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STUDENT EXPRESSION 2009-2010: THE CONFEDERATE FLAG ISSUE**Overview**

In 2009-2010 student expression (speech, attire, hair, music) issues remain high on the list of matters that consume the valuable time of public school administrators across this nation. While many of today's student expression issues more often than not involve some form of technology (e.g., cell phone cameras, text messages), some of the "old chestnuts" such as hair style, dress, flags, and T-shirts continue to spring up every year. Nixon v. Northern Local School District (S.D. OH 2005), Guiles v. Marineau (2nd Cir. 2006) One advantage associated with student expression issues ripening into litigation is that such matters give the researcher a chance on a regular basis to reexamine the relevance, validity, and reliability of age worn Supreme Court standards of judicial analysis.

Student Expression and Judicial Restraint

Legal experts remind us that public school students "continue to test the limits of their personal freedoms in public schools, frequently colliding with educators' efforts to maintain an appropriate school environment. When controversies cannot be resolved locally, courts often are called on to address the legal issues involved." Cambron-McCabe, et al. (2004) It is a fact, however, that judges, federal and state, always have been and remain reluctant to substitute their judgments for those of public school administrators—especially in matters of student expression.

A basic tenet of education law states that public school students are not free to interfere with or in any way disrupt or in any way threaten the learning environment. As the United States Court of Appeals for the Fifth Circuit opined more than forty-years ago, while students do have First Amendment protections, the Constitution does not establish an absolute right to free expression for students in public schools. Ferrell v. Dallas I.S.D. (5th Cir. 1968) One year later, the United States Supreme Court ushered in a new era in which the disciplinary prerogatives of school officials were to be balanced with student First Amendment rights when it handed down its landmark decision in Tinker v. Des Moines (1969). It was that decision that gave us the "material and substantial disruption" standard of analysis.

Tinker Applied. The post-Tinker years are best characterized by a reluctance of school administrators to discipline students for acts of expression. As case law from the 1970's through the mid-1980's demonstrates, the application of Tinker's "material and substantial disruption" standard by the courts below opened more rights for students while decreasing the disciplinary authority of public school officials. During the post-Tinker era many public school systems across the country either abandoned their student expression policies or were reluctant to enforce them. Vacca and Bosher (2008)

Today's Legal Environment. Do contemporary judges rely on the traditional tools of judicial analysis in deciding twenty-first century student expression cases? The answer to this question is both "no" and "yes." First, there is no doubt that the United States Supreme Court's benchmark decisions in Bethel School District v. Fraser (1986), Hazelwood v. Kuhlmeier (1988), and Morse v. Frederick (2007) ushered in a new era in which courts of law granted more authority to public school officials to control acts of student expression both on school grounds and at school sponsored and/or sanctioned activities. However, as Arum and Preiss remind us, in many ways things have not changed. In their view, "[w]hile courts in general have become less sympathetic to students since the legal challenges of the student rights contestation period from the late 1960's through the mid-1970's, the legal environment in the area remains highly ambiguous, as prior case law decisions still define and provide legal parameters to which school practitioners must adhere." Arum and Preiss (2009)

Recently, I came across a comprehensive student expression decision from the United States Court of Appeals for the Sixth Circuit—a decision that offers an excellent example of contemporary judicial reasoning. The appellate level decision, Barr et al. v. Lafon et al. (6th Cir. 2008), involves the Confederate (i.e., Rebel) flag—a symbol that, over the years, has been the subject of First Amendment issues. Denno v. School Board (11th Cir. 2000)

Barr et al v. Lafon et al. (6th Cir. 2008)

Facts: Some students in a Tennessee public high school system challenged, on First and Fourteenth Amendment grounds, specific provisions of a public school system's dress code linking student dress and grooming to potential disruption of the school's learning environment. More specifically, the students in this case wished to express their southern heritage by wearing (at school) clothing depicting the Confederate flag. Subsequently, the high school principal denied their request. The school system policy at issue stated in relevant part that middle- and high-school students were barred from wearing during the school day "clothing which exhibits written, pictorial, or implied references to illegal substances, drugs or alcohol, negative slogans, vulgarities, or causes disruption to the educational process; wearing apparel that is sexually suggestive or that features crude or vulgar commercial lettering or printing and/or pictures that depict drugs, tobacco, alcohol beverages, racial/ethnic slurs or gang affiliation...."

On the first day of the 2005-2006 school year, students attended a meeting at which they received a planner containing an agenda and school rules. Home-room teachers reviewed the planner with their students, and all parents and students were asked to sign indicating that they had read the policy. At a subsequent assembly the school principal (Lafon) told the class that they would not be allowed to have "Rebel flags" or symbols of the "Rebel flag" on their clothing, or "anything else that was a disruption to the school." While the principal did not mention any other flags as being similarly banned, he testified later that at that point no other flags were either causing disruption or had caused a disruption in the previous school year. He did tell the students that "in general...anything that is a disruption to the school learning environment would not be tolerated."

The rationale for specifically banning the Confederate flag was premised on the existence of “racial tensions” at the high school. There had been multiple incidents of racist graffiti making general threats against the lives of African-Americans, graffiti containing “hit lists” of specific student names, physical altercations between African-American and white students, and a police proactive school building lockdown (in reaction to student threats to bring guns to school, to hang people, and other such threats). According to the school principal (Lafon) between August 2005 and March 2006, the school witnessed over 425 documented violations of the dress code policy—twenty-three of which involved students wearing the Confederate flag.

Both sides in the case also cited a specific racially charged student physical altercation at a basketball game (subsequently triggering student suspensions, and an Office of Civil Rights investigation) as “the catalyst of heightened racial tension in the school.” In the view of the school system’s Director of Schools, such incidents, plus several conversations with parents, called for banning the Confederate flag being worn by students at school during school hours.

Student plaintiff Barr declared that in September, 2005, to express pride in his southern heritage, he wore a T-shirt to school bearing a small Confederate flag, a picture of two dogs, and the words “Guarding our Southern Heritage” on the back. He was confronted by the principal (Lafon) who told him to either turn the inside out or remove it and that a failure to do so would result in a suspension from school. Prior to this confrontation, Barr testified that he received no comments regarding his T-shirt from either teachers or other students.

Student plaintiff White declared that in January, 2006, she wore a shirt to school on which was an image of the Confederate flag. She was told by a teacher the shirt violated school policy because of the “image of the flag,” and that she (White) either “cover the shirt with a jacket for the rest of the day or return home and be suspended.”

District Court Action. Subsequently, the students, by and through their parent and guardian, filed suit in federal district court claiming that school officials violated their First Amendment expression rights and their Fourteenth Amendment due process and equal protection guarantees. The district court granted the school officials’ motion for summary judgment and formally dismissed the case with prejudice. In the court’s view “the Confederate flag did not need to have caused a disruption in the past in order for school officials to ban it when (1) there were racially motivated incidents at the school that caused tension among the student body and (2) such a ban was not implemented in a viewpoint-discriminatory manner.” Students appealed the district court’s decision.

The Sixth Circuit Court of Appeals Decision

In affirming the lower court’s decision, the Sixth Circuit sought to balance the students’ free speech with the authority of public school officials to maintain discipline and control in an effort to protect the school’s learning environment. In analyzing the First Amendment issue and in developing its rationale the Court relied on Tinker v. Des Moines (1969), Bethel School District v. Fraser (1986), Hazelwood v. Kuhlmeier (1988), and Morse v. Frederick (2007). In doing so the Court quoted from these opinions and made it clear that while students do “not shed their constitutional rights to freedom of speech or expression at the schoolhouse door,” their constitutional rights “are not automatically coextensive with the rights of adults in other settings.” And, the Court stressed the principle that the rights of public school students must be evaluated “in light of the special characteristics of the school environment.”

The Sixth Circuit declared that while Tinker (1969) “governs the instant case because by wearing clothing depicting images of the Confederate flag students engage in pure speech not sponsored by the school,” Hazelwood (1988) does not apply to the instant case “because no one would reasonably believe that [plaintiffs-Appellants’ clothing] bore the school’s imprimatur,” and Morse (2007) “does not modify our application of the Tinker standard to the instant case.” Thus, in citing several post-Tinker lower court decisions the Sixth Circuit made it clear that there is no requirement that a banned form of student expression itself actually has been the source of past disruptions; rather, the inquiry in this case should focus on “whether the school reasonably forecast that the Confederate flag would cause material and substantial disruption of schoolwork and school discipline.” Under Tinker, said the Court, school officials in the circumstances of this case (e.g., threatening graffiti, racially motivated confrontations, serious racial tension) made a “reasonable forecast” (had reason to believe) that the students wearing the Confederate flag to school would cause disruption and interfere with the security of other students.

Regarding the students’ claim that the school system’s clothing ban is a form of viewpoint discrimination, the Court cited Rosenberger v. Rector and Board of Visitors (1995), Bethel School District v. Fraser (1986), and several lower court decisions, and opined that the exclusion of racially divisive symbols in a school “that has experienced intense racial tensions is a permissible content-based restriction.” What is more, said the Court, the school system’s policy was narrowly tailored to carry out a substantial government interest. And, Plaintiff-Appellants had not produced evidence that would create a genuine issue of material fact regarding discriminatory enforcement of the dress code by Principal Lafon.

The Sixth Circuit Court affirmed the district court’s granting of summary judgment to school officials on all claims.

Barr Applied

The October 15, 2009, edition of the publication *NSBA Legal Clips* reports a recent case from the United States Court of Appeals for the Fifth Circuit, where Barr (Cir. 2008) is cited. In A.M. v. Cash (5th Cir. 2009), involving public school students bringing to school purses (on which the Confederate flag was displayed), the Fifth Circuit upheld the implementation of a school system policy banning the Confederate flag on school property. In reaching its decision, the Fifth Circuit applied Barr’s “reasonable forecast” standard. The appellate court concluded that school officials had “ample evidence” of racial hostility to overcome Tinker’s “more than a mere expectation” mandate and, at the same time, meet Tinker’s “material and substantial disruption” standard. *NSBA Legal Clips* (October 15, 2009)

Policy Implications

In 2009-2010 public school systems have policies clearly spelling out the limits of student expression (speech, dress, attire) on school property and at school sponsored/sanctioned activities and events. As a general rule school system policies make it clear that: (a) building principals are directly responsible for policy implementation, and (b) student violators will be disciplined for their actions. However, as stated at the outset of this commentary, not a year goes past that students somewhere in this nation challenge, on First Amendment grounds, the limits of such policies and in some situations even take the matter into a court of law.

The purpose of this commentary was three-fold. First, to present and review an appellate level decision (Barr et al v. Lafon et al. [2008]) involving an age-worn student First Amendment expression issue (in this case, a Confederate flag symbol display). Second, to establish the fact that the traditional First Amendment standards

handed down by the United States Supreme Court in such benchmark decisions as Tinker (1969), Fraser (1986), Hazelwood (1988), and Morse (2007) remain in tact. Third, to demonstrate how today's judges still rely on these case-hardened precedents (especially Tinker) to resolve contemporary student expression controversies.

As local public school officials ponder the many policy implications associated with student expression on school property and at school sponsored/sanctioned activities and events, the following suggestions are offered for consideration.

School policy must make it clear that:

- While students do possess First Amendment speech and expression rights these rights are not absolute.
- Students are expected to engage in appropriate exercises of expression (which include, but are not limited to verbal comments, written statements, pictorial representations, wearing apparel, insignias and other symbols) when on school property and/or in attendance at school sponsored/sanctioned activities and events.
- Students who, through their exercises of expression, pose a threat of disruption to the educational environment of the school, and/or pose an imminent threat of harm to themselves, or to other students, administrators, teachers, and staff will be subject to immediate disciplinary action including but not limited to suspension and/or expulsion from school.
- Where *ample evidence* exists to believe that student acts of expression will cause disruption to the school's learning environment, or damage to school property, or harm to students, administrators, teachers, and staff, school principals are empowered to take immediate action(s) to prevent such acts of expression from taking place.
- Prior to the start of each school year, all students, parents, teachers, and staff will receive information regarding school system policies dealing with student expression. School principals are responsible for receiving, explaining, and answering all questions regarding these policies, and for clarifying the disciplinary options associated with policy violations.
- All students and their parents will be required to sign and return to the school principal a statement that they, student and their parent, have received and reviewed the policy statements.

Postscript. The Supreme Court in Tinker (1969) did not intend for school officials to wait (sit on their hands) until something serious happened in their school buildings before taking immediate and affirmative disciplinary actions. In an era of heightened security, when judges apply the "deliberate indifference standard," it would not be prudent to adopt a "wait and see" attitude. Moreover, the Supreme Court's subsequent messages to school administrators in Fraser (1986), Hazelwood (1988), and Morse (2007) make it clear that students do not decide what is or is not appropriate speech and expression in public schools. Finally, the Sixth Circuit Court's decision in Barr v. Lafon (2008) is most instructive and captures the spirit of contemporary judicial reasoning and demonstrates a sustained reliance on the traditional standards in analyzing student First Amendment expression (speech) issues.

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