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THE ROBERTS COURT: STUDENT SPEECH AND EXPRESSION (2007)

Overview

Now that a new school year is successfully underway, the time has come to launch a new series of monthly commentaries. While past editions of the **CEPI Education Law Newsletter** contained discussions of selected topics (e.g., *Student Violence in Schools*, *Teacher Evaluation*, *Public School Finance*, *Charter Schools*, *Student Search and Seizure*), this year's commentaries will focus on recently decided cases from various jurisdictions. Individual court decisions with the potential to make an immediate impact on local school system policy formation and implementation will be discussed.

This first issue will look back to last June and briefly discuss one of the United States Supreme Court's closing decisions of the spring (2007) term. In a case out of the United States Court of Appeals for the Ninth Circuit, 439 F.2d 1114 (9th Cir. 2006), *cert. granted*, at 127 S.Ct. 722 (2006), the Supreme Court was faced with the daunting task of balancing student First Amendment rights with the authority of a school administrator to discipline a student for an expressive act. Morse v. Frederick, 20 U.S.LEXIS 8514, 75 U.S.L.W. 4487,127 S.Ct. 2618 (2007). What makes the decision important is that while the student's expressive act took place during normal school hours, at a school sanctioned and school supervised event, the incident happened at a privately sponsored, non-school organized event held off school grounds. A summary of potential policy implications for local school boards will follow the brief discussion.

Morse v. Frederick (2007): The "Bong Hits 4 Jesus" Banner

The Facts: On January 24, 2002, at Juneau-Douglas High School, Alaska, students were allowed to leave the school building during the school day to observe the passing of the Olympic Torch Relay Parade. The parade was privately sponsored. Situated across the street from the school as the parade passed, Frederick, a student at Juneau-Douglas High School, with assistance from other students, unfurled a large banner on which appeared the following statement: "Bong Hits 4 Jesus." Seeing the banner, Morse, the Juneau-Douglas High School principal, crossed the street and directed that the banner be taken down. When student Frederick refused her directive Morse confiscated the banner and "crumpled it." Subsequently Frederick was suspended from school. The school board upheld the suspension.

Taking his case into a federal district court under 42 U.S.C 1983, Frederick argued that his expressive act (displaying the banner) was protected by the First Amendment. Unfurling the banner, which he maintained was "just nonsense meant," was to gain media attention for his ongoing battle with the school principal. Frederick did not see this matter as involving "school speech." He characterized his unfurling of the banner during the public parade event as an act of "symbolic speech." School officials argued that the message on the banner, "Bong Hits 4 Jesus," advocated and promoted illegal drug use. As such, Frederick's act was in violation of the school system's anti-drug policy (against displaying material that advertises or promotes the use of illegal drugs), and the school system's educational mission. Frederick argued that the statement on the banner was not intended as a pro-drug message. Subsequently, the federal district court granted summary judgment to school officials. District Court Judge Sedwick also held that the board of education and the principal were covered by the doctrine of qualified immunity. Frederick v. Morse, 2003 U.S.Dist. LEXIS 27270 (D.Alaska 2003)

On appeal, however, the United States Court of Appeals for the Ninth Circuit disagreed and reversed the trial court. Mainly relying on Tinker v. Des Moines, 393 U.S. 503 (1969), the judgment of the district court was vacated and the case remanded back for further proceedings. In the opinion of the appellate court, school officials failed to demonstrate that Frederick's banner display, which occurred off-school grounds at a non-school sponsored and non-curricular event, either "threatened substantial disruption or interfered with the school system's anti-drug mission." The appellate court also concluded that Morse was not entitled to qualified immunity. On this point of law the appellate court opined that "Frederick's right to display the banner was so clearly established that a reasonable principal would have understood her actions were unconstitutional."

The Roberts Court Speaks: June 25, 2007

The Decision: Certiorari was granted by the United States Supreme Court, at 127 S.Ct. 722 (2006), where the Court faced the following two questions: (1) whether or not Frederick had a First Amendment right to "wield his banner," and (2) whether or not that right was so clearly established that Morse (functioning as a public school principal) may be held liable for damages. Because the Court resolved question one against Frederick the second question was not answered. The Court held that "because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending Frederick." In doing so the Court reversed the Ninth Circuit and remanded the case back for further proceedings. Morse v. Frederick, 127 S.Ct. 2618, 168 L.Ed.2d 290, 2007 U.S. LEXIS 8514, 75 U.S.L.W. 4487 (2007)

The Vote and Rationale: The disconcerting nature of the First Amendment issue before the Court can be observed in the final (5-4) vote. Chief Justice Roberts delivered the opinion, in which Justice Thomas concurred. Justices Kennedy and Alito joined in a separate concurring opinion. Justice Breyer concurred in part and dissented in part. Justices Stevens, Souter, and Ginsburg joined in a dissenting opinion.

The Court's Rationale: In reversing the Ninth Circuit, the main points of Chief Justice Robert's rationale can be briefly summarized as follows:

- Student Frederick cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity at school, and claim that he is not at school."
- The reference on his banner to a "Bong Hit" could be construed as referring to "smoking marijuana."
- The banner's message could be construed by students, school personnel, and others witnessing the display of the banner "as advertising and promoting illegal drug use."

- No meaningful distinction can be made between illegal drug use "in the midst of students and outright advocacy and promotion."
- Student Frederick could have come up with an alternative banner that was "meaningless and funny."
- The banner's message did not represent a subject of political debate.
- While Tinker v. Des Moines (1969) is relevant in this case, it is not an absolute and it is not the only standard to apply in student speech matters.
- Principal Morse's actions were consistent with the First Amendment. More specifically, a public school principal "may…restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."
- Two basic principles can be distilled from Bethel School District v. Fraser (1986) and applied in this case and these are: (1) the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and (2) an absolute reliance on a showing of "substantial disruption" is not necessary in light of the special circumstances of a school environment.
- The First Amendment does not require school officials to tolerate student expression that contributes to the dangers of illegal drugs.
- While Hazelwood v. Kuhlmeier (1988) is not controlling in this case it is very instructive. It acknowledges that school officials may regulate some student speech "even though the government could not censor similar speech outside the school."
- As established in student Fourth Amendment decisions such as New Jersey v. T.L.O. (1985), Vernonia v. Acton (1995), and Board of Education v. Earls (2002), there are "special needs" that exist within a school environment and the constitutional rights of children are different in public schools than elsewhere.
- Deterring drug use and abuse by school children is an "important" indeed "compelling" interest.
- The inquiry to apply in public school discipline cases is one of "reasonableness"

Concurring Opinions. Agreeing with the Court's final decision, but offering a different rationale, Justices Thomas, Kennedy, and Alito focused on the relevance of the age-worn standard of analysis set in Tinker v. Des Moines (1969). Justice Thomas stated that the Tinker (1969) standard is without basis in the Constitution. In his view it extended student speech rights beyond traditional bounds. Because *in loco parentis* exists and should be applied in student speech cases, Bethel School District v. Fraser (1986) is controlling. The matter of determining the appropriateness of student speech and the regulation of indecent student speech is in the hands of school officials.

Justices Kennedy and Alito in their concurrence did not exclude the relevance of Tinker (1969). However, in their view, because the regulation of student speech rests on the "special characteristics of the school environment," school officials must have greater authority to intervene "before actual violence erupts." Student speech advocating illegal drug use poses "a threat to student safety," and "presents a grave and in many ways unique threat to the physical safety of students."

Dissenting Opinions. Justice Breyer's dissent stressed two major concerns. First, the Court should have decided the immunity question and not the First Amendment question. Second, the Court's First Amendment rationale is too nebulous.

Justice Stevens, joined by Justices Souter and Ginsburg, dissented because he saw the banner as a "nonsense banner," and one not meant to persuade anyone to do anything. Moreover, in his view the Tinker (1969) standard applies in this case. Student speech cannot be suppressed simply because it is "unpopular." However, in Frederick , he said, "the Court is inventing out of whole cloth a special First Amendment rule permitting

censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message."

Policy Implications

Four summary points can be gleaned from the United State Supreme Court's decision in Morse v. Frederick (2007). First, public school official's posses discretionary authority to reasonably regulate student speech and expression at *school sanctioned activities* (i.e., those activities that appear to a reasonable observer [both students and other observers] as bearing the school system's *official imprimatur*), whether or not these activities are (a) directly sponsored by the school system, or (b) take place on- or off-school grounds. Second, school principals do not offend the First Amendment so long as their disciplinary actions are directly related to enforcement of school system policies; policies designed to keep students safe and secure, and free from exposure to the promotion of illegal drug use and/or other harmful activities. Third, school principals need not wait until the educational environment is actually disrupted before taking appropriate disciplinary action. Fourth, in deciding student First Amendment cases, the Tinker v. Des Moines (1969) "material and substantial disruption" standard is not the only standard to apply. Bethel School District v. Fraser (1986) and Hazelwood v. Kuhlmeier (1988) are more relevant because of special characteristics of today's school environment.

In my opinion, the Supreme Court's decision in Morse v. Frederick (2007) lays a foundation for public school boards and administrators to proactively do what needs to be done to maintain safe and secure schools. However, the Court does set limits. Thus, where student First Amendment speech protections clearly are implicated school officials, especially building-level administrators, still must proceed with caution.

What follow are *five* suggestions to consider as school boards revisit existing policies and ponder the creation and implementation of new policies; especially those that directly impact on student speech and expression. School system policy must make it clear that:

- The Board possesses the legal authority to discipline students for conduct that advocates, promotes, or encourages illegal activity; or violates school system policies, rules, and regulations; or creates a threat of harm to students, administrators, teachers, and staff; or in anyway disrupts the educational environment of a school, class, activity, or event.
- The Board's authority to discipline students extends to student conduct that takes place off-school grounds, at *school-sanctioned* activities and events.
- The Board grants discretionary authority to school principals to immediately act where student behavior is, encourages, or promotes illegal activity; or violates school policies, rules, and regulations; or creates a threat of harm to students, administrators, teachers, and staff; or in anyway disrupts the educational environment of a school, class, or activity.
- The Board respects the First Amendment speech rights of students. However, said rights are not co-extensive with the rights of adults in other situations.
- The Board and its administrators possess the legal prerogative to decide what is or is not appropriate student speech and expression, both on school grounds and off school grounds at school-sanctioned activities and events.

One final observation is in order. It seems clear to me that at least five members of the United States Supreme Court are in favor of moving away from a strict application of the Tinker v Des Moines (1969) "material and substantial disruption" standard. After forty years of dominating the First Amendment landscape, and in light of

the growing emphasis on maintaining safe and secure schools, maybe the time has come to craft a new tool of judicial analysis.

Resources Cited

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

Board of Education v. Earls, 122 S.Ct. 2559 (2002)

Frederick v. Morse, 2003 U.S.Dist. LEXIS 27270 (D.Alaska 2003)

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

Morse v. Frederick, 20 U.S.LEXIS 8514, 168 L.Ed.2d 290, 75 U.S.L.W. 4487, 127 S.Ct. 2618 (2007)

New Jersey v. T.L.O., 469 U.S. 325 (1985)

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

Vernonia School District v. Acton, 115 S.Ct. 2386 (1995

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Note: The views expressed in this commentary are those of the author.