PUBLIC SCHOOL STUDENT SPEECH RIGHTS IN THE U.S. SUPREME COURT[i]

There are ***four U.S. Supreme Court cases*** that deal with the First Amendment rights of public school students.

*** Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969):** high school students wore black armbands to school as symbols of protest against the Vietnam War. The principal, fearing disturbances, ordered the students to remove the armbands and suspended them when they refused. The Supreme Court overturned the suspensions. The Court ruled, by a 7-2 margin, that public schools cannot restrict student speech unless they can prove – not just speculate – that the speech is likely to "materially and substantially interfere" with school operations. In Tinker, some disturbances did occur, but there was "no evidence whatever of . . . interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." Justice Black, in dissent, warned that "after the Court's holding today, some students [will] be ready, able, and willing to defy their teachers on practically all orders."

LEGAL STANDARD: Will the speech in question "materially and substantially interfere" with the work or discipline of the school? It is unclear whether this standard applies only when the school's concerns are based on the content of the speech, or whether it also applies to "neutral" rules – say, dress codes – that limit speech indirectly.

* **Bethel Sch. Dist. No. 403 v. Fraser, 478 (U.S. 675 (1986):** Bethel carved out the first of three exceptions to Tinker. A high school student was suspended for delivering a sexually suggestive speech at a school election assembly. The Supreme Court, again by a 7-2 vote, upheld the suspension. The majority opinion declares that a school is entitled to teach its students "the boundaries of socially acceptable behavior," and accordingly may ban lewd, vulgar or profane student expression, occurring on school grounds or at school-sponsored events, without having to show a likelihood of disruption. Justice Marshall, one of the dissenters, believed that the Court should have applied the Tinker test, and that the student should have prevailed because school officials "had not demonstrated any disruption of the educational process."

LEGAL STANDARD: student speech lacks protection if it is "vulgar, "lewd," or "indecent," whether or not it disrupts school operations.

* **Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988):** a high school principal refused to allow the school's official student newspaper to publish controversial articles about pregnancy and divorce. The Supreme Court, 5-to-3, sided with the principal and found, as in Bethel that Tinker was not controlling. Specifically, it held that the Tinker test does not apply to "school-sponsored" student speech: speech, that is, which a reasonable reader or listener might impute to the school. The Court explained that school officials have the power to disassociate the school from such speech, by banning it, "so long as their actions are reasonably related to legitimate pedagogical concerns." As in Fraser, no showing of disruption is necessary. (Importantly,

the federal appeals court for this Circuit has held that this power does not extend to banning speech based merely upon objections to the speaker's viewpoint. Peck v. Baldwinsville Cent. School Dist., 426 F.3d 617 (2d Cir. 2005).) The dissenters regretted that the decision "denudes high school students of much of the First Amendment protection that Tinker itself prescribes."

LEGAL STANDARD: educators may, "in any reasonable manner," control the content of "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."

* **Morse v. Frederick, 127 S,Ct, 2618 (2007)**: A high school student was suspended for displaying a sign that read, "Bong Hits 4 Jesus." Though the display did not take place at the school, it did take place at a school-sponsored event: the student and his classmates had been released from school, during school time and under school supervision, to watch the Olympic Torch go by in the streets. In a 5-to-4 decision, the Court found the suspension constitutional. Extending Fraser, the opinion states that, just as a school can define its mission as including the teaching of socially acceptable behavior, it can also define its mission to include discouraging illegal drug use, because "deterring drug use, by children, is an important – indeed perhaps compelling interest." Speech that advocates illegal drug use (or can be reasonably perceived as doing so) undermines that mission. Therefore, the school can prohibit such speech even when the speech is not disruptive. Like Fraser, the decision appears to be limited to speech that occurs under school auspices.

Since the vote was so close, the concurring opinions – that is, the opinions of Justices who agreed with the outcome, but on different grounds – are even more significant than usual. Thus, Justices Alito and Kennedy joined the majority only on the understanding that the ruling "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue…." On the opposite extreme, Justice Thomas voted in the school's favor because he believed that the Tinker standard is "without basis in the Constitution" and that the First Amendment "does not afford students a right to free speech in public schools." The leading dissenting opinion insisted, in contrast, that in order for a school to ban student speech, "[t]he First Amendment demands more, indeed much more," than that the speech contained "an oblique reference to drugs."

LEGAL STANDARD: a school may prohibit or punish student speech, without proving that the speech is likely to cause disruption, if the speech can reasonably be perceived as advocating the use of illegal drugs.

i Summary of cases prepared by retired Quinnipiac Law Professor Martin Margulies for the Center for First Amendment Rights, Inc.