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Students' Free Speech Rights in Public Schools

While it would be inappropriate for The Rutherford Institute to provide you with legal advice at this time or under these circumstances, we are pleased to provide you with the following information which we hope you find useful.

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech."[i] The freedom to express a particular opinion, whether verbally, by disseminating literature, or even conveying a message on one's clothing "strikes at the very core of First Amendment values."[ii] The First Amendment's prohibition on laws restricting speech has been interpreted to also apply, through the Fourteenth Amendment, to actions of state and local governments, including even public school officials. Moreover, the constitutional protection of the rights of "persons" applies without regard to the speaker's age.[iii] Thus, the Supreme Court has emphatically ruled that the Constitution guarantees each student's freedom of speech and expression in the public schools. However, because of the peculiar setting and needs of the school environment, the Supreme Court has permitted more restrictions on student speech than would be permitted outside that context. The following is an overview of the protections afforded student speech by the First Amendment and the guidelines created by the Department of Education.

The General Rule: Student Speech is Protected by the First Amendment

The public schools are charged with teaching students not only reading, writing and arithmetic, but also with providing students with a working knowledge of their Constitution and the freedoms they uniquely possess as U.S. citizens. The Supreme Court has often referred to the public schools as a "marketplace of ideas" where the protections of the First Amendment are particularly important. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[iv]

The seminal case involving student free speech rights is *Tinker v. Des Moines Independent School District*, decided by the Supreme Court in 1969.[v] The *Tinker* case arose during the height of the Vietnam war when a group of public high school and elementary school students were suspended for wearing black arm bands to school to protest the war. School officials discovered the plan prior to the day the students intended to wear the arm bands and forbade the students from wearing them, ostensibly fearing that the demonstration would cause a disturbance. The students defied this prohibition, and, although only a few students objected to the arm bands, school officials suspended them.

The Supreme Court held that the suspensions violated the students' First Amendment rights. The Court first clarified that public school students, no less than any other citizens, were entitled to the protections of the First Amendment. "It can hardly be argued that either teachers or students shed their constitutional rights to free speech or expression at the schoolhouse gate."[vi] The Court rejected school officials' claims that the prohibitions on the arm bands were permissible because of the possibility that they might cause a disruption, noting that although a few students made hostile remarks about the armbands outside the classrooms, there were no threats or acts of violence that disrupted the learning environment.

The Court held that absent such evidence of disruption or interference with the rights of others, the suspensions violated the First Amendment.

Exceptions to the General Rule: Student Speech That May be Restricted:

Tinker was the high water mark for student First Amendment rights. In the decades since *Tinker* was decided, decisions by the Supreme Court and lower courts have chipped away at *Tinker's* broad protection of student speech. Nevertheless, these exceptions have not swallowed *Tinker*'s general rule. Outside the few instances listed below, the First Amendment continues to provide protection for students who wish to express their views, even on controversial topics like war, religion, sexuality and abortion.

Student speech may be suppressed only if the speech: (1) materially and substantially interferes with the requirements of appropriate discipline in the operation of the schools; (2) invades or collides with the rights of others; (3) is vulgar, lewd, obscene, or plainly offensive; or (4) is school-sponsored. Additionally, as with free speech rights in any context, school officials may impose reasonable time, place and manner restrictions on student speech.

Speech Which Materially Interferes With Appropriate Discipline

The first limitations on the general rule of First Amendment protection for student speech stem from the *Tinker* decision itself. In *Tinker*, the Court acknowledged that school officials could restrict student speech if it "materially and substantially interferes with the requirements of appropriate discipline in the operation of the schools."[vii] Thus, where student speech causes a substantial disturbance or inhibits teachers' abilities to teach students, school officials may restrict a student's speech. Nevertheless, as the *Tinker* decision illustrates, schools must offer more than mere speculation that a disturbance will occur as evidence to justify any interference with student speech. The First Amendment prohibits schools from banning student expression simply "because of an undifferentiated fear or apprehension of disturbance."[viii] School officials also must show more than a desire to avoid possible "discomfort and unpleasantness" accompanying a viewpoint.[ix] Finally, as the *Tinker* decision also highlights, a few hostile comments by students who disapprove of the student speaker's message is insufficient justification for the suppression of the student's speech.

An increasingly recurring example of this type of restriction on student speech is the Confederate flag cases. Federal appeals courts have recently found school policies banning the wearing or possession of confederate flags or symbols to be constitutional. In *West v. Derby*, the Tenth Circuit held that a school policy prohibiting Confederate flags and paraphernalia was constitutional.[x] Stressing the history of racial tension in the district, the court found that the board could reasonably believe that the symbols could cause a "material and substantial" disruption.[xi] Where there is no history of racial tension, however, a school district's prohibition on Confederate-themed clothing would appear to violate a student's First Amendment rights for the same reason as the arm band prohibition in *Tinker*. In *Tinker,* the Court rejected school officials' claims that the presence of students whose family members were serving in Vietnam could cause a disturbance. Likewise, the mere fact that a school is racially or culturally diverse, without a showing of any actual racial tension or conflict concerning Confederate items, should not suffice to permit school officials to suppress a student's First Amendment rights.

(2) Speech Which Invades the Rights of Others

The *Tinker* decision also stated that student speech which "invades or collides with the rights of others" could be suppressed.[xii] However, determining whether student expression meets this standard is difficult.[xiii] Although many cases discuss this as a limitation on student speech rights, few, if any, cases have turned on this question. In many cases speech which might fit into this category also interferes with appropriate discipline or is lewd or offensive (see below). It is much easier to tell what speech would *not* be found to "invade the rights of others" than what would. Certainly evidence that other students object to the speech is alone insufficient to justify banning the expression under *Tinker* because some students in *Tinker* did not approve of the students' armbands and even made hostile comments to their wearers. If courts were to accept that evidence alone as sufficient, "the officials would have a license to prohibit virtually every type of expression."[xiv]

In addition, according to one federal district court, a school policy that prohibited attire depicting messages that "harass" other students does not survive the *Tinker* test, at least as applied to student speech that is not directed at any specific student.[xv] The court found that the policy attempted to regulate "the content of speech, not . . . its potential for disruption."[xvi] The court noted that under the school's policy a student could not wear a t-shirt that bore a depiction objecting to homosexuality under the school's policy because it would demean his homosexual classmates.[xvii] While the court recognized that the school wanted to teach students to tolerate different races, ethnic backgrounds, sexes, and sexual orientation, it could not ban such speech, because it conflicted with this objective. The court stated that schools cross "the 'constitutional line . . . when, instead of merely teaching, the educators demand that students express agreement with the educator's values.'"[xviii]

(3) Vulgar, Lewd, Obscene, and Plainly Offensive Speech

In 1986, the Supreme Court held that the *Tinker* rule did not apply to student speech that is "vulgar, lewd, obscene, and plainly offensive."[xix] In *Bethel School District No. 403 v. Fraser* , the Court considered a middle school student's First Amendment challenge to a suspension he received for a speech including sexually suggestive language at a school assembly.[xx] The Supreme Court stated that "[t]he 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."[xxi] 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."[xxii] The Court recognized that adults retain substantial freedom under the First Amendment to engage in plainly offensive speech, but refused to extend the same protection to students in the public schools.[xxiii]

As could be expected, the precise boundaries of this category remain undefined. However, one court has recently held that "[s]peech need not be sexual to be prohibited by school officials; speech that is merely lewd, indecent, or offensive is subject to limitation."[xxiv] Courts also examine the age of the student speaker and his audience when determining whether the restriction on student speech complies with the First Amendment.[xxv] Thus, a school might be able to prohibit certain age-inappropriate speech among elementary school students that it could not prohibit among older students.

Examples of this type of limitation on student speech are school policies prohibiting the wearing or displaying of certain allegedly offensive symbols. For instance, the Sixth Circuit Court of Appeals

recently determined that a student's First Amendment rights were not violated when the principal prohibited him from wearing Marilyn Manson t-shirts to school.[xxvi] The shirts depicted a "ghoulish and creepy" picture of the singer and a picture and slogan which were disparaging of Christianity. Applying the reasoning in *Fraser*, the Court of Appeals determined that the school acted reasonably in determining that the shirts were inappropriate for the classroom and contrary to the school's basic educational mission.[xxvii] A few courts have also considered Confederate flag prohibitions under this heading, but none have held that schools could prohibit the wearing of the image of the Confederate flag or similar items simply because they are "plainly offensive" to some.

(4) School-Sponsored Speech

Courts have also held that schools have much greater latitude in restricting the speech of students where the student's speech is "school sponsored." The Supreme Court's primary discussion of this type of speech is found in *Hazelwood v. Kuhlmeier*.[xxviii] In *Hazelwood*, the Court held that a school official did not violate students' First Amendment rights when he deleted certain stories from a school newspaper that was distributed to residents of the community. The official censored the stories about the impact of divorce on students and another about students' experiences with pregnancy.

The Supreme Court held that the school could act to disassociate itself from what it believed were controversial and potentially embarrassing stories by prohibiting their publication in a school published newspaper. The Court observed that "students, parents and members of the public might reasonably perceive [the students' speech] to bear the imprimatur of the school."[xxix] 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."[xxx]

In recent years, the "school-sponsored speech" exception to the *Tinker* rule has been increasingly and expansively used by school officials in an effort to control more student speech. Courts have sometimes acceded to these arguments, permitting school officials to classify more student speech as "school-sponsored," as thus subject to greater restrictions. With varying degrees of success, school districts have argued that in addition to the forums identified as "school-sponsored" in *Hazelwood*, student art projects, senior class gifts, and student assembly addresses are also "school-sponsored*."* The federal circuit courts have also split over the question whether school officials may discriminate against student speech based upon its viewpoint, even when the speech is school-sponsored. However, the better rule, adopted by the 11th and 9th Circuit Courts of Appeal, is that the First Amendment prohibits viewpoint-based discrimination against student speech even where the speech is sponsored by the school. Thus, the First Amendment prohibits school officials from censoring student newspaper articles opposing war or advocating their religious faith simply because of the viewpoint the student chooses to express.

The First Amendment Protects Student Distribution of Religious Literature

The First Amendment guarantees students the right to distribute literature in a peaceful manner as long as the materials are not "libelous, obscene, disruptive of school activities, or likely to create substantial disorder, or which invade the rights of others."[xxxi] This constitutional protection extends to the distribution of religious literature.[xxxii]

Courts have split over the appropriate standard to evaluate distribution of religious literature

cases. Some courts have placed such speech in the school-sponsored category even though schools have nothing to do with this type of expression.[xxxiii] In other challenges to school restrictions on distribution of religious pamphlets, courts have applied the *Tinker* standard.[xxxiv]

Regardless of their method of analysis, however, courts have treated school efforts to ban such conduct unfavorably.[xxxv] In *Hedges v. Wauconda Community Unit School District*,[xxxvi] for example, the Seventh Circuit Court of Appeals struck down a school policy banning distribution of proselytory religious material and prohibiting any religious speech that might create the appearance of school sponsorship.

Courts have rejected Establishment Clause defenses to categorical bans like the one in *Wauconda*. They maintain that a content-neutral policy allowing the distribution of all leaflets in high schools satisfies Establishment Clause concerns.[xxxvii] In addition, student distribution of religious literature represents private and not government conduct. One federal court summarized this principle:

> Clearly, simply because student speech occurs on school property does not make it government supported. It is undisputed in this case that the students are not government actors, are not acting in concert with the government, and do not seek school cooperation or assistance with their speech. Accordingly, the Establishment Clause simply is not implicated.[xxxviii]

Further, schools cannot curtail student speech simply to appear neutral in the area of religion.[xxxix] As one court has stated, "[s]tudents therefore may hand out literature even if recipients would misunderstand its provenance. The school's proper response is to educate the audience rather than squelch the speaker."[xl]

However, schools may place reasonable time, manner, and place restrictions on distribution as long as the policy is reasonable and applies evenhandedly to all types of literature.[xli] According to courts, "[w]hen, where, and how children can distribute literature in a school is for educators, not judges, to decide 'provided [such choices] are not arbitrary or whimsical.'"[xlii] One court has held reasonable a policy that requires "the student and the principal to determine 'cooperatively' an appropriate time and place for the distribution."[xliii] That same court also upheld the portion of the school's policy that required a disclaimer as a reasonable restriction.[xliv]

Courts have failed to produce a uniform rule regarding policies that require students to obtain prior approval before distributing leaflets. The Seventh Circuit Court of Appeals held that such a policy in the elementary schools was constitutional.[xlv] The court held that the school had an interest in ensuring that obscene, vulgar, and racially and religiously bigoted material did not reach its students.[xlvi] Schools, however, must establish a reasonable prescreening process to avoid Free Speech violations.[xlvii]

Several other courts, however, have struck down prior approval policies.[xlviii] The Ninth Circuit ruled unconstitutional a policy that required prior review of non-school-sponsored speech.[xlix] The Court held that schools cannot require prior approval for such speech "on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials."[l] A federal district court ruled unconstitutional an elementary school's policy that required prior approval of both religious and non-religious literature.[li]

Education Department Religion Guidelines Protect Student Free Speech

As part of implementing the "No Child Left Behind Act", the Department of Education issued a set of guidelines with the goal of informing teachers, school officials, students and parents of the basic principles of religious expression in public schools as established by current caselaw.[lii] The following are a few highlights of the new guidelines:

Students may read their Bibles or other scriptures, say grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour, or other non-instructional time to the same extent that they may engage in nonreligious activities.

Where student groups that meet for nonreligious activities are permitted to advertise or announce their meetings – for example, by advertising in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets – school authorities may not discriminate against groups who meet to pray.

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions.
Where students or other private graduation speakers are selected on the basis of genuinely neutral, even-handed criteria and retain control over the content of their expression, … that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content.

The full text of the guidelines is available at:
http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html

The guidelines make federal education funding contingent on a school's verification that it has no policy prohibiting constitutionally protected religious expression. As a condition of receiving federal funds, local school districts must now submit a written certification to their state department of education that "no policy of [the school district] prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools as set forth in [the guidelines]."[liii] The certifications must be provided annually by October 1. The U.S. Department of Education requires the state departments of education to review and address complaints by individuals that local school districts are not abiding by the guidelines.

Conclusion

The public schools serve as a "marketplace of ideas" and are responsible for teaching students how to be productive citizens who appreciate their constitutional freedoms. Thus, the protection of student speech is of paramount importance. The First Amendment affords students broad freedom to express their opinions in public schools, and, although students' First Amendment rights are not coextensive with those of adults outside the public schools, school officials may suppress student speech only in limited circumstances.

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. *Bolger v. Youngs Drug Product Corp.,* 463 U.S. 60, 84 (1983).

. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 511 (1969).

. *Shelton v. Tucker,* 364 U.S. 479, 487 (1960).

. *Tinker,* at 503.

. *Id.* at 511.

. *Id.* at 513, quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

. *Id.* at 508.

. *Id.* at 509.

. *West v. Derby Unified School Dist. No. 260*, 206 F.3d 1358 (10th Cir., 2000).

. *Id.* at 1366.

. *Tinker* at 513.

. *Clark v. North Dallas Indep. Sch. Dist.*, 806 F. Supp. 116, 120 (N.D. Tex. 1992).

. *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp 157, 159 (D. Mass. 1994), *appealed on other grounds,* 55 F.3d 20 (1st Cir. 1995).

. *Id.* at 171.

. *Id.* at 172.

. *Id.*

. *Id.* at 173 (quoting *Steirer v. Bethlehem Area Sch. Dist.,* 987 F.2d 989, 994 (3rd Cir. 1993). Note however the apparent conflict between this decision and the recent *Boroff* decision (Marilyn Manson), *supra,* n. 16.

. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992), quoting *Tinker,* 393 U.S. at 509 (brackets in original).

. *Bethel Sch. Dist. No 403 v. Fraser,* 478 U.S. 675 (1986).

. *Id.* at 681.

. *Id.* at 683.

. *Id.* at 682-83.

. *Broussard v. School Bd.*, 801 F. Supp. 1526, 1536 (E.D. Va. 1992).

. *Id.* at 1537.

. *Boroff v. Van Wert City Board of Education,* 2000 U.S. App. LEXIS, 18023 (6th Cir.)(July 26, 2000).

. *Id.* at 15.

. *Hazelwood v. Kuhlmeier,* 484 U.S. 260 (1988).

. *Id.* at 270, 71.

. *Id.* at 273.

. *United States v. Grace*, 461 U.S. 171, 176 (1983).

. *See, Frasca v. Andrews,* 463 F.Supp. 1043, 1050 (E.D.N.Y. 1979).

. *See, e.g., Muller v. Jefferson Lighthouse Sch*., 98 F.3d 1530 (7th Cir. 1996), cert. denied; *Hedges v. Wauconda Comm. Unit Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993); *Hemry v. School Bd*., 760 F. Supp. 865 (D. Colo. 1991); *Nelson v. Moline Sch. Dist. No. 40*, 725 F. Supp. 965 (C.D. Ill. 1989).

. *See*, *e.g.*, *Clark v. North Dallas Indep. Sch. Dist*., 806 F. Supp. 116 (N.D. Tex. 1992; *Slotterback v. Interboro Sch. Dist*., 766 F. Supp. 280 (E.D. Pa. 1991); *Rivera v. East Otero Sch. Dist.*, 721 F. Supp. 1189, 1195 (D. Colo. 1989). S*ee also Muller*, 98 F.3d at 1545-47 (Rovner, J., concurring in part & in result) (stating that courts should use *Tinker* in distribution of literature cases).

. *Hedges*, 9 F.3d 1295; *Slotterback*, 766 F. Supp. 280; *Hemry*, 760 F. Supp. 856; *Rivera*, 721 F. Supp. 1189; *Nelson*, 725 F. Supp. 965; *Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379 (M.D. Pa. 1987; *see also* Bjorklun, *Distribution of Religious Literature in the Public Schools*, 68 EDUC. L. REP. 957 (1991).

. *Hedges*, 9 F.3d 1295

. *Hedges*, 9 F.3d at 1298-1300; *Slotterback*, 766 F. Supp. at 294-96; *Rivera*, 721 F. Supp. at 1195-96; *Thompson*, 672 F. Supp. at 1391-92.

. *Rivera*, 721 F.Supp. at 1195.

. *Hedges*, 9 F.3d at 1298-1300.

. *Id.* at 1299.

. *See Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Nelson*, 725 F. Supp. 965; *Hemry*, 760 F. Supp. 856, 863.

. *Muller*, 98 F.3d at 1543, (quoting *Hedges*, 9 F.3d at 1302) (brackets in original); *Nelson*, 725 F. Supp. 965.

. *Id*. at 1543.

. *Id*. at 1544-45.

. *Id*. at 1534-35.

. *Id*.

. *Id.* at 1541 (suggesting that factors such as the nature of the leaflet and problems that might arise in evaluating its impact on recipients are relevant when considering a policy's reasonableness).

. *See*, *e.g.*, *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988); *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994).

. *Burch*, 861 F.2d 1149.

. *Id*. at 1159.

. *Johnston-Loehner,* 859 F.Supp. 575.