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# COURTSIDE

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## Tinker Redux

BY PERRY A. ZIRKEL

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In the summer of 2006, the Watson Chapel School District, about 40 minutes south of Little Rock, Arkansas, implemented a policy requiring students in grades 7-12 to wear a school uniform. This mandatory uniform policy applied not only in school but also on school buses and at school bus stops. The policy allowed students to wear jewelry, insignias, bandanas, or other adornments — including wristbands — only if they did not overlap with any part of the uniform. The policy also stated, “any attempt to defeat the uniformity intended by this policy is prohibited.”

On September 30, 2006, a group of students and parents that opposed the policy handed out black armbands to be worn on their organized day of protest — October 6.

On October 6, several junior and senior high school students wore the black armbands to and at school without covering any part of their uniforms; they wore them on the wrist, forearm, or biceps. Interpreting the students’ actions as an attempt to defeat the policy’s uniformity intent, school officials suspended them for one to three days, purportedly depending on their discipline history, for wearing the armbands. In their previous enforcement of the policy, school officials had not disciplined a student who had worn a white, stretchy rubber bracelet that said “Live Pure: 1 Timothy 4:12” and other students who had worn black rubber wristbands inscribed “Watson Chapel” at a high school pep rally.

Chris Lowry, one of the armband-wearing students, also distributed a flyer critical of the school uniform policy without seeking advance approval from the principal as required by the district’s literature review policy. As a result, he received two additional suspension days.

On October 10, Lowry and the other disciplined students filed suit in federal district court against the

district, administrators, and school board members, claiming the uniform policy, both on its face and as applied to them, violated their First Amendment freedom of expression. They initially sought a preliminary injunction against any future discipline and to expunge the suspensions from their records.

On February 22, 2007, the plaintiff students amended their complaint to add claims that the enforcement of the uniform policy violated Fourteenth Amendment procedural and substantive due process and also that the student literature policy, as applied to Lowry, violated the First Amendment.

On August 22, the district court partly granted the defendants’ motion for summary judgment, ruling that 1) the suspensions did not violate Fourteenth Amendment procedural due process, 2) the uniform policy on its face did not violate the First Amendment, and, in any event, 3) the school board members were covered by qualified immunity because any violation of either the school uniform policy or student literature policy was not clearly established in applicable case law. On the other hand, the court denied the motion with regard to the defendant principal and superintendent, concluding that there was a genuine issue of material fact as to whether they imposed the discipline to suppress a particular viewpoint.

When the trial began on September 11, the defendants stipulated (i.e., agreed factually) that 1) they imposed the discipline because the black armbands signified disagreement with the student uniform policy, and 2) wearing the armbands caused no material disruption at or material interference with the school. As a result, the judge held that the defendants had violated the First Amendment rights of the students, as established in the Supreme Court’s 1969 decision in *Tinker v. Des Moines Community Independent School District*, though they had not violated Fourteenth Amendment substantive due process. Thus, the only issue for the jury was whether the free speech violation caused money damages to the students. Covering the contingency of no compensable losses, the judge’s jury instructions included this directive: “If you find that the plaintiffs’ damages have no monetary value, then you must return a verdict for the plaintiffs in the nominal amount of \$1.” After jury deliberations and amended motions, the court awarded the plaintiff students \$1 in damages and made permanent the injunction against disciplining students for wearing armbands. The court declined to enjoin the literature review policy because it was no longer in effect. Finally, the court awarded the plaintiffs \$54,000 in attorneys’ fees and out-of-pocket expenses.

■ PERRY A. ZIRKEL is University Professor of Education and Law, Lehigh University, Bethlehem, Pa.

es, which was about two-thirds of their request based on the issues for which they prevailed.

On September 2, 2008, in response to the defendants' timely appeal, the Eighth Circuit affirmed the trial court's rulings with regard to the First Amendment armband issue and the attorneys' fees.<sup>1</sup> With regard to the armband issue, the appellate court found that "[t]he facts here nearly mirror *Tinker*." The defendants argued that the target of the armbands (i.e., the school uniform policy, rather than the national policy issue of the Vietnam war) and the timing of the district's policy made the case distinguishable from *Tinker*, but the appeals court concluded that these differences were of no consequence: "*Tinker* is so similar in all constitutionally relevant facts that its holding is dispositive." The court acknowledged that intervening Supreme Court decisions had established more relaxed school standards in certain circumstances but observed that this case was not within those circumstances.

Finally, the appellate court concluded that the trial court's award of attorneys' fees was not an abuse of discretion.

### Downsized *Tinker*

The lessons of this case are fairly obvious. First, *Tinker* still lives, albeit in a downsized dwelling. It is undeniable that the Supreme Court's decisions in the late 1980s concerning school-sponsored student expression<sup>2</sup> and recently concerning pro-drug student expression<sup>3</sup> narrowed the scope of the substantial-disruption standard in *Tinker*. Yet, it is almost eerie that the black armbands as a form of student protest reappeared just a year short of *Tinker*'s 30th anniversary as a reminder of the vitality of its somewhat restricted First Amendment protection.<sup>4</sup>

The lawyers on each side arguably are resistant to the scope of this lesson. ACLU attorney Holly Dickson interprets the case this way: "Student free speech rights are living rights, not simply rights to be taught in civics but disregarded in the hallways." In turn, attorney Mike Dennis, who represented the district defendants, advises: "Be extremely careful when the ACLU stages a protest."

In any event, the second lesson, reinforcing the corollary reminder of *Tinker*'s reduced scope, is that a content-neutral public school policy mandating student uniforms does not violate the First Amendment freedom of expression.<sup>5</sup>

The final lesson of the *Watson Chapel* case is that the application of the First Amendment, including *Tinker*, in relation to material or literature distribu-

tion policies, including but not limited to the feature of an advance administrative approval requirement, are relatively soft and unsettled.<sup>6</sup>

Nevertheless, although the outer boundaries are blurry with regard to *Tinker*'s current application, the central message of the case is, in the words of the immortal scholar Yogi Berra, "Déjà vu all over again."

1. *Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752 (8th Cir. 2008). I obtained supplementary information via e-mail interviews on September 22, 2008, with attorneys Holly Dickson and Michael Dennis, who represented the plaintiff students and the district defendants, respectively.

2. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (school newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (school assembly). For an overview of their effect, see Perry A. Zirkel, "Narrowing the Spectrum of Student Expression," *Phi Delta Kappan*, April 1988, pp. 608-10.

3. *Morse v. Frederick*, 127 S. Ct. 2618 (2007). For an overview, see, for example, Perry A. Zirkel, "Bong Hits?" *Phi Delta Kappan*, October 2007, pp. 158-59.

4. For another retrospective reminder of *Tinker*, see *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633 (D.N.J. 2007) (enjoined school censorship of elementary school students' buttons protesting district's mandatory uniform policy). The *Tinker* decision had borrowed its substantial disruption standard from a lower court's button-protest case.

5. See, for example, *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008); *Blau v. Fort Thomas Pub. Sch.*, 401 F.3d 381 (6th Cir. 2005); *Wilkins v. Penns Grove-Carneys Point Reg'l Sch. Dist.*, 123 Fed. Appx. 493 (3d Cir. 2005); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001); *Phoenix Elementary Sch. Dist. No. 1 v. Green*, 943 P.2d 836 (Ariz. Ct. App. 1997); cf. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001); *Long v. Bd. of Educ.*, 121 F. Supp. 2d 621 (W.D. Ky. 2000), *aff'd mem.*, 21 Fed. Appx. 252 (6th Cir. 2001) (gang-related).

6. Most of the case law concerns religious materials but is based on wider First Amendment grounds. See, for example, Perry A. Zirkel, "Distribution of Religious Literature: An Update," *Principal*, September-October 2007, pp. 12-15; *idem.*, "Student Distribution of Religions Material," *Principal*, September 1997, pp. 62-63. ■

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