Bayonne School District v. DePinto, 2016

Defendant Attorney Essay — a Modernist View

Michael DePinto, a fifth grader from the Bayonne School District, and his friend were accused of offensive behavior with a button they wore to protest the uniform policy. They wore a button that said, "No School Uniforms" over an image of Hitler Youth, a silent protest that exercised his freedom to speech. Therefore, Depinto filed a lawsuit against Bayonne School District, which they won; the school filed an appeal, which they lost; and they filed another appeal, which is this case. Twice already had the students been proven innocent, protected by the First Amendment. The school administration violated this right by attempting to restrict this form of expression, as this is a protest that does not disrupt class, was not offensive, and did not break school rules.

It is well-established that students still retain their Constitutional rights. *Tinker v. Des Moines, 1969* states that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Furthermore, that case set a precedent for future cases of controversial expression in school, maintaining that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." Therefore, because DePinto and his friend had not caused any disruptions at school in the weeks that they wore the button-- similar to the students who wore the silent protest in the *Tinker v. Des Moines* case-- they should be protected by the First Amendment right of freedom to speech. This is supported by the judge of the district court ruling, Joseph Greenaway, who wrote a report stating that the boys did not "materially and

substantially disrupt the work and discipline of the school" (Greenaway). Instead, the school is attacking the students merely because of what the *Tinker* case called the "fear of disturbance," which they decided is not substantial enough to be used to convict students. It is also important to note that although *Tinker* was about a high school protest, it applies to schools across the board: the fact that DePinto and his friend are fifth graders does not undermine the fact that they are still regular citizens, entitled to the First Amendment rights-- saying otherwise would violate the Fourteenth Amendment's Equal Protection Clause, because then they would not be treated equally as the amendment states.

On the other hand, multiple cases limit the power of *Tinker's* ruling. However, *Tinker*'s precedent should still be followed, because the other cases are irrelevant. *Bethel School District v. Fraser, 1986*, for example, "limits the scope of [*Tinker v. Des Moines*] by prohibiting certain styles of expression that are sexually vulgar" ("Bethel School District v. Fraser"). This clearly does not apply to this case, as there are no lewd references, directly nor indirectly, related to this case. Another court ruling about freedom of expression was *Morse v. Frederick, 2007*, in which the court ruled against the defendant "not [because] Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use" -- clearly, this also is not applicable, because there was no mention of drugs in DePinto's button. However, the former argument that presented the option that it might be "offensive" is also very important. This relates to yet another case, *Guiles v. Marineau*, in which the student wore a shirt that contained various "offensive" symbols such as President George Bush superimposed on a chicken, a razor blade, a martini glass, and cocaine; the court ruled for the student in the appeal because they argued that "almost anything is offensive to someone" (Applebome). This argument is very relevant to this

case, because some people may find the image offensive, when it can be argued that it really is not. The button is simply a red cross-out symbol with the words, "No School Uniforms" superimposed on a black-and-white image of grim students in uniform that were a part of the Hitler Youth group. Greenaway wrote that "had the button depicted swastikas, a Confederate flag, or a burning cross, it would have been 'plainly offensive' and he would have ruled differently," but this was not the case. The boys in the image do not perform the characteristic Nazi salute, nor do they display Nazi symbols, which would have justified the superintendent McGeehan's accusation that "images of racial of racial and ethnic intolerance do not belong in an elementary school classroom." There is no evidence that the boys' buttons were disruptive or otherwise disallowed as maintained by precedent-setting court cases.

Another important fact to consider is that the boys did not break any school rules. The handbook for the school district has a strict set of rules for the elementary school, including a section for suspendable offenses and the dress code. One of the suspendable offenses is "noncompliance with the mandatory School Uniform Policy" ("Elementary School Handbook/Calendar," Section XVI.M). In the School Uniform Policy, there is a strict and comprehensive list of appropriate clothing, but nothing that bars the wearing of buttons; and, Michael DePinto still obeyed the regular uniform policy, his only "offense" being having the button placed on top. There is no rule to prohibit this in the School Uniform Policy. As in *Tinker v. Des Moines*, the school administration's threat of suspension lay not on a school policy, but just because it "seemed" offensive; this is in contrast to *Frederick v. Morse*, in which there was already established school policy that prohibited the promotion of drugs in school or school events, thus limiting Frederick's right to free speech in this context. Other possible suspendable

causes are "insubordination" and "passive resistance," but the aforementioned argument about his violated First Amendment rights means that the school should not be able to prevent this silent protest.

It is also important to consider the benevolent intent of the fifth graders, outside the scope of the Constitution. They promoted an unpopular viewpoint against the strict uniform regulations at their school, ones that they likened to Hitler's brainwashing of the youth-- the Hitler Youth organization. They did not promote Hitler's views, but rather wanted to educate the other students of the potential long-term impact that they believed in. There was no intended offense to anyone, nor a forceful protest against school uniforms. As the justice Reynolds said in *Meyer v. Nebraska, 1923*, the nation should not "foster a homogenous people," and he used Sparta's heavy youth regimentation as an example, similar to the children's example of the Hitler Youth. Unlike *Fraser*, in which Frederick himself said that "the words were just nonsense meant to attract television cameras," not a true expression of speech but an offensive outburst, DePinto used his speech in this purposeful way to express his opinion freely under the First Amendment.

The sole fact that DePinto and his friend wore buttons remotely associated with the Nazi Party put them under unfair scrutiny by the school district administration. There was no violation of precedent setting cases regarding free speech in school environments, even if the message appeared to be offensive. The plaintiff, under the Constitutional First Amendment, should not be able to restrict the defendant's right to wearing the anti-uniform buttons in school.

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