


STUDENT EXPRESSION

When is it the school's business?

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"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 Independent Community School District, 393 U.S. 503

Three paragraphs later....

"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."

Tinker v. Des Moines Independent Community School District, 393 U.S. 503

Why a Constitutional Issue?

- Relationship between school and various individuals is not just as employer/employee or educator/student
- Also is as government/citizen, and First Amendment free expression protection means government cannot take adverse action based on a citizen's speech or expression

Student Expression

Tinker v. Des Moines Indep. Comm. S.D. (US 1969)

- Students wore black arm bands to protest the Vietnam war
- School policy prohibited the arm bands
- Students were suspended for several weeks, until they stopped their protest and were allowed to return to school
- Court: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
- Court: In order to discipline for student speech, school must show speech would "materially and substantially interfere" with the operation of the school.
- No actual disruption occurred here

Student Expression

Bethel SD v. Fraser (US 1986)

- Student made nominating speech for student council VP:

"I know a man who is firm - he's firm in his pants, he's firm in his shirt, his character is firm - but most [of] all, his belief in you the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts - he drives hard, pushing and pushing until finally - he succeeds. Jeff is a man who will go to the very end - even the climax, for each and every one of you. So please vote for Jeff Kuhlman, as he'll never come [long pause] between us and the best our school can be. He is firm enough to give it everything."

Student Expression

Bethel SD v. Fraser (US 1986)

- Student was suspended for the sexual innuendo
- Based on *Tinker*, lower courts found that lack of disruption meant District could not discipline
- Supreme Court: Schools can prohibit vulgar and lewd speech, as inconsistent with the "fundamental values of public school education."
- Easton SD – "I [heart] Boobies" case – "Under *Fraser*, schools may restrict ambiguously lewd speech only if it cannot plausibly be interpreted as commenting on a social or political matter."

Student Expression

Hazelwood v. Kuhlmeier (US 1988)

- Student journalism class published a regular newspaper
- District paid for printing, supplies and advisor's salary
- Advisor sought review by Principal of each issue before printing
- Principal objected to two stories in one issue:
 - Story on teen pregnancy that might contain identifying information about students who had been pregnant or might contain information unsuitable for younger students
 - Story on divorce that quoted a student talking about her father and the impact of divorce on her family
- Because advisor did not have time to get parental consent for the divorce story, issue was published without those stories

Student Expression

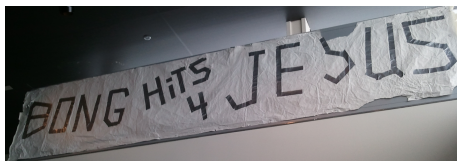
Hazelwood v. Kuhlmeier (US 1988)

- Student authors claimed violation of free speech rights
- Court: Districts can regulate student speech in school-sponsored activities "so long as their actions are reasonably related to legitimate pedagogical concerns."
- Court: "The question whether the First Amendment requires a school to tolerate particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."
- Applies to newspapers, yearbooks, theatrical productions, etc.

Student Expression

Morse v Frederick (US 2007)

- Students were released from school to attend Olympic Torch relay
- While across street from school, student displayed banner:



- Student was suspended

Student Expression

Morse v Frederick (US 2007)

- First issue: Is this even "school speech"?
- A: Yes, because Frederick was attending a school event
- Second issue: Can school punish this speech?
- A: Yes, because school has a legitimate interest in discouraging illegal drug use
- Note: this likely is a narrow decision. Not enough just to say that the speech is 'objectionable.'

Student Expression

Layshock v Hermitage SD / J.S. v Blue Mountain SD
(3rd Cir. 2011)

- Students created fake MySpace profile of principals, containing arguably lewd or offensive language, or at least portraying principals in unflattering light
- Students were disciplined and sued
- Court: neither District had authority to discipline, even if content of speech was vulgar or lewd, since speech occurred outside of school and there was no nexus between the speech and the school.

Student Expression

R.L. v Central York School District (Pa Mid. Dist. 2016)

- "At the outset, we note that our ability to decide with confidence whether R.L.'s speech was protected by the First Amendment is hamstrung by the perplexing state of relevant precedent. The extent to which schools can discipline or punish students for speech has been a developing area of law for the past few decades; with each precedential decision, lower courts are left with as many questions as they have answers."

Student Expression

R.L. v Central York School District (Pa Mid. Dist. 2016)

- A student reported finding an anonymous note that said, "there is a bomb in the school."
- Police and bomb-sniffing dogs searched school for hours but found no evidence of a bomb
- School officials reported seeing an anonymous tweet saying the bomb was in the stadium
- School officials evacuated building and eventually canceled school for rest of the day
- Upon getting home from school cancellation, student RL posted on Facebook, "Plot twist, bomb isn't found and goes off tomorrow."

Student Expression

R.L. v Central York School District (Pa Mid. Dist. 2016)

- RL deleted his post after about 4 hours
- Superintendent tracked down RL later that evening and questioned him about his bomb making skills
- School was held as scheduled next day, with no additional bomb search
- Three students visited principals to express concern about being in school, and five parents called to express concern
- RL initially was suspended ten days, and after a Board hearing was expelled for 23 more days.
- Family sued, claiming the discipline violated student's free speech right, and that the school had no right to consider the speech, which did not occur in school

Student Expression

R.L. v Central York School District (Pa Mid. Dist. 2016)

- District Court upheld the suspension, answering several questions:
 - **Does Tinker's "substantial disruption" standard apply to off-campus speech?** *Snyder/Layshock* Court never said so explicitly, but assumed it did. Court here then will continue to assume so.
 - **Was there a substantial disruption?** Either way, School was reasonable in forecasting a substantial disruption, and that is enough. (must be "specific and significant fear of disruption, not just some remote apprehension of disturbance.")
 - **Does it matter that RL was joking?** No. Intent doesn't matter as much as reasonable impact on reader/hearer

Student Expression

A.N. v Upper Perkiomen School District (Pa East. Dist. 2017)

- Around 8pm, AN, a 15-year old student posted on an anonymous Instagram account a homemade mash-up of "Evan," a video produced by the anti-school-gun-violence group *Sandy Hook Promise*, and "Pumped Up Kicks," a Foster the People song about a young man's homicidal thoughts.
- The song's lyrics, as used in the mash-up, include:
All the other kids with the pumped up kicks
You'd better run, better run, outrun my gun
All the other kids with the pumped up kicks
You'd better run, better run, faster than my bullet
- Post said, "See you next year, if you're still alive," and "see you tomorrow."

Student Expression

A.N. v Upper Perkiomen School District (Pa East. Dist. 2017)

- The video received comments from two students, and a third sent a private message asking if it was a real threat.
- One parent emailed to alert District and another called State Police
- Student first edited the post to say it was not a real threat, and then he deleted the post altogether.
- Post appeared on Instagram for about two hours and was seen by 45 people.
- Superintendent canceled school for next day
- Student was disciplined and sought to enjoin the District's discipline as an unconstitutional restriction on free speech

Student Expression

A.N. v Upper Perkiomen School District (Pa East. Dist. 2017)

- Court: Discipline appropriate – no violation of free speech rights
- Court distinguished this case from *Layshock* and *Snyder* in several ways:
 - In *Snyder* and *Layshock*, the fake Myspace profiles were so nonsensical that nobody could take them seriously, but here the post was taken seriously due to the anonymous nature
 - In *Snyder* and *Layshock*, the MySpace profiles did not cause any disruption, but the post did here, with a cancellation of school among other disruptions
- Court rejected parents' argument that disruption was caused by school officials and not the post, noting the post "reasonably led school officials to 'forecast substantial disruption of or a material interference with school activities.'"

Student Expression

- Other Misc. Issues
 - Dress Code "disruptions"
Young v Giles County Board of Ed (TN, 2016)
"Some People Are Gay, Get Over It" shirt
 - Web Filtering
 - Gender-based dress codes

Student Expression

Tips for responding to situations

- Don't overreact
- Don't make your own disruption
- The standard isn't "this would be unacceptable if it were my child"
- A "reasonable forecast of disruption" requires more than knowledge a topic is controversial
- If ACLU contacts you, take advantage of the opportunity to engage

Student Expression

Hypothetical #1:

After an exciting homecoming football game, several members of the high school football team celebrate with a few beers. One student shares on Instagram a picture of several other team members, each holding a beer. Principal sees the photo.

Q: Can principal suspend each student?

A: No. There is no nexus/disruption

(Why doesn't *Morse* permit discipline for celebrating alcohol?)

Student Expression

Hypothetical #1:

After an exciting homecoming football game, several members of the high school football team celebrate with a few beers. One student shares on Instagram a picture of several other team members, each holding a beer. Principal sees the photo.

Q: What about discipline relating to participation in sports only?

A: That may be ok, since there is no constitutional right to participate in extracurricular activities.

Student Expression

Hypothetical #1:

After an exciting homecoming football game, several members of the high school football team celebrate with a few beers. One student shares on Instagram a picture of several other team members, each holding a beer. Principal sees the photo.

Principal interviews students shown in the picture, in order to determine who else was in the photo and who provided the alcohol. The interviews took a significant amount of the principal's time, and caused students to miss significant instructional time.

Is there a material and substantial disruption? NO

Student Expression

Hypothetical #2:

Student Sally complains to Principal that Student Joe, while at home and on his own device, posted a video of himself talking to Sally while holding a handgun and pointing it at the screen.

Q: Can school, on these facts, discipline Joe for cyberbullying?

A: No. There is no school speech and no material and substantial disruption here.

Q: Can the school do *anything*?

A: Yes. Watch the students. Talk to students (involved and bystanders) and parents. Notify teachers, coaches, etc.

Student Expression

Hypothetical #2b:

Upon learning that Sally complained to Principal about the new video, several other students report that Joe posted a series of other videos throughout the preceding 7 months, including videos of him playing the song "Pumped Up Kicks" while firing guns in his yard and saying, "these weapons would be great for a school shooting."

No video mentions a date for a shooting, and the school was unaware of the videos during the time they were being posted.

Q: Can school impose discipline?

Student Expression

Hypothetical #3:

Students are watching the weather report, hoping for a snow day the next morning. When one student becomes impatient, he tweets, "the stupid moron we call a superintendent better get his head out of you know where and cancel school already."

Q: Can the student be disciplined for being disrespectful?

A: No. Not school speech; no disruption

Q: What about "hey, @Superintendent, come on and cancel school already, or do I need to call in a bomb threat to cancel it?"

Student Expression

Hypothetical #4:

District offers technology class that teaches social media marketing. As part of the course, the class maintains the school's official Facebook page and Twitter account. John, a student in the class, posts on the official accounts a message congratulating another high school student in the district on the birth of her baby. School officials worry that the post encourages sexual activity.

Q: Would District discipline violate the 1st Amendment?

A: No. Those accounts are the school's. Legitimate educational concerns may permit editorial control by teacher.

Student Expression

Hypothetical #5:

John, the student from Hypothetical 4, maintains a public Facebook page entitled "Inside Scoop" where he posts news, gossip and commentary about activity in the High School. Over the last week, he posted messages congratulating another student on the birth of her baby, criticizing the new dress code, and complaining about how bad the music teacher is and calling for her to be fired.

Q: Is there any basis for discipline here?

A: No. Unlike in the prior hypo, this speech occurs on his own page and his own time.

A Note About Employees

- Different rules apply to employees than apply to students. Why?
- Still need to be mindful of whether and when an employees speech/conduct outside of school impacts the workplace
 - Be prepared to articulate the disruption that has occurred or can occur as a result of social media activity deemed inappropriate (bad example to students, inappropriate student communication, etc.)
 - Follow the policy. Uniformly.
 - Use PSEA as resource
- First Amendment is not the only consideration.
 - Collective Bargaining Agreements may impact a school district's ability to discipline
 - School Code provisions limit a school district's ability to terminate employees
 - Anti-discrimination and other labor laws prohibit retaliation

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