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ABSTRACT

This is a collection of paper copies of overhead transparencies that were used for a presentation on student rights and school law. The presentation covered the following topics: (1) student First Amendment rights, focusing on freedom of speech expressed through speeches, articles in student newspapers, demonstrations, T-shirts, and the Confederate flag; (2) student dress and appearance, focusing on gang-related clothing, tattoos, earrings, cross-dressing, hats, and headgear; (3) Internet use, focusing on students' home Web sites; and (4) threats of violence against teachers and students made by students through Web sites and other means. A number of the overheads provide brief outlines of important court cases involving student rights, including "Tinker v. Des Moines" (1969), "Bethel v. Fraser" (1986), and "Hazelwood School District v. Kuhlmeier" (1988). (WFA)

# Can You Shout Food Fight in a Crowded Cafeteria?

Thomas E. Wheeler, II

April 2003



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# CAN YOU SHOUT FOOD FIGHT IN A CROWDED CAFETERIA?

Presented by:

Thomas E. Wheeler, II, Esq.





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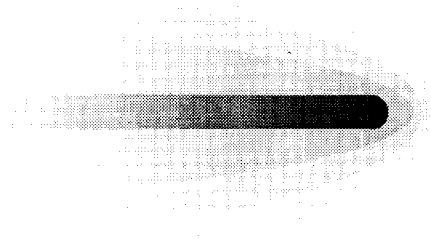
# Student 1st Amendment Rights.

- Constitutional provisions;
- General rules of application, balancing test;
- Specific application of rules:
  - Student speech;
  - Student dress codes;
  - Internet speech;
  - Student threats.

# 1st Amendment.

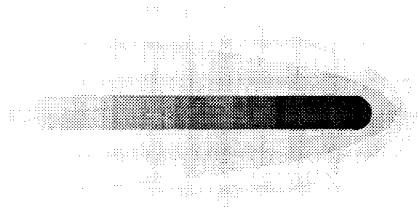


- "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

# Tinker v. Des Moines.

- Tinker v. Des Moines Independent Comm. Sch. Dist., 393 U.S. 503 (1969).
- Students wore black armbands to school in order to protest the Vietnam War.
- The school banned the armbands under its dress code and disciplined the students.
- The students challenged the ban based upon its impact on their 1st Amendment rights.
- The Supreme Court held that absent the showing of a compelling interest, the school could not ban the armbands under the 1st Amendment.

# Tinker cont'd.



- In ruling against the school the Supreme Court penned the oft-quoted statement that "students do not shed their constitutional rights at the school house gate." Tinker, 393 U.S. at 506.
- It also established a two part analysis to be used when balancing a student's 1st Amendment rights and a school's need to preserve order.

# Tinker: Two Part Analysis.

- **Step 1**: Determining whether the student speech is protected under the 1st Amendment. In considering whether student speech is protected under the 1st Amendment, the court considers whether the student intended to **[1]** ***convey a particularized message***. It then considers whether there is a reasonable likelihood that this message would be **[2]** ***understood by those who viewed it***.
- **Step 2**: If the student intended to convey a message that others would understand, the speech is entitled to some constitutional protection. The court then examines whether the school can demonstrate a sufficiently compelling interest to permit it to restrict the protected speech.

# Bethel v. Fraser.

- Bethel v. Fraser, 478 U.S. 675 (1986).
- Student gave a nominating speech for a fellow senior which referred to the candidate in terms of "an elaborate, graphic and explicit sexual metaphor in front of 600 students."
- Supreme Court refused to protect student speech when it deemed that speech to intrude upon the work of the school.
- The court made it clear that vulgar, indecent or disruptive speech can be punished and prohibited in classrooms, assemblies, and other school-sponsored educational activities.

# Bethel cont'd.

- In ruling in favor of the school the Supreme Court noted that "[s]urely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of the schools.'"

# Hazelwood v. Kuhlmeier.

- Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
- Student newspaper sought to publish articles on sexual activities and birth control.
- Principal removed the articles based upon the fact that he felt that the sexual references were inappropriate for younger students, and because they contained some personally identifiable information.
- The students sued contending that the prior restraint violated their 1st Amendment rights.
- The Supreme Court upheld the school's actions.

# Kuhlmeier cont'd.

- While Tinker noted that "students do not shed their constitutional rights at the school house gate," the Supreme Court in Kuhlmeier held that it is also true that the constitutional rights of students in public schools "are not automatically coextensive with the rights of adults in other settings and must be 'applied in light of the special characteristics of the school environment.'"
- The Supreme Court then distinguished Tinker noting: "The question whether the First Amendment requires a school to tolerate particular student speech – the question we addressed in Tinker – is different from whether the First Amendment requires a school affirmatively to promote particular speech."

# Kuhlmeier cont'd.

- The court departed from the disruption requirement articulated in Tinker when the speech might fairly be said to be attributed to the school and not a student.
- "[W]e conclude that the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."
- "[E]ducators do not offend the 1st Amendment ... so long as their actions are reasonably related to legitimate pedagogical concerns."

# Application of the Test.

- Application of the Tinker/Bethel/Kuhlmeier framework.
- When looking at restricting pure student speech:
  - Is it protected speech; and,
  - Can the school demonstrate disruption?
- If the speech can fairly be said to look as if it were school sponsored speech, then the test is simply whether the school can demonstrate that its actions are reasonably related to legitimate pedagogical concerns when banning the speech.

# T-Shirts.


- A Dearborn High School junior was sent home from school this week for wearing a T-shirt emblazoned with an anti-war message.

# T-Shirts.

- Concerned the shirt could spark tensions in a district where more than 50 percent of students are Arab-American, school officials told Barber to turn the shirt inside out, take it off or go home.
- "Bush has already killed over 1,000 people in Afghanistan -- that's terrorism in itself," said Barber, noting he wore the shirt for a presentation he made that morning in English class. The assignment was to write a "compare and contrast" essay -- and he chose to compare Bush with Saddam Hussein.
- Is the School right?

# Dick T-Shirts.

- Pyle v. South Hadley School Committee, 861 F.Supp. 157 (D. Mass. 1994).
- Two brothers wore T-shirts to school reading "Coed Naked Band: Do it to the Rhythm" and "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick."
- The school banned the shirts under its dress code.
- The students' father was a professor of Constitutional law and sued the school claiming that the ban violated the student's 1st Amendment rights.
- The court held that the school's actions were appropriate because the 1st Amendment does not protect obscene, defamatory or other speech that is calculated to incite and is disruptive.

# Marilyn Manson T-Shirts.

- Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465 (6th Cir. 2000).
- School banned Marilyn Manson T-shirts "because the band promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school."
- The Sixth Circuit, finding no evidence that the T-shirts were meant to express any particular political or religious viewpoint, agreed with the district court that the school "did not act in a manifestly unreasonable manner in prohibiting the Marilyn Manson T-shirts pursuant to its dress code."
- Schools "need not tolerate student speech that is inconsistent with the school's basic educational mission."

# Straight Pride T-Shirts.

- Chambers v. Independent School District No. 833, 145 F.Supp.2d 1068 (D.Minn.2001).
- A student wore a T-shirt to school reading "Straight Pride." The school banned the T-shirt as showing intolerance of homosexuality and "gay-bashing."
- The student sought a preliminary injunction overturning the school's actions on 1st Amendment grounds.
- The court granted an injunction finding that the speech was protected under the 1st Amendment as either free speech or religious expression.
- The court also noted that the school had not and could not demonstrate any likely substantial disruption from the wearing of the T-shirt.

# Confederate Flag: Phillips.

- Phillips v. Anderson County School District Five, 987 F.Supp. 488 (D.S.C. 1997)
- A student wore a jacket to school with a large Confederate flag on the back of the jacket.
- The school banned the student from wearing the jacket and the student sued under the 1st Amendment.
- The court found that the student's wearing of the Confederate Flag jacket (although protected speech) would result in a substantial and material disruption of the school and interfere with the educational process.
- The court made this determination based on evidence of prior disturbances involving Confederate symbols and the fact that they carry with them implicit racial tensions.

# Confederate Flag: West & Denno.

- Denno v. School Board of Volusia County, Florida, 218 F.3d 1267 (11th Cir. 2000).
  - School banned student from displaying a confederate battle flag at school despite the fact that he alleged he was simply teaching other students about his southern heritage. The Court approved the ban based upon potential for disruption despite the fact that no prior incidents had occurred.
- West v. Derby Unified School District, 206 F.3d 1358 (10th Cir. 2000).
  - Confederate flag ban approved based upon potential for disruption, not any showing of actual disruption.
- Do you have to wait until someone gets beat up?

# Confederate Flag vs. Malcolm X.

- Castorina v. Madison County School Board, 246 F.3d 356 (6th Cir. 2001).
- Students wore Hank Williams Sr. T-shirts which had large confederate flags and the words "Southern Thunder".
- The school banned the students from wearing the shirts.
- The students presented evidence:
  - That other students had worn Malcolm X clothing and were not disciplined;
  - That there had been no disruption when they wore the shirts;
  - That they were making personal statements about their southern heritage when they wore the shirts.
- The court found that if this evidence was true then the school could not ban the shirts as a prophylactic measure.

# Gang Activity: Baggy Pants.

- Bivens v. Albuquerque Public Schools, 899 F. Supp. 556 (D.N.M. 1995).
- School suspended a white student for repeatedly wearing baggy pants to school, thus violating that school's dress code policy.
- The student challenged this on 1st Amendment grounds finding that the baggy pants were disruptive in that they had the possibility of being related to gang activity.
- The court also noted that "[t]he wearing of a particular type or style of clothing usually is not seen as expressive conduct."
- No 1st Amendment protection, school dress code wins.

# Gang Activity: Student Tattoos.

- Stephenson v. Davenport Comm. Sch. Dist., 110 F.3d 1303 (8th Cir. 1997)
- The student had a tattoo of a cross on her hand but admitted that it was not any religious expression, but was simply a form of self-expression.
- The School identified it as a gang symbol and banned the tattoo.
- The Court found that the tattoo was not protected: "The tattoo is nothing more than 'self-expression,' unlike other forms of expression or conduct which receive first amendment protections. Accordingly, we decline to imbue Stephenson's tattoo with first amendment protections."
- However watch out for the "hair" cases.

# Gang Activity: Sports Apparel.

- Jeglin v. San Jacinto Unified School District, 827 F.Supp. 1459 (C.D. Cal. 1993).
- The school banned students from wearing any type college or professional sports apparel on the grounds that these items were identified with gang activity.
- The students challenged the ban on 1st Amendment grounds and the court upheld the ban at the high school since there had been some showing of gang activity.
- The court overturned the ban at the middle school based upon the fact that there had been no gang activity at the lower schools and thus no "legitimate pedagogical concerns" for the ban.

# Earrings.

- Jeglin v. Olesen v. Board of Education of School District No. 228, 676 F.Supp. 820 (N.D. Ill. 1987).
- School dress code banned boys from wearing earrings: "[T]he [federal constitution] does not necessarily protect an individual's appearance from all state regulation."
- The challenger must show the absence of a rational connection between the policy and the accomplishment of a public purpose.
- Hines v. Caston School Corporation, 651 N.E.2d 330 (Ind. App. 1995).
- The wearing of earrings by males was inconsistent with community standards in the area.

# Cross Dressing.

- Harper v. Edgewood Board of Education, 655 F.Supp. 1353 (S.D. Ohio 1987).
- Students' constitutional rights were not violated when they were not permitted to attend high school prom dressed in clothing of opposite sex.
- Doe v. Brockton School Committee, 2000 Mass.Super. LEXIS 491 (Mass.App. 2000)
- 7th grade male student suffering an identity crisis wants to wear padded bras, dresses, and wigs to school.
- School bans "disruptive" female clothing.
- Court says that personal appearance is protected under the 1st Amendment and school could not show disruption.

# Hats and headgear.

- Isaacs v. Board of Education of Howard County, Maryland, 40 F.Supp.2d 335 (D.Md. 1999)
- The school banned a Jamaican student from wearing a traditional head wrap under a dress code that barred hats.
- The student challenged the ban under the 1st Amendment.
- Court upheld the ban noting that "[a] no hats policy was rationally related to the school's desire to provide a secure learning environment as contraband could be secreted in the hat, that the head wrap obscured the view of other students, and that other students might attempt to pull or remove her head wrap."

# Hats and Headgear cont'd.

- Hodge v. S.T. Lynd, 88 F.Supp.2d 1234 (D.N.M. 2000).
- Approved a ban on baseball caps worn backwards.
- Menora v. Illinois High School Association, 683 F.2d 1030 (7th Cir. 1982).
- Court approved a rule forbidding hats for high school basketball players in the face of a challenge by Jewish students who contended they had the right to wear yarmulkes as religious expression.

# Internet Use: Buessink

- Buessink v. Woodland R-IV, 30 F.Supp.2d 1175 (E.D.Mo. 1998).
- Student web-site contained unflattering comments about the School's administration.
- Principal suspended the student for ten (10) days because he was upset about the contents of the website, not due to any potential disruption of the school.
- Court overturned: "Indeed it is provocative and challenging speech, like Buessink's, which is in most need of the protections of the First Amendment."
- "The public interest is not only served by allowing Buessink's message to be free from censure, but also by giving the students at Woodland High School an opportunity to see the protections of the United States Constitution and the Bill of Rights at work."

# Internet Use: Emmett

- Emmett v. Kent School District No. 415, 92 F.Supp.2d 1088(W.D.Wash. 2000)
- The student had a web-site on his home computer entitled the "Unofficial Kentlake High Home Page."
- The website was highly critical of administration and had two mock obituaries with visitors encouraged to vote for the next one to "die."
- The local media characterized it as a Columbine type "hit list;"
- The student was suspended and the ACLU sued;
- The school lost as the speech took place off of school grounds, and the school was unable to demonstrate any specific evidence of disruption.
- School settled by paying $1.00 in damages and $6,000.00 in legal fees.

# Internet Use: J.S.

- J.S. v. Bethlehem Area School District No. 415, 807 A.2d 847 (Pa. 2002).
- Student web-site created by an 8th grader entitled "Teacher Sux" which described his math teacher in obscene terms, contained a picture of her severed head dripping blood, a picture of her face morphing into Hitler, and a solicitation for funds to hire a hit man to kill her under the caption "Why Should She Die?".
- The math teacher missed the rest of the year due to anxiety and fear and the student was suspended for ten (10) days prior to expulsion, but transferred schools.
- The school presented two defenses to the claim, first that the speech was a true threat and not protected by the 1st Amendment, and second that even if it was protected, the disruption permitted regulation.

# J.S. Cont'd.

- **True Threat:** The Pennsylvania Supreme Court found against the school on this issue because the web-site was not sent to the teacher and indeed contained specific disclaimers designed to preclude viewing by teachers and administrators. Instead the Court noted that "we conclude that the statements made by J.S. did not constitute a true threat, in light of the totality of the circumstances present here. We believe that the web site, taken as a whole was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody." *Id.*, 807 A.2d at 859.
- However, the school won even though the speech primarily took place off of school grounds and was protected by the 1st Amendment because it was able to present specific evidence of disruption **and** was able to show that the site "was accessed at school."

# Internet Use: Coy.

- Coy v. Bd. of Educ. Of the North Canton City Schools, 205 F.Supp.2d 791 (N.D.Ohio 2002).
- A middle school student created a web-site for his skateboarding group that was maintained on his home computer. The website was not obscene *per se* but had some insulting sentences about several fellow students.
- The student accessed the website from school and was suspended for eighty (80) days for visiting an unauthorized website and viewing obscene material.
- The court refused to grant the school summary judgment on the student's 1st Amendment claims finding that it was not inappropriate for a student to visit his own website which was not clearly obscene.

# Student Threats: Lovell.

- Lovell v. Poway Unified School District, 90 F.3d 367 (9th Cir. 1996).
- A student threatened her guidance counselor, stating that she would shoot her if her schedule was not changed.
- The student was expelled for threatening the counselor.
- The Ninth Circuit determined that the statement was not protected speech because it was a "true threat."
- The hallmark of a true threat is whether the victim had reason to believe that the maker of the threat would follow through with it.
- Counselor had reason to believe the student might follow through and therefore it was a true threat and not protected by the 1st Amendment.

# Student Threats: Pulaski.

- Doe v. Pulaski County Special School District, 306 F.3d 616 (8th Cir. 2002).
- A student broke up with his girlfriend and wrote a "composition" at home where "[I]n the space of four handwritten pages, he used the f-word no fewer than ninety times, threatened four different times to kill his former girlfriend by lying in wait under her bed with a knife, and three times proclaimed that he would rape and sodomize her."
- The female student was afraid and got a copy of the letter and turned it in to school authorities.
- As a consequence the male student was expelled for the entire year and challenged the expulsion.

# Pulaski cont'd.

- Despite the fact that the female student testified that due to the "composition" she was fearful and in fact "she took to sleeping with the lights on," the district court and a panel of the 8th Circuit determined that this was not a "true threat" because the student did not intend for the ex-girlfriend to ever see the letter.
- The Court also indicated that it doubted the ability of the student to carry out the violent vicious threats contained in the composition.

# Pulaski: Intent Issues.

- On *rehearing en banc* the 8th Circuit vacated the original opinion and overturned it finding that "there is no requirement that the speaker intended to carry out the threat, nor is there any requirement that the speaker was capable of carrying out the purported threat. However, the speaker must have intentionally or knowingly communicated the statement in question to someone before he or she may be punished or disciplined for it."
- The Court also noted that "a threat does not need to be logical or based in reality before the government may punish someone for making it."
- "Viewing the entire factual circumstances surrounding the letter, we conclude that a reasonable recipient would have perceived J.M.'s letter as a serious expression of an intent to harm K.G. As such, the letter amounted to a true threat."

# Student Threats: Lavine.

- Lavine v. Blaine School District, 257 F.3d 981 (9th Cir. 2002).
- A student wrote a poem which described in graphic terms his killing of twenty-eight (28) fellow students and his intent to either commit suicide or kill more students.
- The student turned the poem in to his English teacher to get her thoughts on the poem.
- The teacher turned the poem in to the principal and the student was eventually expelled for the poem. The student challenged the expulsion.
- Applying the "substantial disruption" standard of Tinker the court noted that given the spate of recent school shootings "we cannot fault the school's response."
- Strong dissent.

# Student Threats: Misc.

- Interest of A.S., 626 N.W.2d 712 (Wis. 2001)
- 13 year old student told other students at a local youth center that he "was going to kill everyone at the middle school" and provided graphic details of how he was going to "make people suffer" and rape a classmate. The Court found that speech was not mere "trash talking" protected by the 1st Amendment but was in fact a "true threat."
- Jones v. State, 64 S.W.2d 728 (Ark. 2002)
- Arkansas Supreme Court found that a rap song from one student to another that described the killing of the recipient and her family constituted a true threat.

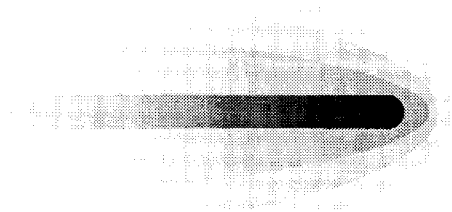
# Student Threats: Misc.

- In Re: C.C.H., 651 N.W.2d 702 (S.D.2002)
- South Dakota Supreme Court found that a student's statement to a teacher that "he wanted to kill [B.C.]" was not a true threat. However, this case relied heavily on the original Doe v. Pulaski decision which was later reversed.
- In re Douglas D., 626 N.W.2d 725 (Wis. 2001)
- Wisconsin Supreme Court finding that a student's story about a teacher's head being cutoff was not a true threat.

# Resources on Student's 1st Amendment Rights.

- Public School Dress Codes: The Constitutional Debate, 1998 BYU Educ. & L. J. 147 (1998).
- School Regulation of Exotic Body Piercing, 79 Neb.L.Rev. 976 (2000).
- Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground, 7 B.U.J. Sci. & Tech. L 243 (2001);
- Public School Discipline for Creating Uncensored Anonymous Forums, 39 Williamette L. Rev. (2003).

# Thank You.



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