SEE YOU AT THE POLE

Introduction

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.[1] Upon their arrival at the poles, the students were met by school administrators, who threatened the students with disciplinary action if they did not disperse.[2] The administrators told the students that their attempts to meet were illegal due to school policy and the religious nature of the rallies.[3] 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.[4] 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 participation in "See You at the Pole" rallies.

Since that time, "See You at the Pole" events have become more widespread and an important celebration and demonstration for people of faith who attend public schools. But the spread of this event, like other attempts at religious expression in public schools, has been met with resistance from school administrators who cling to the outdated notion that religious expression on school grounds must be forbidden. The reality is that religious assembly and expression must be allowed on school property to the same extent that expression with other viewpoints is allowed. Students, parents, teachers and school administrators should understand their legal rights and responsibilities, as explained in this article, with respect to speech on school grounds so that all persons can enjoy the fundamental liberties enshrined in the Constitution.

Student Religious Expression

> *Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."*[5]

Freedom to Speak

In the landmark case Tinker v. Des Moines Independent Community School District,[6] the U.S. Supreme Court held that students have the right to express controversial views in the classroom and during non-curricular times. The Court has further held that religious speech is a protected form of expression.[7]

However, this right is not without limitations. A school may limit expression if it (1) materially disrupts class work or (2) invades the rights of other students.[8] Limitations may not

be based merely on a desire to avoid possible "discomfort and unpleasantness that always accompany an unpopular viewpoint."[9]

The Supreme Court has recognized two other limitations on student on-campus speech. In 1986, the Supreme Court held that the Tinker rule did not protect student speech that is "vulgar, lewd, obscene, and plainly offensive."[10] "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially accepted behavior."[11] The Court held that "[t]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct."[12]

Second, schools have much greater latitude in restricting the speech of students where the student's speech is "school sponsored." In 1988 the Supreme Court held that a school may disassociate itself from potentially embarrassing stories by prohibiting their publication in a school published newspaper.[13] The Court observed that "students, parents and members of the public might reasonably perceive [the students' speech] to bear the imprimatur of the school."[14] Thus, in forums which persons might reasonably perceive as school-sponsored, including school publications, theatrical productions, and school elections, school officials have much greater latitude to restrict students' speech so long as it is "reasonably related to legitimate pedagogical concerns." "School-sponsored" speech was defined as speech that can fairly be characterized as part of the school's curriculum, meaning the speech occurs in activities that "are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[15]

"See You at the Pole" Prayer Times

The only conceivable grounds which might be used to restrict student expressive activity at "See You at the Pole" rallies are the two Tinker limitations.[16] Prayer and fellowship that occurs at "See You at the Pole" events clearly are not vulgar or lewd. The religious expression at these events also does not qualify as "school-sponsored" speech because it is student-led and student-initiated. The "See You at the Pole" rallies are private speech and do not involve the use of the school PA system, sponsorship by the school or the compelled attendance of any student. They are private speech and religious exercise, which are protected by the First Amendment.[17]

The first Tinker limitation, that the expression must not "substantially and materially" disrupt class work, is not applicable because these rallies occur during non-instructional time and do not affect the educational process. Furthermore, Tinker stands for the idea that a "heckler's veto" will not succeed – that opposition from those against the free speech at issue cannot provide the school with grounds to limit the speech.[18] Thus, disturbance from non-participants is not sufficient to provide a school with a reason to limit that speech. The rallies also do not invade the rights of others and the second Tinker limitation is inapplicable as well. No one is

compelled to participate, nor is anyone forced to remain and silently observe while other students pray.

Concerns of school officials over the Establishment Clause, which restricts government endorsement of religion or religious activities, are no basis for forbidding "See You at the Pole" rallies. Private religious speech that is genuinely student-initiated is protected by the Free Speech Clause of the First Amendment.[19] The fact that school officials allow this non-disruptive religious expression does not constitute government endorsement of religion that violates the Establishment Clause. As the Supreme Court has written, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated."[20] Although the school cannot sponsor religious expression or even suggest it, a student's personal decision to pray or speak religiously must be protected.[21]

The United States Department of Education has specifically referred to "See You at the Pole" rallies as constitutionally protected activity of students in guidelines issued under the No Child Left Behind Act of 2001:

> Students may organize prayer groups, religious clubs, and "see you at the pole" gatherings before school to the same extent that students are permitted to organize other non-curricular student activities groups. Such groups must be given the same access to school facilities for assembling as is given to other non-curricular groups, without discrimination because of the religious content of the expression.[22]

Indeed, the Department of Education noted that local educational agencies must certify that they have no policies that prevent students from engaging in constitutionally protected prayer.

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

While public school teachers have rights in schools as well, courts have held that a teacher's expressive rights may be limited by schools, particularly where there are Establishment Clause concerns.[23] Schools concerned with teacher expression being perceived as endorsed by the school (state action) now have more freedom to restrict that expression after these cases. However, public schools must conduct a careful balancing test of all the facts and circumstances involving the government's interest and a teacher's interest in speaking on matters of public concern.[24]

While students' private speech may constitute "state action" if the school participates in or supervises it, mere presence by a teacher is not enough to transform the speech into the school's own.[25] Thus, while mere presence is not enough, active teacher participation in student expression (i.e. "See You at the Pole" rallies) might be enough to constitute "state action" and

permit the school to restrict that expression. This issue has yet to be litigated in the "See You at the Pole" context.

However, in a case involving teacher participation in a Christian-based after-school program, a federal appeals court held that the Establishment Clause was not violated by the teacher's actions. The court ruled that the school's policy of prohibiting all employees—even on their own time—from participating in any religious-based programs held on school grounds was an overly-broad remedy and unnecessarily limited the ability of its employees to engage in private religious speech on their own time.[26] The teacher's private speech did not put the school at risk of violating the Establishment Clause because it did not occur during a school-sponsored event, she did not affiliate her views with the school and students participated in the meetings with parental consent. The court wrote that "[e]ven private speech occurring at school-related functions is constitutionally protected, . . . ; therefore private speech occurring at non-school functions held on school grounds must necessarily be afforded those same protections."[27]

This decision strongly supports the right of teachers to participate in "See You at the Pole" rallies. Because the rallies are student-initiated and led, a teacher's participation during his or her own time would not constitute official school involvement or endorsement of the event. The Establishment Clause is not implicated by the teacher's participation and so there is no basis for a school to forbid or punish teacher participation.

Right of Access—Equal Access Act

Student Access

The rights of students to conduct "See You at the Pole" rallies also is supported by the 1984 Equal Access Act.[28] The EAA provides that if a secondary public school receives federal funds, it may not create a limited open forum and still deny any of its students the opportunity to meet on campus due to the political or religious nature of their speech.[29] A school creates a limited open forum when it allows any non-curriculum-related student group to meet on school premises outside of normal class hours.[30] Thus, if a school permits the student pep club or National Honor Society to meet, it must allow the Fellowship of Christian Athletes or Bible Club to meet on the same terms.

The Supreme Court in Board of Education of the Westside Community Schools v. Mergens[31] affirmed the constitutionality of the Act and clarified its application. The Mergens Court defined a "non-curriculum-related" group as one whose subject matter is not taught in a regularly offered course[32] and held that a school must extend the same support to religious groups as it does to other non-curricular student groups.[33] Schools must provide equal access **and** a fair opportunity **and** may not discriminate on the basis of viewpoint.[34] This includes allowing equal access to school bulletin boards and PA systems.[35]

"See You at the Pole" Meetings

Under the EAA, "See You at the Pole" rallies that are sponsored or initiated by student clubs could be deemed non-curricular student club meetings that the school is required to allow. "[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."[36] A school can characterize itself as a closed forum but, in doing so, may not allow non-curricular groups to meet on school property and the policy must not have a discriminatory effect.[37] Schools are hesitant in characterizing their school as a closed forum, since in that case the school could not permit any non-curricular club to meet on school property. However, even if the schools have a "closed forum" policy regarding other facilities, schoolyards have been intended by the government as locations for interpersonal communication between students and are thus limited public fora.

Furthermore, Department of Education guidelines have recognized that a school may not discriminate against students by forbidding "See You at the Pole" rallies. In 1998, Richard Riley, Secretary of Education under President Clinton, sent a letter to teachers and school administrators stating that students have the right to participate in events with religious content, specifically mentioning "See You at the Pole" rallies, before or after school on equal terms with other non-curriculum groups.

Teacher Participation and Access

Under the Equal Access Act, employees of the school, such as teachers, may be present at "religious meetings only in a non-participatory capacity."[38] Thus, teachers may be assigned to attend the meetings for custodial purposes or to preserve order, but may not participate.

A school district cannot prohibit discussions promoting religion among teachers when they are not involved in classroom instruction.[39] 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.[40]

Conclusion

Religious expression is speech protected by the First Amendment, and students may engage in such expression at school where they have a right to be. When such expression is at a before-school "See You at the Pole" rally, a school can restrict the expression only in the unlikely event that the rally materially disrupts school functions or invades the rights of other students. To the extent that the rally occurs during a time when teachers are not on the job and would not be seen as representing the school, they also may join in the rally without violating the Establishment Clause.

Under the Equal Access Act, a "See You at the Pole" rally is statutorily protected activity if the school has created a forum for student group meetings and the rally is one of the meetings of a religious student group. Teachers may be present as monitors, but the Act does not allow teachers to participate.

About The Rutherford Institute

The Rutherford Institute is an international, nonprofit civil liberties organization committed to defending constitutional and human rights.

Rutherford Institute attorneys have successfully defended the free speech and religious rights of individuals to participate in See You at the Pole events in years past. For example, Institute attorneys protected the right of a Fellowship of Christian Athletes student group in Kansas to advertise the See You at the Pole event on school bulletin boards. School administrators had prohibited the group from putting up posters, citing the posters' religious content. Institute legal staff informed an FCA representative that prohibiting the posters violated the students' rights to free speech, free expression and free exercise of religion as guaranteed by the First and Fourteenth Amendments. School officials relented and agreed to allow the FCA students to display their posters. In Shoreline, Wash., high school officials prohibited a student from distributing information about SYATP. After Institute legal staff informed school officials of the student's rights, they quickly reversed their decision and allowed her to distribute the flyers. In California, high school officials informed a youth pastor that he would not be allowed to attend SYATP at their campus unless he underwent a tuberculosis test and criminal background check. After Institute legal staff pointed out that testing and background checks are only mandatory for school employees and volunteers, school officials relented and allowed the youth pastor to attend the event. In Texas, school officials refused to allow high school teachers to attend the SYATP rally. After being alerted to possible legal action by The Rutherford Institute, school officials opted to respect the teachers' constitutional rights.

Individuals with legal questions or in need of legal assistance relating to their right to participate in SYATP should call (434) 978-3888 or email staff@rutherford.org.

[1] Plaintiff's First Amended Original Complaint at 12, Bishop v. The Corpus Christi Ind. Sch. Dist., C-93-260, U.S. Dist. Ct. S.D. Tex. (filed Sept. 7, 1993).
[2] Id.
[3] Id.
[4] Id. at 8-9
[5] Tinker v. Des Moines Ind. Com. Sch. Dist., 393 U.S. 503, 506 (1969).
[6] 393 U.S. 503 (1969).
[7] See generally Widmar v. Vincent, 454 U.S. 263 (1981).
[8] Tinker, 393 U.S. at 513
[9] Id. at 509
[10] Bethel School District No. 403 v. Fraser, 478 U.S. 675, 683 (1986).
[11] Id. at 681.
[12] Id. at 683.
[13] Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988)
[14] Id. at 271
[15] Id.
[16] Id. at 513
[17] Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990) (opinion of O'CONNOR, J.).
[18] Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County, KY, 258 F. Supp. 2d 667, 689 (E.D. Ky. 2003).
[19] Chandler v. James, 180 F.3d 1254, 1261 (11th Cir. 1999), vacated sub nom Chandler v. Siegelman, 530 U.S. 1256 (2000), reinstated on remand, 230 F.3d 1313 (11th Cir. 2000).
[20] Mergens, 496 U.S. at 250.
[21] Chandler, 180 F.3d at 1264.
[22] "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," p. 3 (U.S. Department of Education Feb. 3, 2003).
[23] See Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469 (2nd Cir. 1999); Downing v. W. Haven Bd. of Educ., 162 F. Supp. 2d 19 (D. Conn. 2001) (School's concerns over the Establishment Clause superseded Teacher's right to wear religious shirt in high school); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000) (Teacher speech can be restricted because of school's policy/goals)
[24] Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will County, 391 U.S. 563, 568 (1968); See Nichol v. Arin Intermediate Unit 28, 268 F. Supp. 2d 536, 556 (W.D. Pa. 2003) (School administrators violated teacher's rights for suspending her for wearing a cross necklace at the Elementary School where she teaches).
[25] Clanton v. Glover, 280 F. Supp. 2d 1360, 1365 (M.D. Fla. 2003).
[26] Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807 (8th Cir. 2004).
[27] Id. at 815.
[28] 20 U.S.C. §§ 4071-4074 (2004).
[29] § 4071(a)
[30] § 4071(b)
[31] 496 U.S. 226 (1990).
[32] Id. at 239.
[33] Id. at 240.
[34] Prince v. Jacoby, 303 F.3d 1074, 1083 (9th Cir. 2002).
[35] Id.
[36] Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 293 (E.D. Pa. 1991).
[37] See East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp.2d 1166 (D. Utah 1999).
[38] Mergens, 496 U.S. at 236.
[39] Texas State Teachers Association v. Garland Ind. Sch. Dist., 777 F.2d 1046, 1053 (5th Cir. 1985), aff'd, 479 U.S. 801 (1986).
[40] May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1107, 1116 (7th Cir. 1986).