of the two categories created by the Court in *Hazelwood*. The decision thus helps guide schools and school counsel in shaping policies which may implicate First Amendment rights.

[100] *Id.* at 14.

[101] 677 F Supp. 1547 (M.D. Fla. 1988).

[102] *Id.* at 1548-49. The objectionable portions of the text were an English translation of "Lysistrata" and "The Miller's Tale," both of "undisputed literary value." *Id.* at 1549-50.

[103] *Id.* at 1552.

[104] *Id.*

CASE NOTES

Handicapped

Spielberg v. Henrico County Public Schools, 853 F.2d 256 (4th Cir. 1988). Fourth Circuit ruled that school district violated EAHCA provision requiring that free appropriate public education be provided to handicapped child by predetermining a placement for the child before developing a new IEP. The court stated that under EAHCA regulations, placement should be based on the IEP which should be developed with parental involvement. The court ruled that the school district violated EAHCA procedures by resolving to place the child in a particular setting and then developing an IEP to carry out its decision. The court found that the school had predetermined a placement based on a series of letters written by the school district before the IEP meeting, which focused on a change of placement of the child from a private to a public setting.

Georgia Association of Retarded Citizens v. McDaniel, 855 F.2d 805 (11th Cir. 1988). Eleventh Circuit ruled that attorney's fees amendment to the EAHCA should not be applied retroactively where a final, unappealed order previously denied fees prior to enactment of the fees amendment. The court reasoned that to give retroactive effect where rights have already been established by judgment would conflict with prior decisions that prohibit legislatures from taking away rights which have vested by judgment.

Employees' Rights

Georgia Association of Educators v. Gwinnet County School District, 856 F.2d 142 (11th Cir. 1988). Eleventh Circuit reversed grant of summary judgment to school district in case where school district terminated its automatic payroll dues deduction service. The appeals court reversed because there existed evidence that the school board had terminated the dues deduction service because the association had affiliated with the National Education Association. The court found that while there is no constitutional right to a dues deduction program, such a benefit cannot be denied in retaliation for the exercise of first amendment rights.

Hughes v. Halifax County School Board, 855 F.2d 183 (4th Cir. 1988). Court ruled that school board could not be held liable under 42 U.S.C. § 1983 for dismissal of maintenance worker by supervisor acting on direction of school superintendent. Plaintiff was discharged after he complained about incident in which two co-workers teased him about his participation in a grand jury investigation of school board and thefts suffered by maintenance department. The court so ruled based on its finding that the supervisor was not a policymaker since he had no responsibility for establishing final government policy respecting employee discharges. The court also pointed out that the supervisor was carrying out a decision of the superintendent and not acting on his own. Court also ruled that there was no evidence of any custom or usage by the school board to retaliate against whistleblowers.

Religion

Clayton v. Place, 690 F. Supp. 850 (W.D. Mo. 1988). District court held that school district rule which prohibited dances on school property violates the establishment clause of the first amendment since the effect of the rule is to endorse the tenets of certain religious groups who believe that social dancing is sinful. In keeping the rule, the school board abandoned religious neutrality with the intent to promote this particular belief on a religious issue.

Copyright

Richard Anderson Photography v. Brown, 852 F.2d 114 (4th Cir. 1988). Court ruled that Congress did not clearly and unequivocally indicate an intent in the Copyright Act of 1976 to waive the eleventh amendment immunity of states from claims for money damages. Fourth Circuit also held that there was no implied waiver of immunity by a state's participation in federally regulated copyright activity. Therefore, state university, its governing board and the university's public relations director to the extent she acted in her official capacity were immune from claim for damages for allegedly unauthorized use of copyrighted photographs. However, the court ruled that the public relations director was subject to suit in her individual capacity, since the mere fact that her conduct was undertaken in the course of her state employment does not relieve her of individual liability even if her employer could not be sued. The court also held that state law cannot provide immunity to persons sued for violating the Copyright Act in the manner herein alleged.