Executive Summary
"Censorship of Student Expression: An Analysis of Student Expression Cases Reported to the Student Press Law Center"

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Purpose of the Study

In the landmark 1969 case *Tinker v. Des Moines Independent Community School District,* the U.S. Supreme Court affirmed that public school students are entitled to their First Amendment rights even on school grounds, with Justice Abe Fortas writing, "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court acknowledged that students' rights to free expression must be balanced against a school's need to maintain a safe environment, but ruled that the onus is on school officials to prove such expression poses a material or substantial disruption to the school environment.

More than 50 years later, *Tinker* still plays a vital role in protecting the First Amendment rights of students; however, the somewhat vague concept of "material or substantial disruption" has created confusion and disagreement amongst the courts. In subsequent cases *Bethel School District No. 403 v. Fraser, Hazelwood School District v. Kuhlmeier et al,* and *Deborah Morse, et al. v. Joseph Frederick,* the U.S. Supreme Court chipped away at students' rights by giving school officials greater power to restrict student expression in order to maintain a safe school environment. Together these cases, along with several lower court decisions, have created a mismatched set of guidelines for school officials to follow. This confusion often leads to the misapplication or even abuse of power on the part of the schools and, as a result, student expression in schools continues to be stifled.

While organizations like the Student Press Law Center (SPLC) fight to uphold First Amendment rights granted by the U.S. Constitution, the reality in the trenches is that school officials often get away with censoring far beyond the scope of *Tinker,* and the courts are helping them do so. This study looked at 106 cases related to press freedom and censorship published as News Flashes on the SPLC website between 2006 and 2008 in an attempt to determine what types of expression were most commonly censored in public schools and what the most common outcomes were. The ultimate purpose of the analysis was to categorize each case in one of two distinct categories of student expression: Truly Disruptive or Merely Upsetting.

Truly Disruptive or Merely Upsetting?

Creating two categories -- Truly Disruptive or harmful to the school environment or Merely Upsetting to school administrators – served to provide a holistic view of what topics are most commonly censored in public schools. The News Flashes published by the SPLC offer snapshots of censorship cases from around the country and offer students a look inside other schools' conflicts. While these individual cases are enlightening, the purpose of this study was to analyze a significant sample of cases to look for similarities that could elevate the information from interesting anecdotes to useful source material. When taken together, it could serve as the foundation for a set of suggested guidelines to help individual schools appropriately and effectively handle issues of student expression.

A set of attributes to classify cases as Truly Disruptive or Merely Upsetting was developed based largely upon recent court decisions and applied to each case in order to make these distinctions in a uniform manner. For the purposes of this study Truly Disruptive included:

- Expression that has caused or can easily be proven to cause a material or substantial disruption to the school environment,
- Expression that can be proven to cause a substantial disruption based on the context and manner in which the expression takes place,
- Expression that poses a serious threat to members of the school community. A serious threat is one that is perceived by a reasonable person to be more than simply a violent statement, one that is directed at a person or group of people, and that includes reference to a desire to take action,
- Expression that may result in harm to individual members of the school community, whether it is inflicted on someone else or is self-inflicted, and
- Expression that is libelous or slanderous, or that violates the privacy of an individual, particularly a minor.

Cases that are labeled as Truly Disruptive would not pass the *Tinker* test, the most stringent of the student expression standards.

Expression categorized as Merely Upsetting is anything that does not fall under the Truly Disruptive moniker. This includes:

- Expression that may be considered unflattering or embarrassing to school administrators or other decision-makers,
- Expression that may be considered by school administrators to be controversial or inappropriate, and
- Expression that is considered violent but not threatening.

Results

Truly Disruptive

Of the 106 cases of censorship included in this study, 26 met the Truly Disruptive standard. Of these 26 cases, 13 were decided in court.

Table 1 Nature of censorship of cases classified as Truly Disruptive, with case outcome

Nature of Censorship	Number of Cases Decided for Student	Number of Cases Decided for School
Apparel	0	4
Flyers/posters/other speech	0	3
Off-campus cyberspeech	0	3
Other writing/not student publication	1	4
Student publication	1	7
Underground paper	1	2

Although the SPLC's main charter is to provide legal advice for student journalists, only eight of the cases meeting the Truly Disruptive standard involved students writing for publication. Topics most frequently censored in the student publications subgroup included sex, discrimination and immigration issues, and drugs. Religious viewpoints on topics like homosexuality and abortion and other religious speech appeared four times (see Table 2). While none of these topics by themselves are enough to restrict expression, each one of the cases had special circumstances that, when weighed together, warranted the Truly Disruptive label. The actual outcomes of the cases were not factored into the coding of cases as Truly Disruptive or Merely Upsetting; however, it should be noted that only one of these cases came back from the judge in favor of the student, and only two of those settled by the school favored the student.

Table 2 Type of content classified as Truly Disruptive, with case outcome

Type of Content Censored	Number of Cases Decided for Student	Number of Cases Decided for School
Political speech	0	1
Religious expression	0	2
Abortion leaflets	0	1
Homosexuality	0	1
Immigration/discrimination	1	4
Sex	0	5
Drugs	0	3
Violent expression	1	8
Content critical of teacher or faculty	0	2
Underground paper	1	0

*Note: N=30, some cases concerned more than one type of content.

Merely Upsetting

Seventy-five percent of the cases reviewed did not meet the Truly Disruptive standard. Of the 80 cases found to be Merely Upsetting, just over half (41) were settled in favor of the students.

Censorship of Student Publications

The most common type of censorship during the 2006-2008 time period was censorship of student publications; fifty-four cases of censorship existed between three designated subcategories (see Table 3). Cases of censorship involving student publications were more likely to be settled in favor of the school, and by a decent margin: 38 of 54 total cases favored the school or censor, while 16 favored the students. Censorship cases involving student publications were resolved within the school or school district, with only one exception. While articles that were censored under prior

review were as likely to end up being printed as they were not to be printed, articles or publications that were censored post-production resulted in sanctions that limited student expression nearly twice as often as outcomes that favored student expression. Topics that could be considered controversial for an adolescent audience were most commonly censored post-production. Content that faced censorship post-production or that resulted in an attempt to change the student publication policy was predominantly related to sex.

Table 3 Most common types of censorship across all cases, with case outcome

Nature of Censorship	Number of Merely Upsetting Cases Decided for Student	Number of Truly Disruptive Cases Decided for Student	Number of Merely Upsetting Cases Decided for School	Number of Truly Disruptive Cases Decided for School	Number of Cases Brought to Court
Apparel	8	0	5	4	9
Student Publications (a): Article censored pre-production	5	0	7	0	0
Student Publications (b): Publication censored post-production	3	1	11	4	0
Student Publications (c): Change in student publication policy following controversial article	7	0	13	3	1
Other writing/Not student publication	0	1	0	4	3
Flyers/posters/other speech	3	0	5	3	6
Off-campus cyberspeech	5	0	5	3	8
Underground publication	0	1	0	2	1
Artwork	2	0	0	0	2
Petition	1	1	0	0	2

Across all types of censorship, expression related to school policies or personnel, and those dealing with teenage sexuality were most commonly censored (see Table 4). Violent or threatening speech was next, with 18 cases; racial issues including immigration and homosexuality had 10 cases, respectively. The topic of teen drug use was censored six times and religious expression was censored eight times.

Table 4 Topics Most Commonly Censored

Subject of Censored Content	Number of Truly Disruptive Cases	Number of Merely Upsetting Cases
Abortion	1	1
Age-inappropriate language/images	0	2
Critical of faculty/school	3	19
Drugs/alcohol	1	5
Homosexuality	1	9
Racial issues/discrimination	5	5
Religious expression	2	6
Political speech	1	7
Teen pregnancy	0	2
Teen sexuality	4	16
Violent expression	10	8

* Note: N=108, some cases involve more than one type of expression

Of the 106 cases analyzed between 2006 and 2008, 32 were decided by the courts, with 15 decided in favor of the student, and 17 in favor of the school. Of the remaining 74 cases, 11 were settled through legal intermediaries. Of note is that of these 11 cases, only one was settled entirely in the school's favor, with the remaining 10 ending solely in favor of the students or in a compromise benefitting both the students and the school. The final 63 cases were decided by the school or school districts themselves and indicate a

higher level of administrative control, with 13 cases ending in favor of students and 50 ending in favor of the schools.

Within specific types of content, no clear pattern exists to indicate consistency between court decisions and those of school officials. Clearer patterns emerge in relation to the cases' classification as Truly Disruptive or Merely Upsetting. The courts and school officials both decided cases coded as Truly Disruptive almost exclusively in favor of the schools. But cases coded as Merely Upsetting received vastly different treatment from the courts and school officials. Seventy-four percent of the Merely Upsetting cases decided by the courts favored the students, while 82 percent of the Merely Upsetting cases decided by school officials favored the schools.

Discussion

Results indicate the majority of decisions made by school administrators fall into the Merely Upsetting category. Based on these results, when school administrators must decide between maintaining an orderly and controversy-free educational environment and honoring students' free expression rights, they are more apt to choose the former. Administrators' actions often showed a misinterpretation or complete disregard for the rights granted to students by the Court, all in the name of avoiding conflict that may or may not occur. What is worse is that, when left unchecked, school administrators are largely getting away with stifling student expression for whatever reason they deem appropriate. Of the 63 cases settled by the schools themselves, 50 of them ended in a resolution that favored the school.

While the U.S. Supreme Court decisions subsequent to *Tinker* did place some limitations on specific types of student expression, these limitations were not meant to replace *Tinker*'s substantial disruption standard, but rather they affirmed school officials' authority to restrict student expression under specific circumstances.[1] Unfortunately, those limiting factors are repeatedly being misapplied to content that is little more than an annoyance, inconvenience, or embarrassment to school administrators. This is clearly illustrated in the findings, as the largest category of content censored is content that is critical of the school or faculty.

After expression critical to school or faculty, material that was believed to be too controversial for students, including issues such as teenage sexuality and drug use, and viewpoints that administrators thought infringed upon the rights of others, such as messages for and against homosexuality and that are religious in nature, earned the next highest counts. In the spirit of political correctness, it seems school administrators are overly sensitive to expression that may have an adverse effect on even one student.[2] It should be noted that, while the topics of sex or drugs are never going to be taken lightly by school administrators, many of the cases that dealt with these subjects did so in an ostentatious manner. One cannot suggest that school administrators are the only adults who believe articles discussing anal sex and the use of sex toys or that quote minors

[1] Specific circumstances include the lewd and vulgar expression at issue in Bethel School District No. 403 et al. v. Fraser, A Minor, et al., expression in school-sponsored publications, as in Hazelwood School District et al. v. Kuhlmeier et al., and expression advocating illegal drug use in Deborah Morse, et al. v. Joseph Frederick.

[2] "The growing sensitivity to political correctness has led some school districts to overreact to students bearing political symbols of any kind," [Sheldon E.] Steinbach [senior attorney in the education practice at the District law firm of Dow Lohnes] said. Andrea Billups, Schools' Censorship Growing, Says Group; Poor Civic Education Blamed," *The Washington Times* (September 19, 2007).

discussing their oral sex practices[3] are outside the purview of appropriate high school subject matter. Parents, religious leaders, and other community members are likely to take issue with that sort of adult subject matter, and while they have no jurisdiction to restrict student expression, their influence can carry great weight with both the schools and the students themselves. That extent of that influence—or the magnitude of the fear of antagonizing someone with such influence—is apparent in the fact that censorship of student publications post-production and changes to student publication policies following a controversial article were the two types of censorship that occurred most frequently in the analysis.

Although school publications were the target of much more censorship than other types of expression during the 2006-2008 time frame, they were also the cases least likely to end up in court. One possible explanation for this is that the *Hazelwood* standard for school-sponsored publications has been so consistently applied in favor of the schools that publications advisers and students do not believe they can win a challenge in the courtroom. The one case that was decided in court concluded in favor of the student. Incidentally, this case was heard in California, one of seven states with a student expression law on the books. These "anti-*Hazelwood* laws" have been established to minimize the impact the decision has on the student press.

Another reason students do not often pursue legal action in cases involving student publications may be that students and their legal advisers are choosing to "pick their battles" when it comes to prior review and censorship, unwilling to risk the future of their publication as a whole or concerned about the personal repercussions of a First

[3] See, e.g., Appendix B, No. 61, "Sex Edition Causes Newspaper to be Held from Distribution at Middle School," and No. 6 "Wash. School District Approves New Policy Allowing Prior Review of Student Publications."

Amendment battle.[4] Cases analyzed in this study include several examples of publications that were shuttered and teachers who were removed from their positions or lost their jobs as a result of controversial or unpopular content in student publications. Not everyone who faces censorship is prepared to take such great risks, so students and advisers often avoid issues they believe will cause trouble. Such acts of self-preservation, however, perpetuate self-censorship and restraint, causing students to miss out on invaluable lessons on the power of free expression.

The increased deference to school administrators from *Tinker* through *Morse* is most prevalent in curricular or school-sponsored activities, especially the school publications. Schools feel pressure from their communities to adhere to commonly held values, and this pressure has manifested itself in greater control of student expression that can be viewed as bearing the imprimatur of the school. Based on the results of this study, the desire to protect the image of the school and of its employees is a more compelling interest than having a free press. The cases included in the study collectively describe a relationship between administrators and student journalists that is tenuous, one that operates on cautious understanding until some content ruffles the feathers of a school stakeholder. Not surprisingly, this is most obvious in cases involving expression that is critical of the school or certain faculty members. In several of the cases reported to the Student Press Law Center (SPLC), administrators could be described as defensive, as though the offending expression was an affront to the image of the school, an idea that was regularly shown to prompt a change in the student publications policy. Rather than engaging students in a discussion about the rights and responsibilities of a free press, a

[4] Thomas V. Dickson, "Self-Censorship and Freedom of the Public High School Press," *Journalism Educator* (October 1, 1994):61. In a survey of 323 student newspaper editors, Dickson found 51% answered they would get into trouble if they wanted to publish an article on a controversial topic.

discussion that emphasizes the educational impact of the situation, administrators in these instances have instead effectively silenced the voices of dissent, the unpopular opinions, and the topics that most impact students' lives. In doing so, they are also eliminating much of the pedagogical purpose for a student press, a move that would seem contrary to the school's mission. Even more disappointing is that administrators are, in most cases, willfully denigrating the significance of their own schools' publications for content that is Merely Upsetting.

The repercussions of administrators overstepping the authority granted them are varied; examples in this study run the gamut from administrators issuing a written apology to the school community for their decision to censor student speech, to the story playing out in public after the local media learns of the situation. In the most extreme cases, school districts have been forced to settle with students whose rights were infringed upon, sometimes for significant sums of money.

Individual court decisions included in this analysis do not by themselves provide step-by-step instructions for administrators who are dealing with student expression issues. However, some interesting conclusions can be drawn from looking at the decisions collectively. Of the 13 court cases that were coded as Truly Disruptive, 12 were decided in favor of the schools. In these cases, the courts deferred to school administrators by acknowledging that they were most qualified to make decisions when a substantial disruption occurred in their own school environment. The 19 cases decided by the courts that were coded as Merely Upsetting, however, tell a very different story. Fourteen of these cases were decided in favor of the students. The high percentage of student victories demonstrates that in cases dealing with expression that has not risen to

the level of a substantial disruption, the courts are quite willing to put school administrators back in their proper place and reassert students' First Amendment rights. It seems that administrators have grown comfortable with the idea that the courts will defer to them in matters that are Truly Disruptive to a school environment, and this analysis suggests they are correct in this assumption. However, administrators would do well to think twice before engaging in a legal conflict over speech that is Merely Upsetting in nature, as this is likely to be a losing battle. Because Merely Upsetting cases would not meet the *Tinker* standard, the courts turn to precedent set by the U.S. Supreme Court in *Fraser*, *Hazelwood*, and *Morse.* But results indicate that these narrow decisions do not directly apply to most censorship scenarios, and that when put to the test against content that is Merely Upsetting to school administrators, the scales tip in favor of students' rights. That 10 of the 11 cases settled by legal intermediaries were settled either entirely in favor of the students or in a compromise between the students and the school should be seen as a red flag to school officials. Rash decisions made primarily with the schools' ability to operate smoothly and without interruption often lead to lengthy and expensive legal proceedings, which are typically more disruptive than the censored expression in question. Students who are educated on their rights know that knee-jerk reactions to student expression often amount to censorship of protected speech. When they challenge those decisions, they have a high degree of success. So while the courts repeatedly give deference to school administrators to police student expression, the schools themselves are finding the fallout from instances of censorship on their campuses is not often worth the disruption.