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Beyond the Schoolhouse Gate: Do Student First Amendment Rights Apply to Classroom Assignments?

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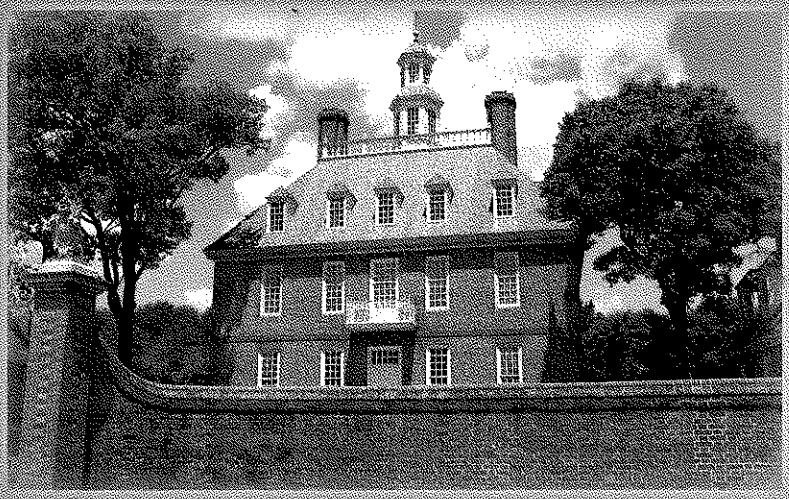

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Beyond the Schoolhouse Gate: Do Student First Amendment Rights Apply to Classroom Assignments?*

by
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While it has long been apparent that the First Amendment protection for freedom of expression limits the discretion of public school teachers and administrators,[1] it has been assumed that those limitations do not constrain equally all aspects of a school's operation. One area that has seemed somewhat immune from First Amendment free speech oversight has been the pedagogic choices made by schools in defining their own educational objectives. Public schools have been permitted to select curricular materials for use in their classrooms[2] and have been able to evaluate whether students have fulfilled course requirements[3] without concern that they may be violating the free speech rights of their students.[4]

One example of this hands-off attitude is found in *Settle v. Dickson County School Board*.[5] In that case, a ninth grade teacher refused to allow a student to write about Jesus Christ for a required research paper. The student brought suit claiming that the teacher's decision violated her free speech rights. The Court of Appeals for the Sixth Circuit dismissed the case after distinguishing the classroom context from articles written for a student newspaper:

> Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum. So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.[6]

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[1] *See, e.g., Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

[2] *See, e.g., Virgil v. Sch. Bd. of Columbia County*, 862 F.2d 1517, 1520 (11th Cir. 1989) ("In matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity.").

[3] *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir.), *cert. denied*, 516 U.S. 989 (1995).

[4] These same limits do not apply to the First Amendment's Establishment Clause since the Establishment Clause directly impacts on the relationship that government may have with religion and applies to all governmental activities. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act); *Epperson v. Arkansas*, 393 U.S. 97 (1986) (invalidating statute forbidding teaching of evolution).

[5] 53 F.3d 152 (6th Cir.), *cert. denied*, 516 U.S. 989 (1995).

[6] *Id.* at 155.

After reviewing the reasons given by the teacher for rejecting the paper topic, the Sixth Circuit gave broad latitude to the teacher, even allowing the teacher to make mistakes in assessing the suitability of the paper topic.[7]

Several recent cases, however, make it clear that there is no longer any blanket immunity from judicial oversight of the ways in which school assignments are defined and evaluated by classroom teachers. Despite these cases, we are a long way from the prospect of federal judges routinely reviewing student homework assignments to make sure that a student's right to freedom of expression was not violated in the design of the assignment or the way in which a teacher assessed the student's work. Nevertheless, schools should be aware that in certain circumstances educational judgments will be subject to judicial scrutiny to make sure that student free speech rights are not impermissibly infringed.

One example of this phenomenon is found in the case of *Peck v. Baldwinsville Central School District*.[8] The *Peck* case arose out of a dispute between the parents of Antonio Peck, a kindergarten student, and the public elementary school he attended over the way in which the school evaluated several posters he created as part of a study of the environment. While not objecting to the rejection of his first poster, his parents complained that the school impermissibly treated a second religiously-themed poster submitted by Antonio. The Pecks brought suit claiming that the school violated both the First Amendment's Establishment Clause as well as its free speech guarantee by objecting to Antonio's poster.[9] While the Establishment Clause claim was dismissed,[10] the United States Court of Appeals for the Second Circuit refused to dismiss the free speech claim and instead remanded the case to the district court for further proceedings.[11]

In order to resolve the dispute in *Peck*, the court examined in detail the content of the unit on the environment taught to the kindergarten class and the requirements of the poster assignment. The teacher's decision to reject Antonio's initial poster was unobjectionable because it was clear that his poster did not fulfill the requirements of the assignment which included that students create a poster to show ways to save the environment based on what the students had learned in school. Since his first poster displayed a figure of Jesus and the message that only God can save the world, rather than the techniques of conservation of natural resources that the students had learned about, the school was justified in finding it unacceptable.

By contrast, the court concluded that questions remained about a second poster Antonio created to replace the first one. In this second poster, while still displaying a robed figure depicting Jesus and a church, he also included "people picking up trash and

[7] *Id.* at 155-56.

[8] 326 F.3d 617 (2d Cir. 2005), *cert. denied*, 126 Sup. Ct. 1880 (2006).

[9] *Id.* at 620.

[10] *Id.* at 635.

[11] *Id.* at 630-31.

placing it in a recycling can" as well as other nonreligious images.[12] Antonio's teacher permitted him to show this second poster to his class and explain its content, which he did without any description of the religious content of the poster. However, when the student posters were hung in the school cafeteria as part of an environmental assembly, on the instructions of the school principal, Antonio's poster was folded in half so only some of its religious content was visible.[13] The Second Circuit's partial overturning of the district court, which had dismissed the case in its entirety, was based on this partial censorship of Antonio's poster when it was displayed in the cafeteria.

In assessing the treatment of the second poster, the court found applicable the test in *Hazelwood School District v. Kuhlmeier*,[14] which focused on whether the school's actions were "reasonably related to legitimate pedagogical concerns."[15] Even though the court cited to a series of cases[16] to support the view that student speech rights were significantly constrained "within a classroom setting as part of a school's curriculum,"[17] the court concluded that speech in this context was still subject to review under the *Kuhlmeier* standard.[18] Moreover, the court took the view that the legitimate pedagogical concerns relied on by the school district were required to be viewpoint neutral.[19] The case was remanded to the district court for further consideration of this issue.

Another recent example of judicial review of student speech that fulfills a classroom assignment is found in *Curry v. School District of the City of Saginaw*.[20] In that case, fifth grade students participated in an interdisciplinary academic activity called "Classroom City." The assignment required students to design, produce, market, and sell a product to the entire student body during the three days of Classroom City.[21] Before products were approved for sale, students created a prototype of their product and did a market survey to

[12] *Id.* at 622.

[13] *Id.* at 623.

[14] 484 U.S. 260 (1984).

[15] *Id.* at 273.

[16] 426 F.2d at 629 (citing *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004); and *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1996)).

[17] *Id.* (quoting *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) (quoting *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 924 (10th Cir. 2002))).

[18] *Id.*

[19] *Id.* at 633. A split among the federal circuits exists on the issue of whether the "legitimate pedagogical concerns" referred to in *Kuhlmeier* are required to be viewpoint neutral. *Compare Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926-28 (10th Cir. 2002) (legitimate pedagogical concerns may be based on viewpoint); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) (same); *with Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (legitimate pedagogical concerns may not be based on viewpoint); *Searcey v. Harris*, 888 F.2d 1314, 1319 n. 7 (11th Cir. 1989) (same). In *Peck*, the Second Circuit agreed with the Ninth and Eleventh Circuits on this issue.

[20] 452 F. Supp. 2d 723 (E.D. Mich. 2006).

[21] *Id.* at 727.

gauge potential interest among the student body. Students were given fake money to pay for their production costs, including the cost of obtaining a business license.

To fulfill the assignment, Joel Curry made candy canes out of pipe cleaners and beads. He then attached a card to each candy cane describing the religious origin of the candy cane. However, the card was not attached to the candy cane for the marketing survey, but was only added later.[22] When the teacher in charge of the Classroom City event learned about the religious content of the card, she examined Joel's business license to make sure that it accurately described his product, which it did. To give the teacher time to confer with the principal about the religious content of Joel's product, Joel agreed to sell the product without the attached card for the remainder of the day. After consultation with the principal and assistant school superintendent, it was decided that the ornament could not be sold with the attached card.[23]

In a suit filed claiming that the school district violated Joel's First Amendment rights, the United States District Court for the Eastern District of Michigan concluded that the constitutional claim was valid on its merits. To reach this conclusion, the court closely examined the three explanations that the school provided for excluding the card: learning the lessons the Classroom City project was designed to teach, avoiding the risk of disruption, and making sure the religious views of the student were not attributed to the school.[24]

To consider the validity of these justifications under the *Kuhlmeier* standard, the court first examined the skills that the Classroom City exercise was designed to teach, including "economics, marketing, civics, and entrepreneurialism," and found that the candy canes with the attached religious message met those objectives.[25] Moreover, the court reviewed the guidelines that the students were required to satisfy in the choice of a product, and concluded that Joel Curry had not violated any of the project requirements.[26] In light of these conclusions, the court rejected the school's first justification. It also concluded there was no evidence of a threat of disruption[27] or danger that the student's views would be attributed to the school.[28] Because none of the school's justifications were found to be valid, the court concluded that Joel Curry's free speech rights were violated.

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[22] *Id.* at 728.

[23] *Id.* at 729-30.

[24] *Id.* at 735.

[25] *Id.* at 736.

[26] *Id.* ("The school made the choice not to limit the products that students could make outside of a few established guidelines. The exercise and its objectives did not preclude incorporating religion. There is no evidence that a child's use of a religious product would prevent other students from learning what the assignment was designed to teach. The concern that the religious message on Joel's product would interfere with the pedagogical exercise is not a legitimate basis on which to restrict his speech.").

[27] *Id.* at 736-37.

[28] *Id.* at 740.

The court's decision in favor of the free speech claim on its merits did not, however, lead to a decision in the plaintiffs' favor. The court found that the plaintiffs were not entitled to any of the remedies that they sought. The request for injunctive relief was moot because Joel no longer attended the same school.[29] In addition, the court concluded that the plaintiffs had not established that the school district itself was liable.[30] Furthermore, a claim for damages against the school principal was barred by the doctrine of qualified immunity.[31] Despite this remedial outcome, the conclusion on the merits of the First Amendment issue should not be ignored.

In assessing the significance of recent cases such as *Peck* and *Curry*, one limiting factor that can be relied on to reduce their importance is the fact that the classroom speech in both instances was placed on display in the school building. The posters in *Peck* were put on view in the school cafeteria and the Classroom City exercise in *Curry* was held in the school's gymnasium. However, neither court limited its rationale to a situation where an academic exercise was displayed for others to see. Moreover, even if the First Amendment requires that for speech to be protected it must reach an audience beyond a single teacher, this could be satisfied if students read required essays to their classmates within the classroom setting or exchange essays with classmates as part of a peer editing exercise.

Despite the possibility of interpreting *Peck* and *Curry* in a limited manner, the cases nevertheless raise issues about the possibility of First Amendment review of school assignments that schools will ignore at their peril.

[29] *Id.* at 743.

[30] *Id.* at 731-33.

[31] *Id.* at 742-43.