



## Case Study: Student Assembly<sup>1</sup>

### **The Facts:**

Was the hanky panky that occurred on the playground at Iburguen Elementary School as innocent as handholding or as naughty as a secret kiss? No one was sure.

It was clear that something happened, however, and that was enough for sixth-grade teacher Kate Chaltain to lay down the law with her students last week: From now on, there would be no talking between boys and girls on the playground.

Iburguen Elementary's students were used to dealing with plenty of school rules every day: no running in the halls, no passing notes in class, no excessively short skirts or tight tops or baggy pants.

But a moratorium on speech between boys and girls? For some of the sixth-grade girls, that was one step too far. They decided they weren't going to keep quiet. First they tried a petition. Then they tried to talk to their principal. But both efforts didn't produce the response they were looking for.

So on the morning of March 13, a group of them stood just outside school grounds, silently hoisting protest signs bearing slogans like, "Speak to whomever, whenever," and "Freedom of Speech."

Drivers, slowing down to peer at the signs, honked in support or disagreement. The students also wrote a letter to the principal that read in part, "We do not want to get in trouble for speaking out on the issues, but we feel we should have answers and not be punished for something only a few of us are doing."

School officials were miffed that they hadn't been given prior notice about the gathering. "None of the parents came to me, or gave me an opportunity to follow

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<sup>1</sup> This case study is based on a news article that appeared on the First Amendment Center Online: <http://www.firstamendmentcenter.org/news.aspx?id=11409&SearchString=klamath>

up on it,” said Principal Dave Bowker. “Obviously, if you have a concern, we should see if we can correct the situation, not call the paper and have a protest.”

The night after the student protest, a special town meeting was called to resolve the conflict. Among the issues to be discussed: whether or not to lift the ban, what if any policy should be drafted to replace the ban, and whether or not to subject the students who protested the policy to disciplinary action.

**Key Legal Questions:**

1. What are the free expression rights of students in public schools under the First Amendment?
  
  
  
  
  
  
  
  
  
  
2. May schools limit the time, place, and manner of student expression?

**Other key issues to Consider:**

1. What is the students’ strongest argument?
  
  
  
  
  
  
  
  
  
  
2. What is the school administration’s strongest argument?
  
  
  
  
  
  
  
  
  
  
3. What (if anything) did the students do the right way?
  
  
  
  
  
  
  
  
  
  
4. What (if anything) should the students have done differently?

**How would you resolve the issues at the town meeting?**

## Answers to legal questions\*

1. The freedoms of speech, press, assembly, and petition are often collectively referred to as the freedom of expression, and the U.S. Supreme Court has developed a separate body of case law regarding the free expression rights of students. In defining the free expression rights of students in a public school, the Court has developed three tests from the following landmark cases.<sup>1</sup>

### **I. The *Tinker* Standard** (*Tinker v. Des Moines Independent School District*, 1969)

When 15-year-old John Tinker, his sister Mary Beth, 13, and Christopher Eckhardt, 16, wore black armbands to their Iowa public schools in December 1965 to protest the Vietnam conflict, they never imagined that their actions would lead to a landmark First Amendment decision. Nonetheless, their protests eventually culminated in the leading First Amendment free speech case for public school students.<sup>2</sup>

The case arose when a group of parents and students in Des Moines, Iowa, met at the Eckhardt home and decided to protest U.S. involvement in Vietnam. The group agreed that one way to protest would be to have the students wear black armbands to public schools.

School officials learned of this planned protest and quickly enacted a no- armband policy. The school then enforced its no-armband rule while allowing the wearing of other symbols, including the Iron Cross.

The students sued in federal court and lost before a federal trial court. The trial court sided with the school officials' argument that they had enacted the policy out of a reasonable fear that the wearing of the armbands would create disturbances at school.

The case eventually made its way to the U.S. Supreme Court, which overturned the previous decision and ruled in favor of the students. In oft-cited language, the Supreme Court wrote, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech and expression at the schoolhouse gate."<sup>3</sup>

Writing for the majority, Justice Abe Fortas noted that the school officials could point to no evidence that the wearing of armbands would disrupt the school environment. As a result, the Court ruled that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of

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\* The answers to these legal questions are taken from *The First Amendment in Schools* (ASCD, 2003). For more information, visit <http://shop.ascd.org/productdisplay.cfm?productid=103054>

expression."<sup>4</sup>

In this decision, the Supreme Court established what has become known as the *Tinker* standard, considered to be the high watermark of students' First Amendment rights. In its ruling, the Court wrote: "the record does not demonstrate any facts which might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."<sup>5</sup>

Simply put, this ruling means school officials may not silence student expression just because they dislike it. They must reasonably forecast, based on evidence and not on an "undifferentiated fear or apprehension of disturbance," that the student expression would lead to either (a) a substantial disruption of the school environment, or (b) an invasion of the rights of others.

The *Tinker* standard governed student expression for years until the Supreme Court decided two other cases in the 1980s. The first of those rulings came in 1986.

## **II. The *Fraser* Standard (*Bethel School District. No. 403 v. Fraser*, 1986)**

In the case of *Bethel v. Fraser*, the Supreme Court ruled that school officials could punish high school senior Matthew Fraser for giving a speech before the student assembly that contained lewd references.<sup>6</sup> In his speech, Fraser nominated classmate Jeff Kuhlman for a student government office. The speech contained numerous sexual references. In court, Fraser argued that a speech nominating another classmate for a student elective office was entitled to as much protection as the black armbands in *Tinker*. The high court disagreed, distinguishing his "vulgar" speech during a school-sponsored event from the pure "political" speech in the *Tinker* decision.

In its opinion, the court majority stated that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."<sup>7</sup> Instead, the high court set up a balancing test: "the freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior."<sup>8</sup>

The high court added: "Surely, it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."<sup>9</sup>

Despite the ruling in the case, courts are still divided in how they apply the *Fraser* standard. Some courts apply *Fraser* to all vulgar or lewd student speech even if the speech is student-initiated. Other courts only apply *Fraser* to vulgar

student speech that is in some way school sponsored.

The question is significant because school officials consider a large amount of student speech offensive or vulgar even if the expression also contains a political message. For example, what standard applies if a student wears a T-shirt with a vulgar, political message? One court confronted this issue when a junior high school student wore a T-shirt to class bearing the words "Drugs Suck!"<sup>10</sup>

The student argued that the shirt conveyed an important, "anti-drug message" and did not cause a disruption of the school environment. The school responded that the shirt was inappropriate for the school environment because the word *sucks* has a vulgar connotation.

The court, siding with the school based on a broad application of the *Fraser* standard, wrote:

Teachers and administrators must have the authority to do what they reasonably believe is in the best interest of their educational responsibilities, as we cannot abandon our schools to the whims or proclivities of children. The Court finds that . . . School Officials had an interest in protecting their young students from exposure to vulgar and offensive language.<sup>11</sup>

### **III. The *Hazelwood* Standard** (*Hazelwood School District v. Kuhlmeier*, 1988)

Many First Amendment experts believe that the Supreme Court went too far in limiting the *Tinker* standard by its ruling in *Bethel v. Fraser*. The Court went even further, however, in its 1988 opinion in *Hazelwood School District v. Kuhlmeier*. In *Hazelwood*, the Court ruled that students' First Amendment rights were not violated when a school principal censored two student articles on controversial topics -- pregnancy and divorce -- in the school newspaper, *The Spectrum*.

The principal had ordered the stories removed from the paper because he believed the story about teen pregnancy was inappropriate for some of the younger students at the school, based on its discussion of sexual activity and birth control. In addition, he decided to censor the divorce article because the writers did not afford the parent of one of the students mentioned in the article a chance to respond to certain comments.

Several staff members of the paper, however, challenged the principal's action in federal court, claiming a violation of their First Amendment rights. The district court sided with the school, finding that the principal's concerns were reasonable and legitimate.

However, a federal appeals court reversed, finding that under the *Tinker*

standard, the principal could not show a reasonable fear of disruption.

The case eventually reached the U.S. Supreme Court. The Court first discussed the First Amendment concept of a public forum -- places such as a public park or street where the government has less leeway to regulate speech than in others -- and asked whether the school officials had by policy or practice opened up a "public forum" or "forum for student expression" by allowing students to make content decisions.

The Court ruled that it had not, finding that school officials had always retained some control in the content decisions regarding the school paper, which was produced as part of the school curriculum -- a journalism class.

By this ruling, the Court created the Hazelwood standard, which states that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>12</sup>

The Court ruled that "a school must be able to set high standards for the student speech that is disseminated under its auspices -- standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real world.'" In addition, the ruling contains broad language on what type of speech school officials may censor, including any speech that might "associate the school with any position other than neutrality on matters of political controversy."

The Court then defined school-sponsored expression equally broadly, including "school-sponsored publications, theatrical productions, and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school . . . whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."

Since the ruling, courts have applied the Hazelwood standard not only to school-sponsored newspapers, but also to the selection of school band songs, school assignments, and even student campaign speeches.<sup>13</sup>

However, even if *Hazelwood* applies, it does not end the inquiry. A reviewing court must still review whether the school officials' actions were "reasonably related to a legitimate pedagogical interest."

In one decision, for example, a New Jersey appeals court determined that a

school principal acted unreasonably when he ordered the removal of two reviews of R-rated movies from a junior high school newspaper.<sup>14</sup> As the court wrote, "When censorship of a school-sponsored publication has no valid educational purpose, the First Amendment is directly implicated and requires judicial intervention."

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#### Notes

<sup>1</sup> This is different from the religious liberty tests, which are general rules applicable to society at large.

<sup>2</sup> Hudson, David, "On 30-Year Anniversary, Tinker Participants Look Back on Landmark Case." Available online at [firstamendmentcenter.org](http://firstamendmentcenter.org).

<sup>3</sup> *Tinker v. Des Moines Independent Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>4</sup> *Id.* at 508.

<sup>5</sup> *Id.* at 514.

<sup>6</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

<sup>7</sup> *Id.* at 683.

<sup>8</sup> *Id.* at 681.

<sup>9</sup> *Id.* at 683.

<sup>10</sup> *Broussard v. School Board of the City of Norfolk*, 801 F. Supp. 1526 (E.D. Virg. 1992).

<sup>11</sup> *Id.* at 1537.

<sup>12</sup> It is interesting to note that the *Hazelwood* standard closely approximates the standard from the 1987 prison case of *Turner v. Safley*, 482 U.S. 78 (1987), one year before *Hazelwood*. In that ruling, the U.S. Supreme Court established the following standard for prisoner constitutional rights: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."

<sup>13</sup> See *Henerey v. City of St. Charles Sch. Dist.*, 200 F.3d 1128 (8th Cir. 1999).

<sup>14</sup> *Desilets v. Clearview Bd. of Education*, 630 A.2d 333, (S. Ct. N.J. 1993), *aff'd*, 137 N.J. 585 (1994).

2. Yes, as long as the time, place, and manner regulations are reasonable and nondiscriminatory.

The U.S. Supreme Court has said that "laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether."<sup>1</sup> First Amendment jurisprudence provides that time, place, and manner restrictions on speech are constitutional if (1) they are content neutral (i.e., they do not treat speech differently based on content); (2) they are narrowly tailored to serve a governmental interest; and (3) they leave open ample alternative means of expression.

Courts will generally grant even more deference to time, place, and manner restrictions in public schools because students do not possess the same level of rights as adults in a public forum. However, the time, place, and manner regulations must still be reasonable. This means that school officials could limit student assemblies or student distributions of material to certain locations and at certain times, but those regulations would need to be both reasonable and nondiscriminatory.

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**Notes**

<sup>1</sup> *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).