

See you at
the pole

A RESOURCE OF
THE RUTHERFORD INSTITUTE

The Rutherford Institute is a civil liberties legal and educational organization that defends persons whose constitutional rights have been threatened or violated.

The Rutherford Institute has assisted schools, teachers, parents, students, and others in the pursuit of a better understanding of constitutional principles as they operate in protecting the rights of religious persons.

In addition, Institute attorneys also participate in legal action to protect other vital constitutional rights. The Rutherford Institute publishes numerous books, papers, and periodicals and provides training programs. Legal research resources are also made available to assist attorneys involved in constitutional litigation.

If you would like further information, please contact

The Rutherford Institute
P.O. Box 7482
Charlottesville, Virginia 22906-7482
(804) 978-3888

See You at the Pole

Religious Expression & Access Issues in Public Schools

© 1998 by The Rutherford Institute

Introduction

The rights of religious expression and access to school forums have perplexed both students and school administrators in setting boundaries of constitutional behavior. Seemingly conflicting court decisions and overreaction by some parties have added to this confusion.

While this may inhibit or dismay religious persons in public education, recent developments in case and statutory law about student expression and access are encouraging. This booklet is intended to foster understanding about these recent legal developments and explain the rights of religious expression and access in public schools.

Religious Expression and the Right of Access: Apples and Oranges

Since the passage of the 1984 Equal Access Act¹, a central point of confusion has been the difference between the right of students to express their religious beliefs and their right of access to school property (e.g., conducting weekly Bible studies or prayer meetings in classrooms).

A simple distinction is supplied by a federal district court in *Slotterback v. Interboro School Dist.*²

The analysis of religious expression is appropriate when students are in a place they have a right to be; the analysis of the right to access is appropriate when a student (or anyone else) is seeking access to government property that

1

they would otherwise have no right to occupy or use for speech.

This distinction between these two concepts often becomes blurred: when one right is affected by a court decision, ignorance causes the perception that the other right has been affected in a like manner. The following is a discussion of (1) the status of religious expression among students, and (2) the status of access to school facilities for students and others.

Student Religious Expression

"Students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."³

Freedom Not to Speak

One of the basic tenets of the First Amendment is the freedom not to speak. The Supreme Court has held that students cannot be required to say a certain creed or statement.⁴ Students (or citizens) also cannot be forced to carry a written manifestation of the state's ideological message.⁵

Freedom to Speak

The Supreme Court held in the landmark case of *Tinker v. Des Moines Independent Community School District*⁶ that students have the right to express controversial views in the classroom and during non-curriculum times. The Court further held that religious speech was a protected type of expression.⁷

Some restraints may be placed on these types of expressions. However, the limitations may not be merely based on a desire to avoid possible "discomfort and unpleasantness that always accompany an unpopular viewpoint."⁸ The Court will limit expression if it (1) materially disrupts class work or (2) invades the rights of other students.⁹

2

"See You at the Pole" Prayer Times

Across the United States, students have begun to meet around their flagpoles before school starts to pray for their teachers and fellow students. Such an activity is purely religious expression and does not need to be analyzed as an "access to school property question." **Since the students are occupying a place where they have a right to be, such as the school flagpole, they have a right to expression.** Analysis under the access question is only necessary when the students are attempting to occupy property where they do not have a right to be.¹⁰

Therefore, the only constitutional restrictions which may be placed on student expressive activity are the two Tinker limitations.¹¹ However, these limitations are not applicable to meetings such as "See You at the Pole" rallies. The first Tinker limitation, that the expression must not materially disrupt class work, is not violated by the "See You at the Pole" rallies, since these rallies do not affect the educational process and occur during non-instructional time. Likewise, the rallies do not violate the second Tinker limitation, since the rallies do not invade the rights of other students. The rallies do not compel non-believing students to participate (Free Exercise issue); and there is no endorsement of the rallies by school officials (Establishment Clause issue).

In 1992, students at a middle school and a high school in Corpus Christi, Texas, assembled one morning at 7:00 a.m. at their respective schools' flagpoles to pray for their fellow students, their teachers and their school.¹² Upon their arrival at the poles, however, the students were met by school administrators, who threatened the students with disciplinary action if they did not disperse and told them their attempts to meet were illegal due to school policy and the religious nature of the rallies.¹³ With the assistance of The Rutherford Institute, sixteen students and their parents joined to sue the

school district for violating their rights to free speech, assembly, and religious expression under the U.S. and Texas Constitutions.¹⁴ While the case settled prior to trial, the school agreed not to restrict students' rights to speech, expression and assembly in the future, particularly as such restrictions would adversely affect "See You At the Pole" rallies.

Religious Expression by Teachers: Teacher Participation in "See You at the Pole"

Concerning religious expression by teachers, including **teacher participation** in an event such as "See You at the Pole," the analysis under freedom of expression would hinge on whether the teacher's participation constitutes "state action."¹⁵ Whether state action occurs is controlled by the particular facts surrounding the relationship. For example, the courts have held that teachers usually are state actors when acting in their capacity as classroom teachers.¹⁶ Thus, teachers are required to uphold laws that accommodate students' rights. In 1995, for instance, a Georgia high school teacher was dismissed for refusing to remain silent, thus disrupting students' state-granted right to a moment of silence, in accord with the "Moment of Quiet Reflection in Schools Act."¹⁷ The teacher sued the district and state for reinstatement. A federal district court upheld the dismissal.¹⁸

Thus, teachers could not prohibit constitutionally-permitted "See You at the Pole" or related activities by students; but whether they could participate in such rallies would depend on the extent to which their participation constitutes either state action or private expression.¹⁹ As of the publication of this booklet, this issue has not yet been litigated in the "See You at the Pole" context.

Right of Access

Analyzing the constitutionality of speech or expression under the right of access is appropriate when one is seeking access to

government property that he or she would otherwise have a right to occupy or use for speech.²⁰ In determining who has access to government property, the forum must be classified as one of three categories: traditional public forums, designated public forums, and non-public forums.

The **traditional public forums** include "places which by long tradition or by government fiat have been devoted to assembly and debate [or which] have immemorially been held in trust for the use of the public and have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions."²¹ Speakers may only be excluded from a traditional public forum when the exclusion is necessary to serve a compelling government interest and the exclusion is narrowly drawn to achieve that interest.²²

The **designated public forum** is created when "the state intentionally opens public property for use by the public at large for assembly and speech, for use by certain speakers, or for discussion of certain subjects."²³ A subcategory of this forum is called the "limited public forum which exists when the government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects."²⁴ Exclusion from designated public forums and limited public forums is subject to the same strict scrutiny analysis applied in traditional public forums.²⁵

Non-public forums exist when the state does not designate public property for indiscriminate expression by the public at large, by certain speakers, or on certain subjects.²⁶ Content-based regulation in a non-public forum is examined under the relaxed "reasonable nexus" standard.²⁷ This means that government may limit speech at non-public places when there is a "reasonable nexus" between the government interest to limit the speech and the means by which it is limited.

Student Access

Student access analysis has been altered somewhat by the passage of the 1984 Equal Access Act.²⁸ The Act stated that a secondary public school may not create a "limited open forum" and still deny any of its students the opportunity to meet on campus because of the political or religious nature of their speech.²⁹ A limited open forum is created whenever the school allows any noncurriculum-related student group to meet on its premises outside normal class hours.³⁰ Thus, if a school allows the student pep club or National Honor Society to meet on school premises before or after school hours, it must allow the Young Democrats or the Bible Club to meet as well.

The Supreme Court in Board of Education of the Westside Community Schools v. Mergens³¹ affirmed the constitutionality of the Act and broadened its application. The Mergens Court defined a "non-curriculum-related" group as one whose subject matter is not taught in a regularly offered course³² and held that a school must extend the same support to religious student groups as it does to other noncurricular student groups.³³

"See You at the Pole" Meetings

As previously discussed, "See You at the Pole" rallies fall within students' rights of speech, assembly and expression. Alternatively, such meetings should be constitutional under forum analysis as well, since the schoolyard could be categorized as a limited public forum. "[T]he government intent to create public schools as limited public fora, during school hours, for the First Amendment personal speech of the students who attend those schools, is intrinsic to the dedication of those schools."³⁴ **Whether or not the schools have a "closed forum" policy (not allowing any non-curricular groups to meet) in regard to its other facilities is irrelevant.** Schoolyards have been

intended by the government as locations for interpersonal communication between students and are thus limited public forums.

Therefore, to prohibit such religious communication and activity, the school must show that the regulations satisfy a compelling state interest (e.g., limiting the interference with educational process, limiting safety hazards, etc.). It is difficult to imagine how prohibiting such a meeting could satisfy a compelling state interest. Thus, under a forum analysis, the "See You at the Pole" rallies should qualify as constitutionally permissible.

Teacher Participation Under an Equal Access Analysis

Under the Equal Access Act, employees or agents of the school may be present at "religious meetings only in a non-participatory capacity."³⁵ Teachers or other school employees may be assigned to a meeting to keep order or for other custodial purposes.

Teachers' Group Access

A school district cannot prohibit discussions promoting religion among teachers when they are not involved in classroom instruction.³⁶ However, a federal appeals court has held that the school district may prohibit teachers from holding meetings on campus for religious purposes if the school's general policy does not allow teachers to meet except for school business.³⁷ On the other hand, if a school has created a limited public forum by allowing teachers to meet on campus for other than school business, then a teachers' religious group may only be denied for a compelling state interest.

Community Access

The Supreme Court has held that a school may legally limit the use of the property under its control

to the use for which it was designated and does not have to allow any group to use its facilities after hours.³⁸ Further, access to such non-public forums may be limited on the basis of subject matter or speaker identity so long as the distinctions drawn are viewpoint neutral.³⁹ The Supreme Court, in Lamb's Chapel v. Center Moriches Union Free School Dist., held that prohibiting a religious group from using a facility to share its viewpoint on a subject that had been previously addressed in the facility from a secular perspective violated the religious group's freedom of speech.⁴⁰ In the Lamb's Chapel decision, the Court held that since a school's facilities had been used to discuss family rearing techniques, a religious group that wanted to show a religious film on family values must be allowed a similar opportunity.⁴¹ Therefore, while religious groups do not have an absolute right to access of school facilities, they must be allowed to present their religious viewpoints on a subject matter if it has been addressed by another group on the school property.

Conclusion

Religious expression may constitutionally occur when students are in a place they have a right to be (subject to the Tinker limitations of not disturbing class work or the rights of other students). Under this Tinker analysis, meetings such as "See You at the Pole" rallies should be considered constitutional activities.

Under the equal access analysis, whether a group may have access to property depends on the extent the property is already available to the public. Since the "See You at the Pole" rallies occur in schoolyards, which are intrinsically limited public forums, they should be considered constitutional under an "access" analysis. Therefore, the "See You at the Pole" rallies should qualify as constitutionally

permissible under either the equal access or religious expression analysis.

Recommended Reading List

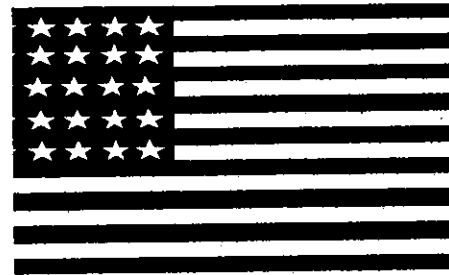
1. *Students' Rights Brochure*
The Rutherford Institute.
2. *Parents' Rights Brochure*
The Rutherford Institute.
3. *Teachers' Rights Brochure*,
The Rutherford Institute.
4. Whitehead, John W. , *The Rights of Religious Persons in Public Education*.
Wheaton, Ill.: Crossway Books, 1991.
5. Whitehead, John W. and Alexis Crow, *Beyond Establishment Clause Analysis In Public School Situations: The Need to Apply the Public Forum and Tinker Decisions*,
28 Tulsa L.J. 149, 177 (1992).

Footnotes

1. Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988).
2. See *Slotterback v. Interboro*, 766 F.Supp. 280, 290 (E.D.PA. 1991).
3. *Tinker v. Des Moines Independent Com. Sch. Dist.*, 393 U.S. 503, 506 (1969).
4. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1942).
5. See generally *Wooley v. Maynard*, 430 U.S. 705 (a state's printing of "Live Free or Die" on license plate was an ideological message which violated drivers' right not to speak).
6. 393 U.S. 503 (1969).

7. See generally *Widmar v. Vincent*, 454 U.S. 263 (1981).
8. *Tinker*, 393 U.S. at 738.
9. *Id.*
10. *Slotterback*, 766 F.Supp. at 290.
11. *Tinker*, 393 U.S. at 738.
12. Plaintiffs' First Amended Original Complaint at 12, *Bishop v. The Corpus Christi Independent School District*, C-93-260, (filed Sept. 7, 1993).
13. *Id.*
14. *Id.* at 8-9.
15. *Rivera v. East Otero School Dist. R-1*, 721 F.Supp. 1189, 1196 (D.Colo. 1989).
16. *Breen v. Runkel*, 614 F.Supp. 1358 (D.Or. 1976).
17. O.C.G.A. Section 20-2-1050 (Supp. 1995).
18. *Bown v. Gwinnett County School Dist.*, 895 F.Supp. 1564, 1570 (N.D.Ga. 1995).
19. *Texas State Teachers Association v. Garland Independent School District*, 777 F.2d 1046 (5th Cir. 1985), *aff'd*, 107 S.Ct. 41 (1986).
20. *Slotterback*, 766 F.Supp. at 290.
21. Whitehead, John W. and Alexis Crow, *Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Decisions*, 28 Tulsa L.J. 149, 177 (1992).
22. *Id.*
23. *Id.* at 179.
24. *Id.*
25. *Slotterback*, 766 F.Supp. at 291.
26. *Id.*
27. *Id.*
28. 20 U.S.C. §§ 4071-74 (1984).
29. Wilkov, Scott J., *The Writing is on the Wall: Equal Access Erodes the Establishment Clause*, 34 Ar. L.R. 375, 376 (1992).
30. *Id.*
31. 496 U.S. 226, 110 S.Ct. 2356 (1990).
32. *Id.* at 2366.

33. Id.
34. Slotterback, 766 F.Supp. at 293.
35. Mergens, 110 S.Ct. at 2364.
36. Texas State Teachers' Association, 777 F.2d at 1053.
37. May v. Evansville-Vanderburgh School Corporation, 787 F.2d 1105, 1107, 1116 (7th Cir. 1986).
38. Cornelius v. NAACP Legal Defense and Ed. Fund, 473 U.S. 788, 800 (1985).
39. Id. at 806.
40. 61 U.S.L.W. 4549.
41. Id.



**THE RUTHERFORD
INSTITUTE**

P.O. Box 7482
Charlottesville, Virginia 22906-7482
(804) 978-3888