

# Legal Issues in the Protection of Student Freedoms

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Hardly a week passes without yet another highly visible court case involving the rights and freedoms of secondary school students. The subject matter of these lawsuits is as varied as the activities of the students who have gone to court to vindicate their legal interests. The outcome of such cases also runs the gamut; some student plaintiffs (and the parents who have typically intervened on their behalf) have prevailed decisively, while other litigants—who seemed no less deserving of legal redress—have met far less enviable fate in the courts. To some degree, such variations in the legal landscape may reflect differences between federal appellate courts; some circuits are simply more receptive than others to the pleas of students whose speech or creative activity has been suppressed. Yet despite such contrasts, pervasive patterns among legal disputes within and beyond the classroom persist in ways that defy easy or familiar classification.

Certain pressures impinge with exceptional force upon the public school community and generate legal disputes in mounting measure. Increasingly, those who govern and guide the nation’s schools are rightly troubled by traumatic incidents like those at Columbine High School and elsewhere. Even in the most seemingly secure and stable environment, most school administrators are understandably concerned about the potential impact of genuine threats, not only to teachers but also to other students. More and more public school officials insist upon “zero tolerance” in and beyond the classroom, and reluctantly impose restrictions on student speech that would have been unheard of—even in the most contentious neighborhoods—a decade or two ago. Moreover, lawyers who bear a special responsibility in advising on

the governance of schools and school systems are far likelier than they were even a half generation ago to recommend imposition and enforcement of seemingly draconian regulations. In such an environment, the proliferation both of legal controversy and of administrative edicts has been virtually inevitable.

## **Tinker and Later**

Over the past four decades, the U.S. Supreme Court has offered curiously little guidance to those who govern the nation’s schools, leaving many difficult questions to the lower courts. Four precedents do, however, merit attention. In the late 1960s, at the height of Vietnam War protest, the Justices declared in *Tinker v. Des Moines Independent School District* that students do not “shed their constitutional rights to freedom of expression

at the schoolhouse gate.”<sup>1</sup> Thus, as the majority of the Court ruled, public school officials could no longer punish students who engaged in peaceful protest without clear evidence of disruption, actual or imminent. Without clear proof of such disruption, students remained free under the First Amendment, to exercise their expressive rights without incurring legal sanctions.

Some years later, however, there followed three other Supreme Court rulings, each one of which progressively limited or qualified the *Tinker* principle. In 1986, the Justices sustained disciplinary action against a student speaker who, during a high school assembly, engaged in profanity and vulgarity that was unrelated to any protected political message.<sup>2</sup> Two years later, the high Court upheld a public school’s broad authority to restrict the content of student publications simply because they bore the school’s imprimatur.<sup>3</sup> Most recently, in 2007, the Justices further modified *Tinker*’s constitutional protection by upholding sanctions that a school official had imposed at a public event because the suspect student’s targeted speech was deemed to advocate the use of illegal drugs.<sup>4</sup> Under such conditions, a sharply divided Court now concluded, the school’s conceded inability to prove the requisite “disruption” would, under *Tinker*, normally have been fatal

to the school principal's legal case.

### **Current Rulings on Student Dress and Displays**

On the basis of such obviously imperfect guidance from the courts, school administrators have continued to do their best in resolving myriad disputes that encompass a bewildering array of expressive activity. Take, for example, the increasingly contentious matter of unwelcome or uncongenial student dress, or the wearing of potentially hostile insignia or displaying images on or near school grounds. Despite a division among federal judges, several recent rulings have generally favored administrative regulation of such activity. Such receptiveness to administrative intervention has been especially apparent in regard to the public display of Confederate battle flag insignia, even in the absence of overt action or expression. Action by school officials to forbid the sporting of garments adorned by the "Stars and Bars" has been especially likely—and has notably led to findings of "disruption"—in the context of a racially-charged climate. Under such volatile conditions, the potential effect of certain insignia has been highly evocative.

One such school district recently relied on a policy—fairly typical of such edicts—prohibiting "dress that materially disrupts the educational environment." Such a desideratum accommodates the guidance of the *Tinker* case, even in the absence of overt "disruption," but recognizes the corollary precept that such threats to school decorum and order may be potential rather than actual.<sup>5</sup> Thus the courts have been consistently receptive to discipline under conditions such as the flaunting of Confederate garb and insignia even in the absence of overt disorder.

The courts have, however, recognized that under the First Amendment school officials may not simply single out a particular image, logo or icon for disadvantageous treatment, however volatile it may appear. The enforcement of school rules

and the application of official sanctions must be uniform and neutral in viewpoint. Conduct regulations must therefore be devoid of animus or hostility based upon the cause for which a student has engaged in abhorrent behavior or displayed unwelcome or offensive imagery.

Thus, despite what must be strong temptations to reflect viewpoint bias in meting out discipline, school officials and boards are constitutionally bound to respect such neutrality—at least in the abstract; yet, in the real world of school administration, there does sometimes appear to have been a higher bar for Confederate battle flag insignia and other unwelcome or hostile displays of a racially, less volatile, type. Especially where a potentially divisive racial element enters the equation, courts have been more ready to uphold such sanctions even within such a viewpoint neutral framework. Such a standard prevails regardless of whether actual disruption has occurred in response to clothing with the "Stars and Bars;" it is often enough that the school "reasonably forecasted" that substantial and material disruption would likely occur.

When it comes to less volatile insignia or displays, however, the outcome among the federal courts seems far more mixed than the pattern in the Confederate insignia cases.<sup>6</sup> One Virginia case is strikingly illustrative. The Albemarle County School Board required a Central Virginia sixth grader who brought with him to school and displayed in the cafeteria a T-shirt that he had received during an extra-curricular outing, prominently featuring the letters "NRA" and the phrase "Shooting Sports Camp." The school promptly revised its dress code to prohibit messages relating to "drugs, alcohol, tobacco, weapons, and other suspect categories."

On that basis, the district judge ruled for the school, but the appeals court took a more protective view, recognizing that the challenged policy was "practically limitless" and excluded a "broad range of symbols, messages, and political

messages."<sup>7</sup> Generalization even about particular images and symbols would, however, be risky. Despite the teaching of the NRA T-shirt case, a later ruling in Pennsylvania upheld discipline imposed on another student who was barred from wearing a more explicit gun T-shirt to school; unlike the NRA logo wearer, this student was admonished by the court that he had "no constitutional right to promote violence in our schools."<sup>8</sup>

Several years later, in dealing with the display of a seemingly more ominous message, a federal appeals court in Illinois ruled that a suburban Chicago student could come to school wearing an anti-gay shirt despite the principal's concern that such a message or display could well be disruptive.<sup>9</sup> The court of appeals ruling dissolved the school's ban on T-shirts which displayed the message "Be Happy, Not Gay," despite the potentially disruptive nature of that message. This ruling reflected a high level of viewpoint neutrality on the court's part, despite the potential for disruption. The school board, seeking immediately after the decision to narrow its scope, insisted that the judgment "is specifically limited to that phrase but doesn't allow other derogatory speech." Soon thereafter, a federal judge ruled in favor of four Western Pennsylvania students who appeared in school sporting on T-shirts the words "Not Guilty" after they had been cleared of a disputed harassment claim—ironically borne of an argument over expenses at a spring prom.<sup>10</sup>

### **Student Writing**

If one moves from clothing to writing, another array of intriguing student speech issues emerges. Most notable was a California Supreme Court judgment, one of very few significant non-federal rulings involving student speech issues.<sup>11</sup> A high school senior in Santa Clara County had penned a problematic poem headed "Dark Poetry," which included a number of potentially explosive verses. The student was charged in juvenile court for having uttered a series of threats embed-

ded in the volatile text. By the narrowest of margins, the California Supreme Court ruled in the student's favor despite the seriousness of the juvenile judge's charge. The state's highest court took note of two extenuating factors—not only the ambiguous nature of the poem's content, but also the fact that, despite having harbored the capacity to kill other students, the young author had never acted upon his inclinations.

A later case in the federal courts also involved the disturbing writings of a deeply troubled student, but produced a different outcome.<sup>12</sup> This time the focus was a dream or fantasy. A troubled (indeed tormented) student had written in her notebook of shooting her math teacher. When confronted by school authorities, she later sought to substitute a different notebook after being asked for a response by her art teacher. In what was clearly a case of first impression, the federal court ruled that the student had been properly suspended (indeed, had first

been expelled but was later reinstated), because her account of the dream and the imbedded threat, as well as sharing the fantasy with at least one other student, created a substantial risk of disruption.

### Electronic/Digital Student Expression

The final area in which courts have adjudicated student speech issues is by far the most volatile, and now deserves full treatment of its own. The array of potential court cases involving electronic or digital expression—cases arising on the Internet—has proliferated apace in the last few years, and shows no sign of abating. Courts have, however, begun to differentiate on the basis of the source of potentially reusable electronic expression. Thus some disputes involve Internet speech that was generated or brought to the campus by the speaker, while others involve speech that has been introduced or posted (and thus brought on campus) by another student, while still others implicate speech generated by more remote sources that may foreseeably reach campus.

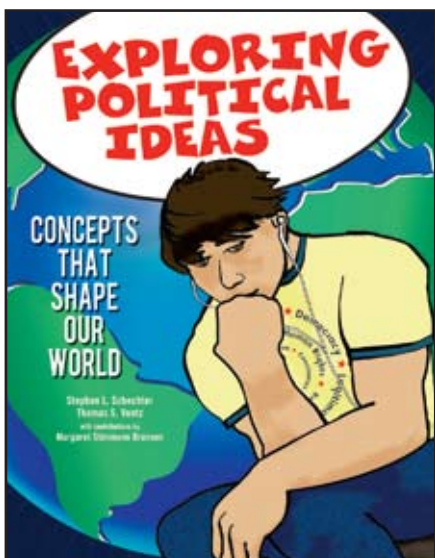
Illustrative of the first situation—speech induced by the speaker—are two concurrent Court of Appeals rulings handed down on the very same day (February 4, 2010).<sup>13</sup> The contrast between the rulings is striking, along with the parallels between the circumstances. One Pennsylvania student had created a Facebook site, featuring the principal's photo and unwelcome, intrusive information about the school; the court concluded that the potential for substantial disruption by the student was averted only by the principal's eleventh-hour intervention and otherwise would have met *Tinker's* "substantial disruption" standard. Concurrently, another student in a different part of Pennsylvania created on MySpace a fake Internet profile. But in the latter case, the appeals court took a much more tolerant view of the student's legal claim than had prevailed in the Facebook dispute. The federal judges ruled in the MySpace dispute, that there had been minimal evidence either

of substantial disruption on the offending student's part, or of substantial ties to the school since the student's use of the MySpace site did not constitute entering the school for legal purposes.

Courts have also begun to sort out distinct issues of potential legal liability involved in instant messaging. An upstate New York student had been suspended from school on the basis of an instant message icon that consisted of a drawing of a pistol firing a bullet at a person's head, accompanied by words calling for the killing of the student's English teacher. Another appeals court ruled that the charged icon created a reasonably foreseeable risk that the icon would materially and substantially disrupt the work and discipline of the school.<sup>14</sup>

Finally, the current case that has probably evoked the keenest interest and controversy reached judgment in the summer of 2008. A suburban Connecticut student and her parents sued the principal and superintendent after their protest of rescheduling of a band contest. The student, a leader in student government, asked the principal to send a corrective e-mail, which he declined to do. The student then posted her account of the dispute on a blog, using vulgar language, falsely charging that the contest had been cancelled, and urging readers to contact the school. Concluding that the student had failed to show the kind of civility and good citizenship expected of class officers, the principal then barred the student from running for class office.

The federal courts eventually ruled against the student, noting that the blog contained language of the type that could constitutionally be barred. Those ruling added the probability that the offending blog involved unprotected expression that posed a substantial risk of disruption by encouraging others (who had now been drawn into the dispute) to contact the school and thus widen the controversy. Thus, despite the student's exemplary record both in the classroom and in extracurricular activities (the court noted that she is "by all reports a respected and accomplished student"), the final



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judgment went decisively against the student.<sup>15</sup>

Along the way, the appeals court reprised the major Supreme Court rulings to which we referred earlier—notably *Tinker's* assurance, on one hand, that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” contrasting on the other hand with *Fraser's* caution that such guarantees must be applied within the “special characteristics of the school environment” so that administrators may “teach [. . .] students the boundaries of socially appropriate behavior.” Clearly, this court appreciated that the Justices not only have not yet ruled on such issues as they have arisen in traditional print format, but that the lower courts have barely touched upon such disputes in electronic or digital format.

#### Issues into the Future

A host of daunting First Amendment issues await us in future cases. The

landmark status of the *Tinker* decision stands in some contrast to those recent lower court decisions that favor school districts and administrations in the pursuit of measures to insure student safety, security, and socially appropriate behavior. Many basic issues of student speech rights and limits are not yet fully resolved, and more contemporary speech issues involving student use of computers, cellular phones, and other available technologies are just emerging. Despite a mixed set of decisions and some lack of clarity, it is a vital time for social educators to be informed about developing legal interpretations in the protection of student freedoms. 🌐

#### Notes

1. 393 U.S. 503 (1969).
2. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).
3. *Hazelwood Schl. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).
4. *Morse v. Frederick*, 551 U.S. 393 (2007).
5. E.g., *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008).

6. E.g., *Palmer v. Waxahachie Indep. School Dist.*, 579 F.3d 502 (5th Cir. 2009).
7. *Newsom v. Albemarle County School Bd.*, 354 F.3d 260 (4th Cir. 2004).
8. *Miller v. Penn Manor School Dist.*, 588 F.Supp.2d 606 (E.D. Pa. 2008).
9. *Nuxoll v. Indian Prairie School Dist.*, 523 F.3d 668 (7th Cir. 2008).
10. [An informal, unreported ruling was noted by the Associated Press on Dec. 11, 2009]
11. *In re George T.*, 33 Cal. 4th 620, 93 P.3d 1007, 16 Cal. Rptr. 3d 61 (2004)
12. *Boim v. Fulton County School Dist.*, 494 F.3d 978 (11th Cir. 2007).
13. *Layschook v. Hermitage School Dist.*, 593 F.3d 249 (3rd Cir. 2010); *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010).
14. *Wisniewski v. Board of Educ. of Weedsport Schl. Dist.*, 494 F.3d 34 (2d Cir. 2007).
15. *Doninger v. Niehoff*, 527 F.3d 41 92d Cir. 2008).

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