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N.J. v. Sonnabend: A First Amendment Face-Off at the District Court Level

On June 15, 2022, the Seventh Circuit issued its decision in *N.J. v. Sonnabend*, holding that schools must apply the test from *Tinker v. Des Moines* prior to restricting students from wearing clothing depicting firearms. Through this decision, the *Sonnabend* Court has resolved conflicting decisions within the Eastern District of Wisconsin.

In addition to reversing the lower court's holding, the *N.J. v. Sonnabend* decision overruled *Muller v. Jefferson Lighthouse School*, longstanding Seventh Circuit precedent from 1996 involving a fourth-grade student who was not allowed to distribute religious fliers at school. The Court in *Sonnabend* concluded that the *Tinker* standard must be used not only when assessing gun imagery-related student speech restrictions, but also when examining limitations on students' right to express religious speech at school.

PRIOR EASTERN DISTRICT CASE LAW:

Gun violence and free speech have been hot-button issues in U.S. school districts for the past few years, and the district-level split that *Sonnabend* resolved stemmed from a disagreement over the correct legal standard to apply in free speech cases involving gun imagery.

Schoenecker v. Koopman

The 2018 case before Judge Adelman concerned Matthew Schoenecker, a freshman who had worn two different T-shirts depicting weapons to Markesan Public High School. When the school's principal precluded him from continuing to wear the shirts, Schoenecker sued, alleging that this prohibition violated his First Amendment right to free speech. The Eastern District agreed with Schoenecker, applying the test articulated in *Tinker v. Des Moines Independent Community School District* in finding the principal was unable to show that the shirts would likely cause a material and substantial disruption. Because the principal presented insufficient evidence to suggest that the challenged clothing contributed to students' anxiety, Judge Adelman ordered him to allow its appearance at school.

N.J. v. Sonnabend

In May of 2021, the consolidated case before Judge Griesbach presented similar facts: N.J. and A.L. sought to enjoin their principals from enforcing dress code prohibitions on clothing depicting firearms. The plaintiffs, students of Shattuck Middle School in Neenah and Kettle Moraine High School, respectively, challenged their schools' policies on First Amendment grounds. They argued that the "no gun" provisions were unconstitutional because the provisions could not satisfy *Tinker*'s substantial disruption test.

However, Judge Griesbach found the Tinker standard was inapplicable to the facts at issue. Rather, the Judge applied *Muller v. Jefferson Lighthouse School* to differentiate and distinguish Tinker's narrow holding. Judge Griesbach concluded that the substantial disruption test is not applicable to viewpoint-neutral restrictions on student speech in non-public fora, but that the test under those circumstances is whether the restriction on student expression is reasonably related to legitimate pedagogical concerns. Judge Griesbach asserted that this outcome did not conflict with other binding Seventh Circuit precedent in *Nuxoll v. Indian Prairie School District #204* and *Zamecnik v. Indian Prairie School District #204* because the facts in those cases concerned viewpoint-based restrictions. As such, the defendants in *Nuxoll* and *Zamecnik* bore a heavier evidentiary burden than the defendant principals in *Sonnabend*.

Given the prevalence of school violence, ensuing anxiety among students and staff, and expert testimony regarding the "weapons effect" in schools, Judge Griesbach ultimately sided with the defendant principals. He deemed the promotion of a safe and effective learning environment a legitimate pedagogical concern and the use of dress code restrictions an appropriate means to that end.

SEVENTH CIRCUIT RESOLUTION

The Seventh Circuit ultimately adopted the reasoning of *Schoenecker v. Koopman*, holding that *Tinker* articulates the correct standard to apply and concluding that the speech-forum analysis was inapplicable to the facts in *Sonnabend*. In so doing, the Court confirmed that restrictions on student speech are constitutionally permissible only:

If school officials reasonably forecast that such speech would materially and substantially disrupt the work and discipline of the school or invade the rights of others; or

Such speech falls into one of the three categories of speech that schools may regulate, regardless of whether the circumstances satisfy *Tinker*'s substantial disruption standard:

Indecent, vulgar, and lewd student speech, pursuant to *Bethel Sch. Dist. No. 403 v. Fraser*;

Student speech that can reasonably be regarded as encouraging illegal drug use, pursuant to *Morse v. Frederick*; and

Student expression that others might reasonably perceive to bear the imprimatur of the school, pursuant to *Hazelwood Sch. Dist. v. Kuhlmeier*.

Additionally, because it "mistakenly applied *Kuhlmeier* and speech-forum analysis," the Seventh Circuit overruled *Muller v. Jefferson Lighthouse School*, thereby indicating that school officials must also apply *Tinker* when assessing student religious expression that does not fall into one of the three aforementioned categories. As the *Sonnabend* Court emphasized, the standard for determining when a school may restrict student expression that occurs on school premises differs from the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. The forum analysis, as articulated within *Kuhlmeier*, applies only in the latter situation.

KEY TAKEAWAYS

Schools should decide whether and how to regulate student speech cautiously and on a case-by-case basis.

Schools should review current dress code and behavioral policies for potential pitfalls.

Schools must satisfy the substantial disruption standard to restrict student speech that does not fall into one of the three aforementioned categories. While it is not necessary to wait for a substantial disruption to actually occur, schools must be able to articulate a reasonable basis for forecasting a substantial disruption.

Schools should tread carefully when attempting to limit student religious expression.

If you need assistance reviewing dress code policies or responding to individual student situations, or if you have questions about this legal update, please contact Mary Gerbig at mgerbig@buelowvetter.com; Corinne Duffy at cduffy@buelowvetter.com; Alana Leffler at aleffler@buelowvetter.com; or your Buelow Vetter attorney.