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“TINKERING” WITH STUDENT EXPRESSION: COURT OF APPEAL UPHOLDS RESTRICTION ON AMERICAN FLAG T-SHIRTS DURING CINCO DE MAYO EVENT IN LIGHT OF THREATS OF VIOLENCE

The United States Court of Appeals for the Ninth Circuit recently issued an opinion upholding the actions of California school administrators prohibiting some students from wearing t-shirts displaying the American flag, based on a reasonable forecast of campus violence and substantial disruption.¹ The Court applied the “*Tinker*” standard developed by the Unified States Supreme Court.² The case illustrates the difficulties inherent in attempting to balance students’ free speech rights with the need to maintain a safe and educational school environment.

BACKGROUND

Live Oak High School approved a Cinco de Mayo celebration in May of 2010. At the Cinco de Mayo event the prior year, an altercation between Caucasian and Hispanic students occurred after a group of Caucasian students who hung an American flag on a tree and clapped and chanted “USA” came in contact with Hispanic students carrying the Mexican flag. The school had experienced a history of violence, including at least 30 school fights observed by school administrators between gangs or between Caucasian and Hispanic students.

On the day of the 2010 event, a group of Caucasian students wore American flag shirts to school. That morning, three of them were confronted about their clothing by other students before lunch. A student made statements to the vice-principal which he took to mean that the wearing of the t-shirts might lead to a physical altercation. The principal directed the vice-principal to have the students turn their shirts inside out or take them off, which they refused to do. The vice-principal met with the students and explained his concern for their safety. They responded that they were “willing to take on that responsibility.”

¹ *Dariano v. Morgan Hill Unified School District* (9th Cir. 2014) 2014 U.S. App. LEXIS 3790

² In *Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503, the Court held a school district could not regulate student speech in the form of black arm bands worn to protest the Vietnam War absent evidence it was necessary to avoid material and substantial interference with school work or discipline.

Two students were permitted to return to class, because their “TapouT” shirts had a less prominent flag logo which the principal felt was less likely to cause them to be targeted. The other students were offered the choice of turning the shirts inside out or going home with an excused absence. They chose to go home, and neither was disciplined.

After leaving school, the two absent students received numerous threats from other students such that their parents kept them home from school on May 7. The students sued the District, principal and vice-principal alleging violations of their right to free expression, equal protection and due process. The lower court denied the students’ claims and they appealed.³

ANALYSIS OF THE CLAIMS

The Court looked at the events through the lens of the United States Supreme Court’s “*Tinker*” standard which holds that students may express their opinions even on controversial subjects if they do so without “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.” The Court stressed that the First Amendment does not require school officials to wait until disruption actually occurs before acting, noting that the level of disturbance required to justify intervention is lower in a public school than on a street corner.

The Court of Appeal held that while *Tinker* provided the standard for analyzing the case, the facts of the two cases were sufficiently different to justify a different result. At Live Oak High School, school officials learned of threats of physical violence toward the t-shirt wearers on the morning of the Cinco de Mayo event against a backdrop of “nascent and escalating” violence. The Court felt that the school’s actions “presciently avoided an altercation,” and that the restrictions on student expression were narrow and tailored to address the possible disruption and violence. The school did not ban all flag-related clothing, and allowed two students to return to class when it appeared their shirts were unlikely to cause disruption. The court highlighted the fact that the school restricted the wearing of the t-shirts, but did not punish the students. Under the circumstances, the Court felt that the District’s forecast of substantial violence or disruption at school was reasonable and the actions it took to protect student safety did not violate the constitutional rights of the students, even though no classes were actually delayed or disrupted that day and no incidents of violence occurred on campus.

CONCLUSION

The line between protecting student speech and ensuring student safety is not always a bright one. Courts are less apt to second-guess an administrator’s narrowly tailored restriction on speech in the face of a reasonable prediction that it may result in substantial disruption or material interference with school activities. This case demonstrates that a court may be more likely to uphold a district’s action to curtail student expression when:

- ▶ there is credible current evidence of threatened violence or substantial disruption;
- ▶ there is a history of violence or substantial disruption stemming from similar speech or issues;

³ The claims against the school district were not part of the appeal. The lower court held they were dismissed based on sovereign immunity. The claims against the principal were stayed by a bankruptcy court. Only the claims against the vice-principal were the subject of the appeal.

- ▶ the type of speech involved is not completely banned (restrictions should be as narrowly tailored to the circumstances as possible, unless protection of student safety or freedom from substantial disruption dictates otherwise);
- ▶ careful consideration of the circumstances has been given in deciding whether discipline is appropriate.

Whenever possible, legal counsel should be consulted in these situations.

If you have any questions concerning this or related issues, do not hesitate to contact our office.

— Grant Herndon

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