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Free Speech in Schools: How Classroom Assignments Implicate the First Amendment

by Brian M. Kester

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

The following is based on two true stories.

During the third week of the second semester, a first-grade teacher in central Oklahoma, Yvonne Youmust, provided her class with coloring pages of Pistol Pete, the lovable yet fearsome mascot of Oklahoma State University. In order for the students to give this assignment the appropriate amount of care and attention it deserved, the teacher gave the children the entire period to complete the task.

When Ms. Youmust handed the page to Nellie Noway, the young student balked and refused to pick up her orange and black coloring sticks. Instead, little Nellie, the six-year-old daughter of devout University of Oklahoma fans, grabbed for her cream and crimson colors and insisted that Ms. Youmust provide her with a coloring page of the Sooner Schooner. Despite the youngster's plea for the different page, the veteran teacher refused to give in to this pintsize Boomer. So, in hopes of compelling the student to do her assigned work, Ms. Youmust told Nellie that she could finish the assignment at home and return it the next morning for her grade.

She warned Nellie, however, that if she failed to do her work as assigned, she would receive a zero.

As one might imagine, this coloring assignment did not go over well in the Noway house. Nellie's father, Norman, was furious that Ms. Youmust would use her position to "perpetuate propaganda in favor of those upstart Cowboys." In protest, Mr. Noway told his daughter that she could decide for herself whether or not she wanted to color the page. Nellie chose to continue her protest by refusing to color in the Cowboy. Protesting the assignment a little further, Nellie also decided to wear her favorite shirt the next morning when she turned in the untouched page just to remind Ms. Youmust that only one university in this state has seven crystal footballs in its trophy case.

Nellie's continued antics did not go over well with Ms. Youmust the next day. True to her word, when the first grader turned in the uncolored page, the teacher placed a zero next to Nellie's name in her grade book. While Nellie sat in shock that the teacher would actually fail her for not coloring in Pistol Pete, Ms. Youmust informed the young student that she was also receiving two afternoons of detention for wearing her OU shirt to class. The teacher then sent Nellie to the principal's office so that she could call her father and have him deliver acceptable attire for her to wear for the remainder of the day.

When Norman arrived and learned all that transpired, he pulled his daughter out of school and drove straight to the law offices of Bedlam & Bedlam. After hearing the facts and doing a little research, the attorney informed Norman that he felt confident Nellie had a strong case against the school district. Based on this advice, Mr. Norman filed suit on behalf of his daughter alleging that the defendant violated Nellie's First Amendment rights. Specifically, he alleged that the school district infringed on his daughter's freedom of speech when it compelled her to color Pistol Pete and then punished her for not doing so. He further alleged that the district violated Nellie's freedom of speech rights when it gave her detention for wearing her OU shirt in protest of the assignment. Depending on additional facts, little Nellie may in fact win her lawsuit.

Even while in school, students still have First Amendment rights. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Despite retaining these rights, the United States Supreme Court has held that students' free speech rights in school "are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

In order to violate a student's right to speak or refrain from speaking in a school setting, the school must act in such a way that either "punish[es], or threaten[s] to punish [the student's] protected speech" *Phelan v. Laramie County Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1247 (10th Cir. 2000). Whether and to what extent a student's speech is protected in school depends largely on the type of speech involved. Speech falling within the category of "student speech" will generally warrant greater protection, while speech classified as "school-sponsored speech" will garner less protection. When a student possesses a right to speak or refrain from speaking in school, and when the school district violates that right, the student has a cause of action for that violation and may sue either for damages stemming from the unlawful action, to enjoin the school's unlawful infringement of rights, or both.

"Student speech" is speech by a student that just "happens to occur on the school premises." *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 923

(10th Cir. 2002). This category of speech comprises "pure student expression that a school must tolerate unless it can reasonably forecast that the expression will lead to 'substantial disruption of or material interference with school activities.'" *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969)). A school cannot suppress student speech due only to its "desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or as "an urgent wish to avoid the controversy which might result from the expression." *Tinker*, 393 U.S. at 509, 510. Instead, the school can only ban its students' "silent, passive expression[s] of opinion" if the protected speech is accompanied by actual or sufficiently certain impending disorders or disturbances. *Id.* at 508.

In contrast to "student speech," "school-sponsored speech" occurs when the school "affirmatively ... promotes" speech rather than "tolerates" it. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988). This type of speech comprises "[e]xpressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271. Classroom assignments almost always fall within this type of speech because "[f]ew activities bear a school's 'imprimatur' and 'involve pedagogical interests' more significantly than speech that occurs within a classroom setting as part of a school's curriculum." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004).

Because school-sponsored speech derives from the relationship between the school and its students, schools can exercise editorial control over this speech "so long as [its] actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. "Age, maturity, and sophistication level of the students [are] factored in determining whether the restriction is reasonably related to legitimate pedagogical concerns." *Axson-Flynn*, 356 F.3d at 1289. Additionally, courts give "substantial deference" to "educators' stated pedagogical concerns." *Fleming*, 298 F.3d at 925. Though courts by and large defer to teachers' expertise in educating students, they will "override an educator's judg-

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ment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive.” Axson-Flynn, 356 F.3d at 1293.

In applying these rules of law to the scenario above, a court could reach different conclusions in Nellie’s lawsuit depending on the underlying facts. For instance, because the coloring assignment constitutes “school-sponsored speech,” the court would find for the school district if Ms. Youmust gave this assignment pursuant to a legitimate pedagogical concern, such as helping the children to learn their colors, to work within defined parameters, or to stay on task. Conversely, if Ms. Youmust directed Nellie to color Pistol Pete for an ulterior, non-educational purpose, such as to upset or embarrass Nellie because she knew the young student was a Sooner fan, then the court would come down on the student’s side.

Looking next at the OU shirt, since this type of speech falls within “student speech,” the court would find for

the school district if the teacher doled out her punishment for proper reasons. For instance, the court would support Ms. Youmust’s decision to give Nellie detention if she did so simply because Nellie violated the school’s dress code. On the other hand, the court would find against the school district if Ms. Youmust punished her student for this act of protest due simply to her personal hatred for that particular in-state rival.

As court opinions show, the basis of the school’s action or reaction to the student’s protected speech plays a pivotal role in these types of cases, and the outcome generally comes down to the types of protected speech involved and the underlying facts surrounding the case. Even though students cannot exercise their constitutional rights as extensively in school as they can outside, they nevertheless have some First Amendment protections that must be respected. Educators must, therefore, remain mindful of their students’ liberties and act in such a way that does not deprive them of those rights.

January 1, 2013 Deadline for Shifting to Narrowband Broadcasts over VHF/UHF Radio Channels is Fast Approaching

Many school districts and municipalities broadcast private mobile radio communications over channels in the 150-174 MHz and 421-512 MHz (VHF/UHF) range. Broadcasts over these frequencies are often used for communications with school bus drivers, by medical services organizations, and for a variety of emergency services. The Federal Communications Commission (FCC) issues licenses for radio channels broadcasting in these frequencies. Several years ago, in response to the increasing congestion in this spectrum, the FCC adopted rules to accommodate greater use of this spectrum and to minimize interference between broadcasts in adjacent frequency ranges. The FCC’s rules accomplish these goals by requiring that, with few exceptions, licensees operating in the VHF/UHF range will begin transmitting over narrower bandwidths.

In the past, school districts and municipalities that transmitted radio communications under licenses for channels operating in this range have generally used transmitters that broadcast over a 25.0 kHz bandwidth. Under the FCC’s new rules, licensees operating within the VHF/UHF range must either shift to transmitters utilizing a narrower 12.5 kHz

(narrowband) bandwidth or install newer and more efficient technology that minimizes the amount of data transmitted and thereby achieves the narrowband equivalent over a broader bandwidth. Ultimately, the FCC plans to implement rules that will require licensees to broadcast over channels with a still narrower 6.25 kHz bandwidth.

The FCC’s new rules go into effect on January 1, 2013. By that date, school districts, municipalities, and others that operate radio channels in the VHF/UHF range must have filed applications with the FCC for modification of their existing licenses to show compliance with the new narrowbanding requirements.

What are the potential consequences for failure to meet the deadline? Penalties of \$16,000 for each violation (or for each day of a continuing violation) and up to \$112,500 for a single act or failure to act may be imposed.

We hope that your technical staff, working with vendors, has already filed the necessary license modification applications with the FCC and installed new transmitters that comply with the narrowbanding rules. If it has not, you will want to contact your technical and legal advisers promptly.

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RFR News



Kelsey K. Bardwell

Rosenstein, Fist & Ringold is pleased to announce that Kelsey K. Bardwell has joined the firm as an associate attorney. Ms. Bardwell was raised in Arkansas and admitted to the Oklahoma Bar in 2012. She earned her bachelor of science in Marketing and Management from Evangel University, in Springfield, Missouri, graduating *summa cum laude*. She obtained her Masters of Business Administration from the University of Arkansas. After seven years of small business ownership, Kelsey attended law school at the University of Arkansas School of Law. While in law school, Kelsey was on the Dean's List, served as president of the Business Law Society, was elected to the Honor Council, and was awarded the Wilson and Associates Ethics Scholarship Award. Kelsey now lives with her husband and three children in Tulsa.

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

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