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The State of South Carolina

OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 18, 1995

Informal Opinion

The Honorable Joe Wilson
Senator, Lexington County
P.O. Box 142
Columbia, South Carolina 29202

Dear Senator Wilson:

You have requested the advice of this Office as to whether an elementary school student has a right, under the First Amendment of the United States Constitution, to distribute anti-abortion material at his school. Set forth below is some case law which may be of guidance concerning this question.

In Tinker v. Des Moines Ind. Community Sch. Dist., 393 US 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), the Court indicated that restriction of expression by students on school property as to matters such as the Vietnam conflict or opposition to it would at least require "... a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." 393 US 513, 89 S. Ct. at 740; See Baxter by Baxter v. Vigo County School Corp., 26 F.3rd 728, 737 (7th Cir. 1994). Burch v. Barker 861 F.2d 1149 (9th Cir. 1988), cited Tinker in reviewing a lengthy history of cases in this area for the purpose of considering a school policy for pre-distribution review of written materials for censorship purposes. The Court found that the policy was of unlimited scope and duration, was overbroad and violated the students' First Amendment rights as to a non-school sponsored publication. However the court expressly did not decide "under what more limited circumstances, if any, a school may impose a policy of pre-distribution review." Id., 861 F.2d at 1159.

Nevertheless, as follows, the Supreme Court and other courts have noted that some limits exist on expression in the public schools:

> The United States Supreme Court has recognized that ...the First Amendment rights of students in the public schools "are not automatically co-extensive with the rights of adults in other settings," Bethel School District No. 40 v. Fraser, 478 US 675, 682, 106 S.Ct. 3159,

> 3164, 92 L.Ed.2d 549 (1986), and must be "applied in light of the special characteristics of the school environment...." Hazelwood School District v. Kuhlmeier, 484 US 260, 266, 106 S. Ct. 562, 567,98 L.Ed.2d 592 (1988).
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> "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," Id., 683, 106 S. Ct., at 3164, rather than with the Federal Courts. Id, 484 US 267, 108 S.Ct. **at 567.**

Hazelwood addressed issues concerning a high school newspaper published by journalism students under the supervision of a teacher, and Bethel addressed issues of a "lewd and indecent" nominating speech by a high school student at a student assembly. Neither of these factual circumstances are the same as the one presented by your request, but these cases do emphasize that schools retain some degree of authority with respect to the appropriateness of speech in the school environment. Similarly, in Planned Parenthood v. Clark County School District, 887 F.2d 935 (9th Cir. 1989), the Court upheld the school district's refusal to publish Planned Parenthood's advertisement in school-sponsored publications. Significantly, the Court stated that "nowhere [has the Supreme Court] suggested that students, teachers or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environment for ... unlimited expressive purposes." 887 F.2d at 941, quoting from Perry Education Association v. Perry Local Educator's Association, 460 US 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

More recently, Baxter v. Baxter, supra, found that the Supreme Court has indicated in Fraser and Hazlewood that "age is a relevant factor in assessing the extent of a student's free speech right in school.... " 26 F.3rd at 738. Although the court did not articulate a standard for elementary school students, it clearly conveyed that more restrictions on speech may be permissible in that setting as compared to the high school setting. The 7th Circuit concluded that the plaintiffs had not demonstrated that an elementary school student had a "clearly established" right to wear an expressive t-shirt at elementary school. Id. In Tinker, supra, in which the wearing of an armband, was at issue, the setting was a high school rather than an elementary school.

To determine whether the particular material at issue may be barred from distribution in an elementary school would require a

review of the material and the circumstances of its distribution; however, such investigation of factual matters is beyond the scope of opinions of this Office. Ops. Atty. Gen. (December 12, 1983).

Nevertheless, the above cases indicate that some restrictions on speech and distribution of material may be permissible in school settings and that a greater degree may be permissible in the elementary setting. Of course, this letter, does not, in any way, express an opinion about merits of the material being distributed or the wisdom of school policy in restricting it.

I hope that the above case law will provide some guidance as to these matters. This letter is an informal opinion. It has been written by the designated Assistant Deputy Attorney General and represents the opinion of the undersigned attorney as to the specific questions asked. It has not, however, been personally reviewed by the Attorney General nor officially published in the manner of a formal opinion.

I hope that this information is of assistance to you.

Yours very truly,

J. Emory Smith, Jr.
Assistant Deputy Attorney General

JESjr./vw