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STUDENT EXPRESSION AND ASSAULTIVE SPEECH: TINKER REVISITED**Overview**

Legal and policy experts agree that students (general education and special education) in today's public schools (elementary, middle, and secondary) must be protected from bullying (including physical abuse), taunting, name calling, hate-speech, sexual harassment, and other forms of hurtful behaviors initiated by fellow students—especially where such behaviors become pervasive and severe. Today, the prevailing attitude is that in addition to any physical and emotional damage suffered, such behaviors foster a hostile and non-productive school environment in which the student victim is deprived of his/her opportunity to pursue and receive a meaningful educational opportunity. And, as the United States Supreme Court has admonished, “[s]chool officials may be held liable where the harassment is so severe and pervasive that it limits the student victim’s ability to learn; where school officials show deliberate indifference to the matter; and where school officials fail to take reasonable steps to remedy the situation. Davis v. Monroe (1999)

A recent NBC news commentary reported a very troubling story involving high school students in Connecticut and neighboring New York State. The story involved the electronic publication of what was called the “smut list.” As I understood the report, school officials and local law enforcement personnel are now in the process of a widespread investigation to find the source(s) of this terrible list which contains the names of several young female and some male students followed by very derogatory and hurtful comments made about each student on the list. In my view such news reports (accurately referred to as “cyber bullying”) are appearing all too frequently and are rapidly changing the case hardened First Amendment judicial analysis dominated by the Tinker (1969) test. (Vacca, 2008)

Student Speech 2011: The Changing Judicial Analysis

The First Amendment to the United States Constitution states, in part, that “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.” (Ratified December 15, 1791) In the 1960’s the federal courts expanded the notion of free speech to matters of expression, e.g., Ferrell v. Dallas I.S.D. (1968), and in 1969 the United States Supreme Court held that the First Amendment’s free speech clause applied to students in

public schools. The Court made it clear that “undifferentiated fear or apprehension of disturbance” is not enough to warrant violations of student First Amendment rights. In the Court’s view, a cause and effect link had to be forged between a student’s actions and “material and substantial disruption” of the school’s learning environment. Tinker v. Des Moines (1969)

Over the past forty-plus years, post-Tinker, the United States Supreme Court, has been busy with the difficult task of deciding student-related issues associated with First Amendment’s free speech and assembly guarantees. In handing down decisions such as Bethel School District v. Fraser (1986), Hazelwood v. Kuhlmeier (1988), Board of Education v. Mergens (1990), and Morse v. Frederick (2007) the Court created a standard of analysis that moved away from a strict application of the traditional “action-oriented” search for “material and substantial disruption” and toward a more “content-oriented and potential harm and disruption model.” In doing so, the Court made a clear that: (a) the school environment is not an open public forum, (b) school sponsored and/or school sanctioned student speech is different from student initiated speech and/or expressive activities that involve either personal viewpoints or matters of public concern, and (c) student-initiated speech and expressive activities that take place off school property, Wisniewski v. Board of Education (2nd Cir. 2007)—including electronically [e.g., internet] created and communicated speech—are not automatically free from school system control and sanctions. Doniger v. Niehoff (2nd Cir. 2008)

Assaultive Speech. It is a well established tenet of constitutional law that not all speech is “protected speech.” As Alexander and Alexander remind us, “...the First Amendment rights of speech and expression were never intended to embrace all circumstances. Restrictions on the content of speech are permitted in certain circumstances.” The Alexanders cite the following examples of traditional non-protected speech: true threats of violence, racial epithets, speech that incites danger and harm to individuals or school disruption, fighting words, and profanity. (Alexander and Alexander, 2012)

In 1994, Professor H.C Hudgins, Jr., and I published an article entitled *Student Speech and the First Amendment: The Courts Operationalize the Notion of Assaultive Speech*. (Vacca and Hudgins, 1994) Based on a comprehensive analysis of the case law we postulated that a new concept (*assaultive speech*) had taken root in student First Amendment jurisprudence and would rapidly replace the case hardened reliance on the Tinker (1969) standard. In our piece we defined *assaultive speech* as “those expressive acts (spoken, written, or gestures) of one or more persons that either cause actual harm to another person or persons, or, at a minimum, place another person or persons in imminent fear of harm.” (Vacca and Hudgins, 1994) However, in the article we cautioned the reader that a court’s final determination of what is or is not protected student speech and/or expression would be evaluated: (1) in light of the special characteristics of the school environment, and (2) based on ample evidence that harm and/or disruption would at a future time take place on school grounds.

Based on a more recent review of case law, my colleague Professor Bill Boshier and I concluded that over the past two decades the Vacca/Hudgins prediction came to fruition as student First Amendment issues moved beyond traditional boundaries of protected speech. At the same time, courts in several jurisdictions dealt with emerging student speech and expressive activities considered intimidating, hostile, insensitive, or in some way socially or culturally biased. Denno v. School Board (11th Cir. 2000), Harper v. Poway Unified School District (9th Cir. 2006), and Zamecnik v. Indian Prairie School District No. 24., 2007) As a result, contemporary school administrators now find themselves faced with the task of differentiating between student speech and expression that is “merely distasteful and speech, no matter how distasteful, that is either inherently or actually threatening or in some way harmful.” Barr, et al. v. Lafoon, et al. (6th Cir. 2008) Thus, the balance of competing interests tipped away from protecting the rights of the speaker and toward protecting the rights of those exposed to the

speech or expressive act—whether or not material and substantial disruption of the learning environment actually has taken place. (Vacca and Bosher, 2008)

Recent Case Law

I recently came across a decision from the United States Court of Appeals for the Sixth Circuit—a decision that I had initially reviewed when it emerged from a federal district court in Tennessee. (Vacca, 2008) The case, now styled as Defoe v. Spiva (6th Cir. 2011), involves a challenge brought by a student (by and through his parent) to a local school system’s code of student conduct that stated, in relevant part, “[a]pparel or appearance, which tends to draw attention to an individual rather than to a learning environment, must be avoided...[c]lothing and accessories such as backpacks, patches, jewelry, and notebooks must not display (1) racial or ethnic slurs/symbols, (2) gang affiliations, (3) vulgar, subversive, or sexually suggestive language or images; nor, should they promote products which students may not legally buy; such as alcohol, tobacco, and illegal drugs.”

Facts: On October 30, 2006, the plaintiff student (hereafter referred to as Tom) wore a shirt to school bearing an image of the Confederate flag. School officials told Tom that he was in violation of the student code of conduct. He was asked to either turn the shirt inside out or remove it. Tom refused to comply so he was sent home.

On November 6, 2006, Tom wore a belt buckle to school that displayed an image of the Confederate flag. Again he was told the he was in violation of the code of conduct. When he refused to comply he was suspended from school. The case report does point out, however, that in the past Tom had worn clothing depicting the Confederate flag, but that he had complied with requests to either remove or cover the clothing.

On November 20, 2006, plaintiffs went into a federal district court where they alleged violations of the First and Fourteenth Amendments. They petitioned the court for a preliminary injunction and a restraining order. Their motions were denied. Between September 21, 2007 and April 28, 2008, and the case was in and out of court. Subsequently, a jury trial was held from August 11, 2008, through August 15, 2008. The jury trial ended in a mistrial. The district court requested that the parties file post-trial briefs. On August 11, 2009, the court granted summary judgment in favor of the defendants and dismissed the action. Plaintiffs filed an appeal.

Sixth Circuit Rationale: Relevant precedents relied on and quoted directly by a three-judge panel of the Court of Appeals for the Sixth Circuit included Tinker (1969), Fraser (1986), Hazelwood (1988), and Morse (2007). The appellate court made it clear at the outset that while public school students do not “shed their rights to freedom of speech or expression at the schoolhouse gate,” the constitutional rights of students in public schools “are not automatically coextensive with the rights of adults in other settings.” Moreover, school officials do not “surrender control of the American public school system to public school students.” And, students’ First Amendment rights must be “applied in light of the special characteristics of the school environment.”

It is significant to note that while the Sixth Circuit cited Fraser (1986) and Hazelwood (1988) as examples of the United States Supreme Court deviating from using the “Tinker framework” to justify the regulation of student speech, Defoe v. Spiva (2011) is different. This case, said the Sixth Circuit, involves the wearing of clothing bearing images of the Confederate flag—thus, Tinker (1969) applies in a search for “any facts that might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.” The plaintiffs had argued that the Confederate flag itself did not cause any disruption in the past. In the Sixth Circuit’s view” Tinker does not require disruption to have actually occurred.” School officials

need to be able to “reasonably forecast that such displays could cause substantial disruption or materially interfere with the learning environment.”

Regarding the issue of alleged viewpoint discrimination the Court opined that even though some of the past incidents of racial violence, threats, and tensions in the school system were currently not present, school officials could predict that displays of the Confederate flag could cause material and substantial disruption. While some ambiguity in the school system’s policy as applied to the Confederate flag and not to how it might apply to other displays (e.g., the Mexican flag, Malcolm X shirts) does exist, the Court did not find evidence of viewpoint discrimination. Tinker (1969), said the Court, “does not require an individualized analysis of each student’s clothing each day....”

Decision: For the reasons stated above, the Sixth Circuit three-judge panel (two judges concurring, one dissent), affirmed the judgment of the district court granting summary judgment to the defendants.

Post Script: The Sixth Circuit’s rationale and decision are not as clear as they seem. The March 17, 2011, issue of Legal Clips (National School Boards Association) offers significant observations regarding the Defoe (2011) decision, where there exists a concurring opinion (in which 2 of the 3 judges join), and a dissenting opinion. In my view the reader will be wise to read both the concurring and dissenting opinions—especially for what they say about the relevance and changing nature of Tinker (1969) and Morse (2007)

Also, it will be interesting to watch the future impact of the United States Supreme Court’s recent 8-to-1 (Westboro Baptist Church) decision, Snyder v. Phelps (2011). In my view, while the issue before the Court specifically dealt with tort liability, Snyder (decided March 2, 2011) nonetheless will spawn future First Amendment content-oriented issues.

Policy Implications

The Sixth Circuit’s rationale in Defoe v. Spiva (2011) is both informative and instructive. As local school boards review their policy statements regarding student speech and expression the following suggestions are offered for consideration.

School policy must make it clear that:

- Even though students possess First Amendment speech and expression rights while at school and in attendance at school sponsored and/or sanctioned activities and events, these rights are not absolute.
- Students are expected to engage in appropriate exercises of speech and expression (as specified in the *Student Code of Conduct*) when on school property (including school busses) and when in attendance at school sponsored and/or sanctioned activities and events.
- Where substantive evidence exists that student exercises of speech and/or expression (including electronic communications) will: (1) pose an imminent threat of harm to themselves, staff, and/or other students (including acts of bullying and harassment); or (2) pose an imminent threat of disruption of the learning environment; or (3) pose a threat of imminent damage and/or destruction of school property, school principals are empowered to take immediate and appropriate preventive and disciplinary actions (as specified in the *Student Code of Conduct*).
- Prior to the beginning of each school year, parents, students, and staff shall receive written information clarifying school system speech and expression policies and procedures—including the relationship

(cross references) of these policies and procedures to appropriate sections of the *Student Code of Conduct*.

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