DOCUMENT RESUME

ED 378 695 EA 026 465

AUTHOR Stern, Ralph D.
TITLE Hate Speech: Political Correctness v. the First Amendment.
PUB DATE 19 Nov 94
NOTE 18p.; Paper presented at the Annual Meeting of the National Organization on Legal Problems of Education (San Diego, CA, November 1994).
PUB TYPE Speeches/Conference Papers (150) -- Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Censorship; *Civil Rights Legislation; *Constitutional Law; *Court Litigation; Elementary Secondary Education; *Freedom of Speech; Racial Bias; *Racial Discrimination; School Policy; Student Rights; Teacher Rights
IDENTIFIERS *Hate Speech; *Political Correctness

ABSTRACT

Both freedom of speech and freedom from discrimination are generally accepted expressions of public policy. The application of these policies, however, leads to conflicts that pose both practical and conceptual problems. This paper presents a review of court litigation and addresses the question of how to reconcile the conflicting societal goals of free speech and freedom from discrimination, considering the limited guidance provided by courts. The following principles emerged from the review of cases: (1) Racially biased conduct, including speech, which interferes with another person's ability to benefit from or participate in the district's programs creates an unlawful racially hostile educational environment; (2) school districts have an affirmative obligation to take prompt and decisive remedial action when racially biased conduct creates a hostile educational environment; (3) the nature of the remedial action must be designed to redress the harm caused by the offensive conduct and prevent its recurrence; (4) speech or expressive conduct which, although offensive, does not interfere with another person's ability to benefit from or participate in the district's program is protected by the state and federal constitutions; and (5) school districts should adopt a clear statement of policy in support of an educational environment free of racial or other bias as well as a complaint procedure under which racial incidents may be fairly and systematically investigated. A model school district policy is included. (LMI)

The National Organization on Legal Problems of Education

HATE SPEECH:

Political Correctness v. The First Amendment

By

Ralph D. Stern
General Counsel
Schools Legal Counsel
313 W. Winton Avenue, Suite 372
Hayward, California 94544-1198

San Diego, California
November 19, 1994

The First Amendment to the United States Constitution provides that:

"Congress shall make no law . . .
abridging the freedom of speech . . ."

The Fourteenth Amendment to our federal constitution prohibits the states from denying a person "the equal protection of the laws." Based on this grant of authority, and on the ability to impose conditions on federal aid, Congress enacted Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color or national origin in any program receiving federal financial assistance. Both freedom of speech and freedom from discrimination are generally accepted expressions of public policy. The application of these policies, however, leads to conflicts which pose both practical and conceptual problems.[1]

Clearly, free speech has its limits. We are all familiar with Justice Holme's observation that First Amendment protection does not extend to yelling "Fire!" in a crowded theatre.[2] The practical corollary is that speech which directly incites violence is not protected; however, speech which may cause discomfort falls squarely within the protection of the First Amendment. During the past quarter-century, the Supreme Court has on several occasions explored the extent to which the foregoing First Amendment

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[1]This tension between conflicting societal goals is reminiscent of the Supreme Court's 50-year struggle to reconcile the Free Exercise and Establishment Clauses of the First Amendment and define the relationship between government and religion.

[2]Schenck v. United States 249 U.S. 47 (1919).

principles apply to public school students. The Court's decision in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) is best known for the observation that, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court's opinion, however, stops far short of making the First Amendment rights of students within the public school environment coextensive with the rights of adults in society at-large. It addresses First Amendment rights "applied in light of the special characteristics of the school environment." Some of these "special circumstances" are implicit in the Court's analysis of the effect of the black armbands worn by the protesting students on the operation of the school:

> "There is no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.
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> . . .
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> . . . They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder."

In Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986), the Court upheld the right of a school district to discipline a student who made a vulgar and obscene nominating speech at a student assembly. Expanding on the foundation laid in Tinker, the Court explained that,

> "It does not follow, however that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, that the same latitude must be permitted to children in a public school . . . [T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."

More recently, a federal court held that an eighth-grade student in Los Angeles did not have a constitutional right to wear colored condoms in clear packages on the outside of her clothing. The trial judge explained that,

> "School administrators and teachers must be given great latitude to govern schools attended by children. Educators -- not children -- should be given the right to choose which values to emphasize and the means by which those values will be instilled in their students."[3]

Although beyond the scope of this presentation, it is interesting to note that the efforts of some colleges and universities to mandate "political correctness" raises many of the same issues. In April, 1991, the George Mason University Chapter of Sigma Chi held an ugly woman contest -- both for entertainment and to raise funds for charity. The fraternity members dressed as caricatures of different types of women, including an offensive caricature of a black woman. Following complaints from a number of students, the University imposed sanctions on Sigma Chi, including suspension from all activities for the rest of 1991 and a two-year prohibition on all social activities "except pre-approved pledging events and pre-approved philanthropic events with an educational

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[3] Johnson v. Los Angeles Unified School District [CV 94-1782 TJH (EEx), D.C. Cen. Dist. CA., 5/16/94]

purpose directly related to gender discrimination and cultural diversity. The University's sanctions also required Sigma Chi to plan and implement an educational program addressing cultural differences, diversity, and the concerns of women."

Sigma Chi filed suit claiming that the sanctions violated its members' rights to free speech. Both the trial court and the Court of Appeal[4] held that the University's actions amounted to censorship based on the content of speech. The Appellate Court explained,

> "... University officials sanctioned Sigma Chi for the message conveyed by the 'ugly woman contest' because it ran counter to the views the University sought to communicate to its students and the community. The mischief was the University's punishment of those who scoffed at its goals of racial interaction and gender neutrality while permitting, even encouraging conduct that would further the viewpoint expressed in the University's goals and probably embraced by a majority of society as well."

The University of California at Riverside also found itself caught in the conflict between the bad taste of a fraternity, political correctness, and the First Amendment. Phi Kappa Sigma members wore T-shirts for a party with caricatures of two Mexican men, one with a sombrero and serape, drinking. The interfraternity council recommended destroying the T-shirts and banning the fraternity from intramural sports of a year. The Assistant Vice Chancellor imposed more severe punishment, ordering the chapter dissolved for three years. Phi Kappa Sigma filed suit in state court. The suit was settled when the University rescinded the sanctions and the Assistant Vice Chancellor and the Director of Campus Activities agreed to be tutored in First Amendment rights by

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[4] Iota XI Chapter of Sigma Chi Fraternity v. George Mason University 993 F.2d 43 (4th Cir., 1993)

a member of the University's legal staff.[5]

Where to draw the line between constitutionally protected "pure speech" and unprotected racial discrimination and between "hate speech" and "hate crime" are questions to which there are no precise answers, although the United States Supreme Court has provided some guidelines.

In 1990, the City of St. Paul enacted the Bias-Motivated Crime Ordinance which provided:

> "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

A teenager who burned a cross on a black family's lawn was charged with violating the ordinance. The trial court found the ordinance unconstitutional; however, the Minnesota Supreme Court found it constitutional. The United States Supreme Court [6] ruled that the Bias-Motivated Crimes Ordinance was unconstitutional with four of the nine justices writing opinions expressing different reasons for coming to this conclusion. The majority opinion, written by Justice Scalia, concluded that St. Paul's ordinance violated the First Amendment because it prohibits speech on the basis of the subjects the speech addresses. Special prohibitions are imposed on those who express their opinion on the disfavored

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[5] *I'm Insensitive, You're Insensitive,* California Lawyer, p. 16, January, 1994.

[6] R.A.V. v. St. Paul, 505 U.S. ___, 112 S. Ct. 2538 (1992)

subjects of "race, color, creed, religion or gender." In order to illustrate this point, Justice Scalia explained:

> ". . . the government may proscribe libel, but it may not make the further content discrimination of proscribing *only* libel critical of the government.
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> . . .
>
> The government may not regulate use [of words] based on hostility -- or favoritism -- towards the underlying message expressed
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> . . .
>
> . . . [T]he Federal Government can criminalize only those threats of violence that are directed against the President . . . [but] may not criminalize only those threats against the President that mention his policy on aid to inner cities."

Applying the foregoing principles to St.Paul's ordinance, the Court held that:

> "Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specific disfavored topics . . . The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."

In conclusion, the Court explained, the ordinance permits "silencing speech on the basis of its contents" in violation of the First Amendment.

Within a year, the Court accepted a second case involving hate-motivated behavior.[7] In this case, the constitutionality of a Wisconsin statute providing for an enhanced sentence when a defendant is found to have selected a victim based on the

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[7] Wisconsin v. Mitchell ___U.S.___, 113 S. Ct. 2194 (1993).

victim's race was upheld. The Court found that, in contrast to the St. Paul ordinance, Wisconsin's law did not have a chilling effect on free speech. The St. Paul ordinance was directed at speech, while the Wisconsin law dealt with physical conduct not protected by the First Amendment. Motive, the court explained, is a proper consideration in determining the sentence for a criminal offense.

Also,

> "... motive plays the same role under the Wisconsin statute as it does under federal and state anti-discrimination laws, which we have previously upheld against constitutional challenge...Title VII, for example, makes it unlawful for an employer to discriminate against an employee *because of* such individual's race, color, religion, sex, or national origin."

Interestingly, the law which evolved in connection with Title VII employment discrimination cases provides some insights as to the possible resolution of the conflict between free speech rights and the right to a non-discriminatory educational environment guaranteed by Title VI. In Rogers v. EEOC 454 F.2d 234 (CA 5, 1971) cert. denied 406 U.S. 957 (1972), the federal courts first recognized the right of an employee to bring suit based on a discriminatory work environment. In that case, a Hispanic worker was permitted to show a Title VII violation by establishing that her employer provided discriminatory service to its Hispanic clientele. The Court explained that Title VII:

> "... sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination... One can readily envisions working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers..."

Subsequent decisions applied the hostile work environment concept to cases involving

racial discrimination,[8] discrimination based on religion[9] and on national origin.[10] In 1986, the United States Supreme Court endorsed the hostile work environment concept in connection with employment discrimination based on race, national origin, religion and sex[11] where conduct creates an intimidating, hostile or offensive environment or where it unreasonably interferes with work performance. Lower federal courts have held that in sexual harassment cases, the existence of a hostile work environment is to be determined from the perspective of a reasonable person of the same gender as the alleged victim.[12] In November, 1993 the Supreme Court adopted its most expansive description of a hostile work environment:[13]

> "... Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality."

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[8]See for example Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506 (CA 8) cert. denied sub nom. Banta v. United States, 434 U.S. 819 (1979); Gray v. Greyhound Lines, East (CA D.C., 1976).

[9]Compston v. Border, Inc. 424 F.Supp. 157 (S.D., Ohio, 1976)

[10]Cariopi v. Kansas City Chiefs Football Club, 568 F.2d 87 (CA 8, 1977)

[11]Meriton Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986)

[12]Ellison v. Brady, 924 F.2d 872 (CA 9, 1991)

[13]Harris v. Forklift Systems, Inc. ___U.S.___, 114 S.Ct. 367 (1993)

It is against this legal backdrop that on March 10, 1994, the United States Department of Education's Office for Civil Rights (OCR) adopted a Notice of Investigative Guidance on Racial Incidents and Harassment Against Students.[14] The Guidance notes that harassing conduct may be physical, verbal, graphic or written.[15] In order to create a hostile educational environment, the conduct must be "sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges" provided by the district. OCR will find a violation of Title VI if three factors coexist: (1) there is a racially hostile environment; (2) the district had actual or constructive knowledge of the situation; and (3) the district did not respond adequately.

Casual or isolated racial incidents, unless extremely severe, do not constitute a violation of Title VI. OCR will consider the "content, nature, scope, frequency, duration, and location" of racial incidents along with the age of the students, the size of the institution, and the relationship of the individuals involved (e.g., the impact may be more serious if the offending conduct is that of a teacher and the victim is a student then if all parties are students). Also, "[i]f OCR determines that the harassment was

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[14]59 Fed. Reg. 11,448 (1994)

[15]In a footnote, OCR acknowledges the interplay between a hostile racial environment and the First Amendment:

> "This investigative guidance is directed at conduct that constitutes race discrimination under Title VI of the Civil Rights Act of 1964...and not at the content speech. In cases in which verbal statements or other forms of expression are involved, consideration will be given to any implications of the First Amendment to the United States Constitution. In such cases, regional staff will consult with headquarters."

sufficiently severe that it would have adversely affected the enjoyment of some aspect of the...educational program by a reasonable person, of the same age race as the victim, under similar circumstances, OCR will find that a hostile environment existed." There need be no "tangible injury or detriment to the victims of harassment."

The Guidance makes it clear that a school district that has actual or constructive notice of the existence of a racially hostile educational environment must take appropriate responsive action. The concept of actual or constructive notice is expansive; it includes receipt of a complaint, knowledge by a responsible employee, information contained in flyers, and conduct witnesses by an employee. Once the district has actual or constructive notice of the hostile environment, it must take reasonable action to redress the harm caused and prevent recurrence. Possible responses include disciplinary action, development of appropriate policies prohibiting racial harassment, establishment of complaint procedures, racial awareness-training, and counseling.

Returning to the original question of how to reconcile the conflicting societal goals of free speech and freedom from discrimination -- and taking into account the limited guidance provided by the courts -- the following principles emerge:

1. Racially biased conduct, including speech, which interferes with another person's ability to benefit from or participate in the district's programs creates an unlawful racially hostile educational environment.

2. School districts have an affirmative obligation to take prompt and decisive remedial action when racially biased conduct creates a hostile educational environment.

3. The nature of the remedial action must be designed to redress the harm caused by the offensive conduct and prevent its recurrence.

4. Speech or expressive conduct which, although offensive, does not interfere with another person's abi'ity to benefit from or participate in the district's program is protected by the state and federal constitutions.

5. School districts should adopt a clear statement of policy in support of an educational environment free of racial or other bias as well as a complaint procedure under which racial incidents may be fairly and systematically investigated.

A model school district policy is attached.

SAMPLE POLICY

RACIAL HARASSMENT **Policy No. ____**

I. POLICY

Every student is entitled to attend school in an educational environment free of bias based on race, color or national origin. Racial harassment in any form is prohibited. Incidents of racial harassment will be fully investigated and action taken to redress any harm and prevent recurrence.

II. DEFINITION OF RACIAL HARASSMENT

A. General Definitions

1. Racial harassment may result from conduct that is physical, verbal, graphic or written.

2. In order to fall within the prohibition of this policy -- and outside of the constitutional protection afforded to speech and expressive conduct -- the conduct must interfere with or limit the ability of an individual to participate in or benefit from services, activities or privileges provided by the district. The determination of interference will be made from the perspective of a reasonable person of the same age, race, color or national origin as the victim.

3. This policy applies to the conduct of students, parents, employees and visitors.

III. DUTY TO REPORT

Students and employees shall report all racial incidents. Parents and visitors are strongly encouraged to report racial incidents. Reports may be made to the Superintendent or to:

_____
Name

_____
Title

_____
Address

_____

_____
Telephone Number

IV. INVESTIGATION OF RACIAL INCIDENTS

A. **Complaints -- General Provisions**

1. Filing

While complaints should be in writing, any complaint received, whether in writing or not, shall be investigated.

2. Review and Disclosure of Complaint

The Superintendent, or the Superintendent's designee, shall review the complaint and, as soon as reasonably possible after receipt of the complaint, the student, employee, or other person who is accused of racial harassment should be informed of the contents of the complaint.

3. Time Limits

A complaint shall be filed as soon as reasonably possible after the conduct in question has arisen.

4. Investigation

All complaints shall be promptly and thoroughly investigated in a confidential manner. The investigation, including written report, shall be completed within thirty (30) calendar days.

B. **Complaints Against Employees**

Upon completion of the investigation of a complaint filed against an employee, the Superintendent, or designee, shall determine whether harassment has occurred and, if so, the appropriate corrective action. Corrective action may include counseling, warning, or the initiation of disciplinary proceedings against the employee. The corrective action shall be designed to prevent recurrence of the harassment and redress any harm caused by the harassment.

C. **Complaints Against Other Individuals**

Upon completion of the investigation of a complaint filed against an individual who is neither a student nor an employee, the Superintendent or designee, shall determine whether harassment has occurred and, if so, the appropriate corrective action. Such individuals include visitors to the district and those who have business relations with the district. Corrective action may include counseling, warning, or such penalties or sanctions against other individuals or parties as may be available to the district given the nature of the contractual or business relationship that may exist with such parties or individuals. The corrective action shall be designed to prevent recurrence of the harassment and redress any harm caused by the harassment.

D. **Complaints Against Students**

Upon completion of the investigation of a complaint filed against a student, the Superintendent or designee, shall determine whether the harassment has occurred and, if so, the appropriate corrective action. Corrective action may include counseling, warning, or the initiation of disciplinary procedures against the student. Corrective action shall be designed to prevent recurrence of the harassment and redress any harm caused by the harassment.

E. **Appeal and Disciplinary Procedures**

All decisions made under this procedure, may be appealed by the aggrieved person to the Superintendent and, thereafter, to the Governing

Board. If the Superintendent conducted the investigation personally, the appeal shall be directly to the Governing Board.

Established statutory and District procedures, under which the District has the burden of proof, shall be used in the event the administrative review results in a decision that disciplinary action against an employee or a student is necessary.

F. **Purpose of Policy**

This policy is intended to supplement, and not replace, any applicable state and federal laws and regulations. Formal complaints under those laws and regulations shall be processed through the procedures established by applicable state and federal agencies.

G. **Special Assistance**

It is expected that questions may arise concerning the interpretation of the prohibition against sexual harassment, the methods and procedures to be followed in the investigation of complaints, and the appropriateness of specific solutions in disposition of complaints. For assistance in these matters, an aggrieved person may contact the Superintendent or the person listed in Section III, above.

V. CONFIDENTIALITY

Reasonable efforts will be made to keep a complaint and the results of the investigation confidential. Witnesses shall be informed of the confidential nature of the matter and the investigation and shall be informed that it would be a violation of this policy to disclose the complaint or the nature of the investigation to others.

VI. RETALIATION PROHIBITED

The initiation of a complaint of racial harassment will not reflect on the complainant or witnesses in any way. It will not affect such person's future relationship with the district, his or her employment, compensation or work assignments, or, in the case of students, grades, class section or other matters pertaining to his or her status as a student in any district program. It is unlawful and a violation of this policy to engage in such retaliation.

VII. DISCIPLINARY ACTION

A. Employees who act in violation of this policy and/or the law may be subject to discipline up to and including dismissal. Such disciplinary action shall be in accordance with applicable policies, laws and/or collective bargaining agreements.

B. Students who act in violation of this policy and/or the law may be subject to discipline up to and including expulsion. Such disciplinary action shall be in accordance with District policy and state law.

VIII. DISSEMINATION

The Superintendent shall ensure that all students, parents and employees are aware of this Policy.

Adopted: _____

Legal References: Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*
34 CFR Part 100