

THE CONTOURS OF FIRST AMENDMENT SPEECH

Navigating the Boundaries of Student
Speech

Presented by:
Kathy A. Ahearn, Esq.
Guercio & Guercio, LLP
Latham, New York
March 15, 2018

THE FIRST AMENDMENT TO THE U.S. CONSTITUTION

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble; and to petition the government for a redress of grievances.”



THE BALANCING ACT

- Students do not shed their constitutional rights at the school-house gate.
- Yet, schools must maintain a safe environment that is conducive to learning.



3

WHAT ARE THE BOUNDARIES ?

- Are there any limits on student speech in school?
- What speech is protected under the Constitution?
- How far can a school go in regulating student speech?
- When does speech cross the line from protected to a Code of Conduct violation?
- When does off-campus speech become the school's concern?



4

THE LANDMARK RULINGS



5



***TINKER V. DES MOINES INDEPENDENT
COMMUNITY SCHOOL DISTRICT, 393 U.S.
503 (1969)***

- Student Speech rights are not shed at the schoolhouse gate but may be reasonably restricted as to time, place and manner.
- The speech was “symbolic” – wearing a black arm band to protest the Vietnam War.
- Speech protected so long as it would not “materially and substantially disrupt the educational process of the school environment or impinge on the rights of others.”

6

BETHEL SCHOOL DISTRICT NO. 403 V. FRASER, 487 U.S. 675 (1986)

- The suspension of a high school student was upheld for giving a nominating speech for a class officer that was laced with sexual innuendo.
- The Court did not base its decision on the “material disruption” standard of *Tinker*.
- Rather, the Court held that the use of “vulgar or indecent speech” in a school-sponsored activity could be restricted.



7

HAZELWOOD SCHOOL DISTRICT V. KUHLMIEER, 486 U.S. 260 (1988)

- The school-sponsored newspaper was subject to editing (censorship) by the administration for legitimate educational reasons (e.g., grammar, accuracy, balance in reporting and age-appropriate subject matter).
- Why? Because the school-sponsored newspaper bore the imprimatur of the school district.



8

MORSE V. FREDRICK, 551 U.S. 393 (2007)

- Morse (known as the “Bong Hits for Jesus” case), is the last and most recent ruling by SCOTUS on the parameters of student free speech.
- Near the sidewalk outside and across the street from the school where a school-sanctioned event was taking place, students held up a sign saying “Bong hits for Jesus.”
- Court: the sign advocated for the use of illegal drugs and would not be protected under the 1st Amendment.
- This limitation on speech rights was explained in terms of the special characteristics of the school environment.



9

APPLYING THE SCOTUS RULINGS IN NEW YORK



10

***GUILES V. MARINEAU*, 461 F. 3d 320 (2d Cir. 2006)**



- George W. Bush's head superimposed on the body of a chicken wearing a combat helmet, surrounded by oil rigs, dollar symbols and cocaine. Statements on the shirt included: "world domination tour", "crook", "cocaine addict", "AWOL draft dodger", and "lying drunk driver".
- Court: analyzed in light of *Tinker*, *Fraser* and *Hazelwood*, ruled student had a right to wear the T-shirt.
- Absent profanity or sexual innuendo, the court would not use the "plainly offensive speech" standard from *Fraser* and instead found *Tinker* analysis fitting for this case.

11

ON CAMPUS SPEECH

- No violation of 1st amendment where district censored student publication drawing of stick figures in various sexual positions. *R.O. ex rel v. Ithaca City School District*, 645 F. 3d 533 (2d Cir. 2011).
- No violation of 1st amendment where district censored a sex questionnaire, when there was reasonable cause to believe that it could have caused psychological harm to some of the students. *Trachtman v. Anchor*, 563 F. 2d 512 (2d Cir. 1977).

12

ON CAMPUS SPEECH



- *Cuff v. Valley Central School District*, 677 F. 3d 109 (2d Cir. 2012)-5th grader drew a crayon picture of an astronaut who wants “to blow up the school with the teachers in it” the year after he had drawn a picture of a “big wind that destroyed every school in America” killing all the adults and leaving the children alive.
- Student said he was only kidding, but was suspended for 6 days.
- 2d Cir. applied *Tinker*, said it was reasonably foreseeable that the threat would cause a disruption. The student’s intent was not dispositive; instead, the reasonableness of the administrator’s response was determinative.

13

ON CAMPUS SPEECH

- In *Defabio v. East Hampton*, 623 F. 3d 71 (2d Cir. 2010), a student was suspended for stating, on Monday after the Friday death of a Latino student, “one down, 40,000 to go.”
- The rumor of the statement spread through school, and the situation at the racially mixed school became tense, with threats made against the student. Student was disciplined.
- Student wrote a letter of apology, but administration refused to allow it to be read over the loudspeaker, concerned about potential disruption.
- Student sued. Court: sided with school; the decision to not allow letter to be read met a “Might reasonably portend disruption” standard.

14

OFF CAMPUS SPEECH

- District violated 1st amendment when it disciplined a student for an underground newspaper created off campus because the content was vulgar. *Thomas v. BOE*, 607 F. 2d 1043 (2d Cir. 1979).



15

OFF CAMPUS SPEECH

- In *Wisniewski v. BOE*, 494 F. 3d 34 (2d Cir. 2007), student sent an icon by IM from his home computer depicting a person being shot with the caption: "Kill Mr. Vandermolen" (a teacher in the school).
- Even though the conduct originated off-campus, it was subject to discipline because it reasonably posed a foreseeable risk that it would materially and substantially cause a disruption in school.



16

WISNIEWSKI, CONTINUED

- The court described and applied the four tests in *Tinker*, any one of which it said would support discipline:
 - Substantially interferes with the work of the school;
 - Would cause material and substantial interference with the work of the school;
 - Would materially and substantially disrupt the work and discipline of the school; and
 - Reasonably supports forecast of material disruption or interference with school activities.

12

OFF CAMPUS SPEECH

- In *Doninger v. Neff*, 642 F.3d 334 (2d Cir. 2011), a student was prohibited from running for class office as a penalty for writing a blog post from her home during non-school hours.
- In the post, she called school administration “douchbags” and urged students to “piss off” the administration because it had cancelled a school event, JamFest.
- Court: “The question is not whether there has been an *actual* disruption, but whether school officials might ‘reasonably portend disruption from the student expression at issue.’”

13

DONINGER, CONTINUED

- Critical point of the decision: a *privilege* (running for office) was withheld, not a *right* (such as the right to attend school).
- The court did not opine upon whether a *suspension from school* for such conduct would have violated 1st amendment rights..
- Was this a distinction with a difference?



19

THE DIGNITY FOR ALL STUDENTS ACT

- Prohibits harassing conduct, threats or cyberbullying that happens on school grounds.
- Prohibits harassing conduct, threats or cyberbullying that occurs off school grounds if the conduct, etc., creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

20

THE DIGNITY FOR ALL STUDENTS ACT

- DASA standard for restricting/disciplining off-campus conduct seems to have been lifted from the court decisions.
- Schools must have policies and procedures that enforce DASA and create an environment free from harassment, bullying and discrimination.

21

WHAT GENERAL RULES CAN WE DRAW FROM THESE CASES?



CONCLUSION
SUMMARY OVERVIEW

22

CONCLUSIONS

01

While students have a 1st amendment right to free speech in a school environment, the right is not unlimited or absolute.

02

Because of the “special characteristics of the school environment”, schools can exercise some control over student speech through policies and codes of conduct.

03

Speech cannot be restricted merely because the school disagrees with the viewpoint expressed.

23

CONCLUSIONS

- Lewd, vulgar, plainly offensive speech, or speech that advocates illegal activity, may be restricted when it happens on campus. (*Fraser*).
- Lewd, vulgar, plainly offensive off-campus speech may not be restricted on that basis alone (*Fraser*); it must also substantially disrupt the educational process (*Tinker*).
- Schools have broader authority to restrict student speech when it is school-sponsored, and thus appears to have the school’s imprimatur (*Hazelwood*); for example, school newspaper, announcements on public address system, student speech at graduation.

24

CONCLUSIONS

- Schools can always censor student on-campus newspapers, magazines, etc., for legitimate pedagogical concerns (grammar, protecting privacy rights, balanced reporting, age-appropriateness).
- Schools can restrict on-campus and off-campus speech that substantially disrupts the educational process or school order, or if the speech reasonably poses a foreseeable risk that it would materially and substantially cause disruption at school. School officials need not wait until actual disruption happens.



25

CONCLUSIONS

- Schools should take care, in formulating policies, etc., that may impinge upon student speech, to narrowly tailor the rules as necessary and not create overly-broad and generalized rules that may inadvertently capture protected speech within the rules' prohibition.



26

KATHY A. AHEARN, ESQ.
GUERCIO & GUERCIO, LLP
GUERCIOLAW.COM
518-690-7000

Kathy wishes to thank Jay Worona, Esq. &
David Shaw, Esq. for sharing materials with
her for this presentation.



294426312-526



27