



# VCU

Make it real.

## THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

### CEPI Education Law Newsletter

Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

MAY 2011 : Vol. 9-9

#### TEACHER PROTECTIONS FROM STUDENT ASSAULTIVE SPEECH

##### Overview

The First Amendment states, in part, that “Congress shall make no law...abridging the freedom of speech...” Over the years, the United States Supreme Court and the courts below (both federal and state) expanded the notion of free speech to include free *expression*. In 1969, the Supreme Court made the First Amendment’s free speech (expression) mandate applicable to public school systems in the states. Tinker v. Des Moines (1969) During the 1970’s student speech and expression rights in public schools expanded and underwent radical change. (Vacca and Bosher, 2008)

*The Changing Environment.* In the mid-1980’s, student speech and expression rights in public schools took another path as limitations and boundaries were created. Bethel v. Fraser(1986) and Hazelwood v. Kuhlmeier (1988) In the late 1980’s and early 1990’s, a period of “shrinking student expression rights” emerged and continued to expand in the early 2000’s. Courts made it clear that not all student speech (expression) exercises in school, or on school property, or at school sponsored/sanctioned events are immune from the disciplinary authority and control of school officials. To put it another way, in contemporary public school systems student freedom of speech (expression) “inside the schoolhouse” is subject to reasonable limitations and disciplinary action. Morse v. Frederick (2007)

While several past commentaries have focused on the expanding First Amendment speech and expression rights of public school students, post-*Tinker* (1969), no previous commentary specifically focused on the rights of classroom teachers to be protected from acts of student speech (expression) that they, teachers, determined to be in some way either inappropriate, or profane, or obscene, or demeaning, or offensive, or threatening.

##### In Re Nicholas (Ariz. 2011).

Recently, I came across a decision handed down by the Supreme Court of Arizona which offers an opportunity to discuss the legal and policy implications of a timely, over looked, and often under reported set of circumstances present in today’s public schools—*i.e.*, situations where a student has directed language toward a

**A Commonwealth Educational Policy Institute Publication - Copyright © CEPI 2011**

CEPI grants permission to reproduce this paper for noncommercial purposes providing CEPI is credited.

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

classroom teacher and the student is disciplined for what the teacher, not the student, deems was unacceptable, offensive, and/or threatening language.

*Key Terminology to Ponder:* To comprehend the facts and the judicial rationale in the Arizona case, the reader must first ponder certain key terms. Webster's New Collegiate Dictionary (1977) offers the following definition of the word *profane*: to treat with abuse, irreverence, or contempt; to debase by a wrong, unworthy, or vulgar use. The same source tells us that something *obscene* is disgusting to the senses, repulsive, abhorrent, designed to incite to lust or depravity. Black Law Dictionary (7th Edition, 1999) offers the following definition of the term *threat*: a communication intent to inflict harm or loss on another or another's property...an indication of an approaching menace...a person or thing that might well cause harm. *Fighting words*, states Black's, involve "inflammatory speech that might not be protected by the First Amendment's free speech guarantee...." Fighting words often incite violent reactions. On the other hand, Black's also tells us that something that is merely *offensive* causes displeasure, anger, or is repugnant to the prevailing sense of what is decent or moral.

*Questions to Ask:* When are the words or expressive acts of one person *intimidating* and/or *threatening* to another person? When does one person feel that he/she has been *insulted*, *demeaned*, *libeled* or *slandered* by the words or acts of another person? When do the words or actions of one person result in a violent reaction from the person to whom the words or actions are directed?

*Facts:* The following facts are taken directly from the case report. Some of the more explicit language (found in the student's epithets) has been *edited by me* for publication and general distribution of this commentary. It is therefore recommended that the reader see the actual case report to see the exact words used by the student.

The first incident took place when Nicholas was attending a classroom for students who were assigned there to complete an on-campus suspension. When the classroom teacher saw him using a cell phone she asked him give the phone to her. He refused. The teacher called security. Nicholas said "bitch" under his breath.

The second incident occurred two days later and involved the same teacher. When Nicholas asked to be sent to another classroom the teacher said that he would have to wait while she got administrative approval. After ten or fifteen minutes had passed Nicholas yelled, "This is stupid, I want to go to Room 205." When the teacher again said that he would have to wait he began to play with his cell phone. She told him to put it away but he refused and began to argue with her. When the other students noticed the disruption some stood up. The teacher later testified that the "whole room basically lost control." Now Nicholas yelled "This is f...ing bull sh..." and while looking at the teacher in a challenging manner from about ten feet away he yelled, "You're a f...ing bitch." Disregarding the teacher's instructions he left the classroom yelling "F...ing bitch" and "You stupid bitch." When the teacher looked out the classroom door to see where Nicholas was going he shouted "Get away from me you f...ing bitch."

Subsequently, Nicholas was suspended from school for ten days because of his verbal outbursts directed at a teacher. In addition, he was charged with violating *Arizona Revised Statutes (ARS)*, section 15-507 (2009), which makes it a crime to "knowingly abuse...teachers or other school employees"

*Court Disposition and Appeal:* The Superior Court of Maricopa County, Arizona, adjudicated Nicholas a juvenile delinquent. Nicholas appealed to the Arizona Court of Appeals where the Court held that "when pure speech is involved, the statute applied only to fighting words." The Court of Appeals vacated the adjudication, for the first incident but affirmed as to the second. *In re Nicholas S.* (Ariz. App. 2010) Noting that the statute

may encompass constitutionally protected speech, and thus is facially overbroad, the Court held that the statute could be constitutionally applied involving speech only if it is narrowed to fighting words. Regarding the use of the word “bitch” under his breath could not support a delinquency charge. But, the words used in the second incident were different. The second incident, said the Court, was one in which “a reasonable person in these circumstances might well react violently when confronted with such repeated, angry, and personal epithets” Nicholas then took his case to the Arizona Supreme Court where he argued that the Court of Appeals misapplied the fighting words doctrine by focusing on the “theoretical reaction of a hypothetical reasonable person instead of the likely reaction of the teacher addressed by the speech.”

*Arizona Supreme Court Opinion:* At the outset of the opinion the Court makes the following statements regarding the appropriateness of the school system’s disciplinary action (ten-day suspension). First, “[t]his case does not concern the propriety of school discipline.” Second, “[a]lthough students do not ‘shed their rights to freedom of speech or expression at the schoolhouse gate.’ . . . schools may discipline students for certain speech that would be constitutionally protected if made by non-students outside a school setting.” Tinker v. Des Moines (1969), Morse v. Frederick (2007), and Bethel School District v. Fraser (1986) Third, Nicholas acknowledged that his conduct was “appropriately subject to school discipline, and he has not challenged his ten-day suspension.” Fourth, said the Court, “[r]ecognizing that a school may discipline a student for a profanity-laced classroom outburst, we need not here address . . . more generally the constitutional limits on school discipline for student comments.” In Re Nicholas S. (2011) The Court also noted that Nicholas was not charged with violating any statute targeting “the disruption of school activities.” Instead he was specifically charged with violating a statute that states: “A person who knowingly abuses a teacher or other school employee on school grounds . . . or while the teacher or employee is engaged in the performance of his duties is guilty of a class 3 misdemeanor.”

Following a brief reiteration of the statute’s history, the Court opined, without deciding, that the current statute may apply to certain speech absent any physical abuse. However, the key question is: What kind of speech?” Nicholas argued that the statute is overbroad and vague. However, while the Court focused on the term “abuse” as used but not defined in the statute, it concluded that use of the term, in and of itself, did not render the statute overbroad.

Focusing on the “fighting words” doctrine itself and citing leading United States Supreme Court decisions on point, the Arizona Supreme Court concluded that the underlying rationale for the fighting words doctrine is “that some speech may be suppressed because it would likely provoke an immediate violent reaction by the person to whom it is addressed.” It therefore is necessary to consider the characteristics of the addressee (such as occupation) at whom the words are directed and the context within which the action took place. Thus, it is important “to determine whether an ‘average addressee’ in the circumstances of the actual addressee would likely react violently to the words.”

The addressee in this case was a teacher monitoring students in an on-campus suspension classroom. Nicholas vulgarity insulted the teacher in the classroom from about ten-feet away and then in the hallway while the teacher was watching him from the classroom door. Considering the circumstances the Court concluded that his insults would not likely have provoked “an ordinary teacher to ‘exchange fisticuffs’ with the student or to otherwise react violently.” Moreover, concluded the Court, Arizona teachers exemplify a higher level of professionalism, as the conduct of the teacher involved here reflected. Nicholas’s conduct, although reprehensible, is properly punished through school discipline or possibly prosecution under other statutes rather than by characterizing it as fighting words likely to provoke a violent reaction by his teacher.” In Re Nicholas S. (2011)

*Decision:* The decision of The Court of Appeals was reversed insofar as it affirmed the adjudication of delinquency for the second incident. The order of the Court Of Appeals was vacated and the juvenile court's order of adjudication was vacated as to both counts.

*Concurring Opinion:* One Justice filed a concurring opinion in which it was agreed that that the Court "narrowly and correctly" held that Nicholas' "words were not inherently likely to provoke a violent reaction by the teacher." The case was decided on "very discrete grounds, limited to the sole issue raised on review and argued by the parties: whether Nicholas' words constitute 'fighting words,' as delineated by the United States Supreme Court....That issue is different from the question of whether Nicholas' profanity-laced tirade against the teacher in a classroom setting was covered and protected by the...First Amendment." In Re Nicholas S. (2011)

Thus, stated the concurring Justice, Nicholas' verbal barrage against the teacher constituted "abuse" within the meaning of the statute and was therefore statutorily proscribed.

### **Policy Implications**

While In Re Nicholas S. (2011) is more a juvenile law case than a school law case, and one that does not specifically treat constitutional issues associated with student speech, it is nonetheless informative and instructive to public school officials. In my view it is what the Arizona Supreme Court says about student speech (expression) in public schools, the disciplinary authority of school officials, and the role of classroom teachers that possesses implications for school system policy. Based on my analysis of the Court's rationale the following suggestions are offered as existing policies are reviewed and new policies are formulated.

The Board must make it clear that:

- While student free speech and expression is valued and encouraged in school classrooms (e.g., assigned projects, research papers) and during school sponsored/sanctioned activities (e.g., plays, musical productions) and events, students are not free to engage in behaviors that disrupt the learning environment, or pose a threat of harm to themselves or to others, or demean, or bully, or abuse, or intimidate others.
- Student speech (expression) that is profane, or obscene, or vulgar shall not be tolerated and students who engage in such activities during school hours, on school property, or at school sponsored/sanctioned activities and events shall be subject to immediate and appropriate discipline as specified in the *Student Code of Conduct*.
- Students who behave in a disrespectful and/or abusive, and/or threatening manner toward school administrators, teachers, counselors, coaches, and other staff members (including support staff) shall be subject to immediate disciplinary action.
- Students who violate school system policies and are properly punished through school system disciplinary actions also may, where appropriate, be subject to prosecution under the law.
- Students and their parents will be regularly made aware of the Board's expectations regarding appropriate student speech (expression) on school property and at school sponsored/sanctioned activities and events.
- Staff development shall be provided on a regular basis to up-date all staff on changes in the legal, policy, and procedural aspects involved in dealing with students whose speech and expression (including, but not limited to, electronic communications) violate school system expectations and rules. Staff development shall also include training in how to handle such situations if and when they occur.

Two final notes are in order. First, in this era of rapidly expanding technology, the Board must work closely with the school system's legal counsel to draft and regularly review policies and procedures that deal with student speech and expression—especially those that cover electronic means of communication. Second, while today's young people are exposed to changing definitions and usages of words once considered inappropriate (i.e., “taboo,” “earthy”) but now have become terms of common parlance in the outside world, the schoolhouse is not a “street corner.” School still is a special place—where appropriate language and behavior are expected, taught, and modeled as a part of emphasizing and developing *civility* in our future citizens.

### **Resources Cited**

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

Garner, Bryan A., Editor-in-Chief, BLACK'S LAW DICTIONARY, Seventh Edition (West Group 1999)

Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988)

In Re Nicholas S., 224 P.3d 1038 (Ariz. App. 1 Div. 2010)

In Re Nicholas S., 245 P.3d 446 (Ariz. 2011)

Morse v. Frederick, 551 U.S. 393 (2007)

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

Vacca, Richard S., and Bosher, William C., Jr., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, Seventh Edition (LexisNexis 2008)

WEBSTER'S NEW COLLEGIATE DICTIONARY (C.G. Merriam Company 1977)

Richard S. Vacca  
Senior Fellow CEPI

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