

Civil Rights Update

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Student Speech Can Be Restricted

On June 25, 2007, the United States Supreme Court decided whether a high school student's constitutional right of free speech had been violated when the principal confiscated the banner she viewed as promoting illegal drug use. *Morse v. Frederick*, 127 S. Ct. 2618 (2007). The case involved a student banner unfurled at a parade in Juneau, Alaska, on June 24, 2002. On that day, the Olympic Torch Relay passed through the city and in front of Juneau-Douglas High School (JDHS) while school was in session. The school allowed staff and students to participate in the Torch Relay as an approved social event or class trip. School administrative officials and teachers monitored the students' actions. *Morse*, 127 S. Ct. at 2622. Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends across the street from the school to watch the event. *Id.* As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS." The large banner was easily readable by the students on the other side of the street. *Id.*

Principal Morse immediately crossed the street and demanded the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse told Frederick to take the banner down because she thought it encouraged illegal drug use in violation of established school policy. *Id.* at 2622-23.

Frederick administratively appealed his suspension; however, the Juneau School District Superintendent upheld it, limiting it to time served (eight days). In a memorandum setting forth his reasons, the superintendent determined Frederick had displayed his banner "in the midst of his fellow students, during school hours, at a school-sanctioned activity." He further explained Frederick "was not disciplined because the principal***disagreed with his message, but because his speech appeared to advocate the use of illegal drugs." *Id.* at 2623.

The superintendent continued:

The common-sense understanding of the phrase "bong-hits" is that it is a reference to a means of smoking marijuana. Given [Frederick's] inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. [Frederick's] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use. *Id.*

The superintendent concluded the principal's actions were permissible. The Juneau School District Board of Education upheld the suspension. *Id.*

Frederick then filed suit under 42 U. S. C. §1983, alleging the school board and Morse had violated his First Amendment rights. The district court granted summary judgment for the school board and Morse, ruling they were entitled to qualified immunity and that they had not infringed Frederick's First Amendment rights. *Id.*

The Ninth Circuit reversed. The court found a violation of Frederick's First Amendment rights because the school punished Frederick without demonstrating his speech gave rise to a "risk of substantial disruption." *Frederick v. Morse*, 439 F.3d 1114, 1118, 1121-1123 (9th Cir. 2006). The court further concluded Frederick's right to display his banner was so "clearly established" a reasonable principal in Morse's position would have understood her actions were unconstitutional and Morse was therefore not entitled to qualified immunity. *Frederick*, 439 F.3d at 1123-1125.

The Supreme Court granted certiorari on two questions: 1) whether Frederick had a First Amendment right to wield his banner and, if so, 2) whether that right was so clearly established that the principal may be held liable for damages. *Morse*, 127 S. Ct. at 2624. The Court resolved the first question against Frederick and therefore had no occasion to reach the second. *Id.* at 2624.

Despite Frederick's claim that the "words were just nonsense meant to attract television cameras," the Court found the principal's interpretation of the message as promoting illegal drug use was reasonable. *Id.* The pro-drug interpretation of the banner gained further plausibility given the paucity of alternative meanings the banner might bear. *Id.* at 2625.

The question thus became whether a principal could, consistent with the First Amendment, restrict student speech at a school event, when that speech was reasonably viewed as promoting illegal drug use. The Court held she could. *Id.* In reaching its conclusion, the Supreme Court analyzed its student speech precedent. In *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969), the Court made clear that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." *Tinker* involved a group of high school students who decided to wear black armbands to protest the Vietnam War. School officials learned of the plan and then adopted a policy prohibiting students from wearing armbands. When several students nonetheless wore armbands to school, they were suspended. The students sued, claiming their First Amendment rights had been violated and the Court agreed. *Tinker*, 393 U.S. at 504. *Tinker* held that student expression may not be suppressed unless school officials reasonably conclude it will "materially and substantially disrupt the work and discipline of the school." *Id.* at 513.

As the Supreme Court later explained, the students in *Tinker* sought to engage in political speech which was "at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003). The only interest the Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." *Tinker*, 393 U.S. at 509-10. That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id.* at 508; *Morse*, 127 S. Ct. at 2626.

The Court's next student speech case was *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Matthew Fraser was suspended for delivering a speech before a high school assembly in which he employed what the Court called "an elaborate, graphic, and explicit sexual metaphor." *Fraser*, 478 U.S. at 678. The Court held that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech." *Id.* at 685; *Morse*, 127 S. Ct. at 2626.

Two principles from *Fraser* were utilized to decide *Morse*. First, *Fraser's* holding demonstrated "the constitutional rights of students in public school are not automatically coextensive with the rights

of adults in other settings.” *Fraser*, 478 U.S. at 682. Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. *Id.* at 682-683. In school, however, Fraser’s First Amendment rights were circumscribed “in light of the special characteristics of the school environment.” *Tinker*, 393 U.S. at 506; *Morse*, 127 S. Ct. at 2626-27. Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the “substantial disruption” analysis prescribed by *Tinker*. *Morse*, 127 S. Ct. at 2627.

Drawing on the principles applied in student speech cases, the Supreme Court has held in the Fourth Amendment context “while children assuredly do not ‘shed their constitutional rights***at the schoolhouse gate,’ ***the nature of those rights is what is appropriate for children in school. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655-656 (1995). In particular, “the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.” *New Jersey v. T. L. O.*, 469 U.S. 325, 340 (1985); *Morse*, 127 S. Ct. at 2627.

The Court also recognized that deterring drug use by schoolchildren is an “important-indeed, perhaps compelling” interest. *Vernonia*, 515 U.S. at 661. The Court concluded “student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.” *Morse*, 127 S. Ct. at 2628.

The “special circumstances of the school environment,” and the governmental interest in stopping student drug abuse allow schools to restrict student expression they reasonably regard as promoting illegal drug use. *Tinker*, 393 U.S. at 506, *Morse*, 127 S. Ct. at 2629. The *Morse* case demonstrates the Supreme Court’s continuing efforts to allow schools to balance their interest in exercising authority while accommodating a student’s constitutional rights.

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