

EMERGING LEGAL ISSUES IN URBAN EDUCATION



First Amendment Issues in Public Schools

November 16, 2020



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1

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2

Agenda

- I. First Amendment Protections
- II. Federal Laws
- III. Cases and Scenarios



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3

The Balance We Need to Strike...

- Care and concern for students
- Right to expression
- Prevention of illegal conduct



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4

First Amendment



- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”
- Applies to public institutions



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5

First Amendment Limitations

- Incitements to violence
- “True threats”/“Fighting words”
- Obscenity
- Defamation
- Other illegal conduct



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6

Incitement: *Brandenburg v. Ohio* (1969)

- Plaintiff was leader of Klu Klux Klan group arrested for violating Ohio law criminalizing “crime, sabotage, violence, or unlawful methods of terrorism”
- *Brandenburg* Test: “[T]he constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to **inciting or producing imminent lawless action** and is likely to incite or produce such action.”



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“True” Threats

Virginia v. Black, 538 U.S. 343, 344 (2003)

- “[S]tatements where the speaker means to communicate a **serious expression** of an intent to commit an act of **unlawful violence** to a particular individual or group of individuals”
- “The speaker need not actually intend to carry out the threat.”
- “**Intimidation** in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”



- *R.I. v. Central York Sch. Dist.* (M.D. Pa. 2016) (“joke” bomb threat)
- *Ponce v. Socorro Independent School District* (5th Cir. 2007) (diary with “terroristic threats,” including reference to mass school shootings)



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Bell v. Itawamba Cty. Sch. Bd. (5th Cir. 2015)

- Rap song posted by student on public Facebook and YouTube
- Naming coaches for alleged sex with students, with four references to violent acts to be carried out against coaches
- School policies against physical threats, harassment, intimidation



“It equally goes without saying that **threatening, harassing, and intimidating a teacher** impedes, if not destroys, the ability to teach; it impedes, if not destroys, the ability to educate. It disrupts, if not destroys, the discipline necessary for an environment in which education can take place. In addition, it encourages and **incites** other students to engage in similar disruptive conduct. Moreover, it can even cause a teacher to leave that profession. In sum, it disrupts, if not destroys, the very mission for which schools exist—to educate.”



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Students and the First Amendment

“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

– *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (U.S. 1969)



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10

Tinker Standard

“On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”

- Students are entitled to protect their views absent constitutionally valid reasons to regulate
- Schools may respond to speech that causes a **substantial disruption** of appropriate discipline in school operation or invasion of the rights of others
 - “in class or out of it”
 - On-campus speech (room for expansion)*
 - Reasonably foreseeable
 - May be disciplined without violating free speech rights



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11

Exception: Offensive/Lewd/Indecent Speech

Bethel Sch. Dist. No. 403 v. Fraser (U.S. 1986)

- Permissible for school to impose sanctions in response to “offensively lewd and indecent speech” that is “unrelated to any political viewpoint” and “undermine[s] the school’s basic educational mission.”
- “[C]onstitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”



Matthew Fraser, 18 Feb 1988, Spanaway, Washington, Image by © Bettmann/CORBIS



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12

Exception: School-sponsored Speech

Hazelwood Sch. Dist. V. Kuhlmeier (U.S. 1988)



- Right to editorial control over content of student newspaper where:
 - School funded
 - Curricular
 - Students, parents, and members of public might reasonably believe school-sanctioned
- “Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”



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Exception: Speech Promoting Threats to Safety

Morse v. Frederick (U.S. 2007)



“School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. **It was reasonable for her to conclude that the banner promoted illegal drug use**—in violation of established school policy—**and that failing to act would send a powerful message** to the students in her charge, including Frederick, about how serious the school was **about the dangers of illegal drug use**. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.”



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14

Viewpoint / Content Neutrality

Jacobs v. Clark County Sch. Dist. (9th Cir. 2007)

- High school uniform policy
- Plaintiffs: shirt containing a printed message reflecting religious beliefs; “religion teaches its members to embrace their individuality”
- Court upheld uniform policy: “[T]he District's encroachment upon its students' rights to free speech and expression via its content-neutral school uniform policies need only survive intermediate scrutiny to be constitutional—a level of scrutiny we find the uniform policies easily withstand.
- Distinguishes *Tinker* because discipline there was not viewpoint-neutral



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15

Key Factor: “Substantial Disruption”



- Reason to anticipate substantial disruption
 - Less likely to be protected where reason to anticipate substantial disruption
 - Confederate flags, E.g., *B.W.A. v. Farmington, R-7 Sch. Dist.* (8th Cir. 2009)
- No evidence of reason to anticipate substantial disruptions
 - LGBT rights, E.g., *Young v. Giles County Bd. of Educ.* (M.D. Tenn. 2015)
 - Breast cancer awareness, E.g., *B.H. v. Easton Area Sch. Dist.* (3d Cir. 2014)



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Regulation of “Off-campus” Speech

- May regulate in-school student speech in a way not constitutional in other settings
 - *Morse* (Alito, J. concurring)
- “Until now, all five circuits to face the question—the Second, Fourth, Fifth, Eighth, and Ninth—have agreed that under *Tinker*, schools may discipline off-campus student speech that has a close nexus to the school environment.” (Pet. Br. in *Mahanoy*, cert. pending)



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17

In the Supreme Court of the United States

MAHANAY AREA SCHOOL DISTRICT,
PETITIONER,

v.

B.L., A MINOR, BY AND THROUGH HER FATHER
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Whether *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus.

- Circuit Split
- Ignores impact of off-campus speech on school environment, particularly when off-campus speech directed at individual/school
- Line between on- and off-campus speech is arbitrary in the social media age, when students can disrupt the school community from anywhere with the touch of a button
- Need for resolution acute with shift to online learning due to COVID-19



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18

Summary: First Amendment Analysis



- Disruption (or articulable reasonably foreseeable disruption)?
- Content/viewpoint neutral?
- Nexus to school environment?
- Balance of interests?
- Otherwise illegal?



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19

Federal Anti-Discrimination Laws

- Title VI of the Civil Rights Act of 1964
- Title IX of the Education Amendments of 1972
- Section 504 of the Rehabilitation Act of 1973
- Title II of the Americans with Disabilities Act of 1990



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20

Harassment

ED's First Amendment Dear Colleague Letter (July 2003)

- Regulations not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution
 - Offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment
 - Must be sufficiently serious (i.e., severe, persistent or pervasive) as to limit or deny a student's ability to participate in or benefit from an educational program....
- Must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive....



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21

Peer Harassment

School districts may violate these civil rights statutes when harassment is sufficiently serious that it creates a hostile environment AND such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.



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Role of School Personnel in Prevention

- ED's Guidance (2010 DCL on Harassment) States:
 - "School personnel who understand their legal obligation to address harassment under these laws are in the best position to prevent it from occurring and to respond appropriately when it does."
 - "[S]chool administrators should look beyond simply disciplining the perpetrators. . . . A school's responsibility is to eliminate the hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur."

- October 26, 2010 DCL



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23

Obligations Under Statutes

- Once a school knows or reasonably should know of possible student-on-student harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred.
- If harassment has occurred, school must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, and prevent its recurrence.



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24

Hostile Environment

- When the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school.
- **Consider all the facts and circumstances, such as:**
 - The type of misconduct
 - The frequency of the misconduct
 - Where the misconduct occurs
 - Whether a power differential exists, etc.
- **From the perspective of a reasonable person**



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25

Summary: Specific Steps in Response to Allegations of Harassment

- **Response will vary depending on:**
 - Nature of the allegations;
 - Source of the complaint;
 - The age of the students; and
 - Size and administrative structure of the school



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26

Retaliation

- Adverse action for exercising free speech rights
- Often evidenced by sequence and timing of events
- ***Seamons v. Snow* (10th Cir. 2000)**
 - HS football player reported assault by teammates to school
 - Teammates and football coach belittled and ostracized student for reporting
 - Student required to apologize (compelled speech)
 - Student removed from football team due to “attitude” (retaliation)



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29

EXECUTIVE ORDERS

Executive Order on Combating Race and Sex Stereotyping

— LAW & JUSTICE | Issued on: September 22, 2020



By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and in order to promote economy and efficiency in Federal contracting, to promote unity in the Federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating, it is hereby ordered as follows:

“Therefore, it shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes. In addition, Federal contractors will not be permitted to inculcate such views in their employees.”

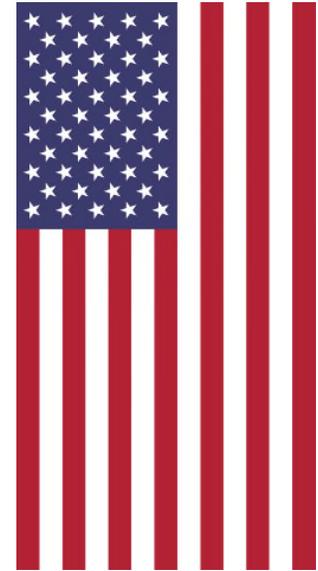


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30

Scenario #1

- Student A, a high school student at Alabama High School, refused to recite the daily pledge of allegiance to the U.S. flag with his classmates. When pressed by his teacher, he stated: he “didn't want to say it, he didn't have to say it, and he hadn't said it for a month.”
- School administrator finds this disrespectful and offensive, demanding that Student A participate in the pledge, requiring an apology, and threatening to report Student A to the local Air Force Recruiter that school had previously recommended Student B to.



➤ Constitutional?



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Scenario #1 cont.

- Student A apologizes, and the next day participates in the pledge.
- One day later, Student B, angry about School's treatment of Student A, refuses to say the pledge, and instead stood and silently raised his fist in the air.
- Principal's choice of discipline for Student B: detention (which would have delayed his graduation) or paddling

➤ Constitutional?



32

Scenario #2

- During a class lesson which involved discussion of law enforcement, a Fifth Grade student mutters, loud enough for several classmates to hear, “F*** the police.” Several students snicker, others nod, and others shake their head and say “shut up.”



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Scenario #3

- At recess, elementary-age students invent a game called “catch the illegal,” in which the students chase others, in some instances grabbing or touching other students, and bringing them to the “judge” to be “deported.” When parents complain the students say that it was all just a game.



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Scenario #3 cont.

The teacher decides to have an educational conversation with the class that organized the game.



- During the conversation, Student A says, “If you weren’t born here, you should be kicked out!”
- Student B, whose family immigrated outside the U.S., speaks up, identifying herself as an immigrant and sharing her family’s story.
- Later, Student A slips a note to Student B, letting her know that he would call the police to report her and her family to ICE.



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Scenario #4

- At Madison High School, a transgender female student is called names and teased by other girls each time she uses the bathroom.
- She now avoids using the restroom during the school day, and recently had to go to the doctor for a urinary tract infection.
- She reports feeling unsafe to the school counselor.



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Scenario #5

- Every year, Holly Jolly Elementary School facilitates a gift exchange between students in its classrooms. Students are encouraged to bring a gift to exchange during the holiday party.
- Student A brings a dreidel as a gift. Student B brings an illustrated copy of The Christmas Story. Student C brings a barbie doll.



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Questions?



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38

Join us for our next webinar:

- *Looking Forward to Possible Legal and Policy Changes Affecting Public Education Under the Biden Administration*
- Thursday, January 28, 2021
(1:30-2:30 EST/12:30-1:30pm CST)



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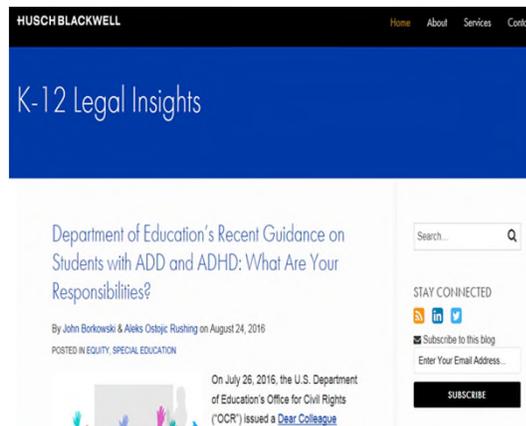
39

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40



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