

Kneeling, Walkouts, & Social Media Nastiness

The Latest Student Free Speech Issues

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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

Newest Issues to Consider

- Student Walkouts (Parkland-related gun protests)
 - Walkouts themselves
 - District-sponsored events/assemblies
 - Student speech promoting or opposing event
- Kneeling for National Anthem/Pledge of Allegiance
- Out-of-school speech
 - School threats
 - General “bad behavior”
- Right vs. Privilege analysis (discipline involving extracurricular activities compared to regular education program)

General Framework

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

General Framework

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."

General Framework

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."

General Framework

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

General Framework

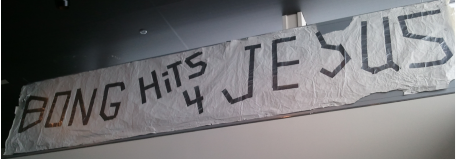
Hazelwood v. Kuhlmeier (US 1988)

- 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.

General Framework

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

General Framework

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.'

General Framework

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.

General Framework

Summary

- Can discipline/regulate student speech IF
 - Substantial disruption
 - Lewdness
 - School-sponsored speech / Part of educational program
 - Drug/alcohol advocacy
- But cannot regulate IF
 - Speech occurs outside of school and therefore has no nexus with school activity

Walkouts

- *Nationwide student-promoted event held March 14, 2018, intended to advocate for gun control policies and to honor the 17 victims of the shooting at Marjory Stoneman Douglas High School in Parkland, Florida.*
- *Other events held April 20, along with events promoting competing views or even for other unrelated causes*

Walkouts – disruption

- Can a District discipline students for participating in a walkout?
 - Yes, student attendance is statutorily mandated
 - Also, *could* cause substantial disruption
- May a District discipline students more severely for participating in walkout than for other similar absences?
 - No, should not base decision on viewpoint
- *MUST* a District discipline students for participating in a walkout?
 - Yes, again should not base decision on viewpoint
 - When class attendance policy later is applied in other context, District could face claim policy is applied non-uniformly, because of race, gender, religion, etc.

Walkouts – school sponsorship

- Some schools held assemblies with moments of silence, student speakers, and/or teacher-led discussions
- Remember, *Hazelwood v. Kuhlmeier* permits District to regulate speech during school-sponsored activities
- Assuming event really is District-sponsored and controlled, this is District-sponsored speech and there is no student free speech right implicated

Walkouts – promotion of event

- *K.A. v. Pocono Mountain SD (3rd Cir, 2013)*
 - During non-instructional time, a fifth grade student tried to distribute invitations to Christmas party at her church
 - Other students had been permitted to distribute invitations to birthday parties, Halloween parties, Valentine's dances, and the like during non-instructional time
 - Student testified her reason for distributing the invitations was that she wanted to share her faith with her friends
 - School said distributed materials needed to be pre-approved, and did not approve K.A.'s invitations

Walkouts – promotion of event

- *K.A. v. Pocono Mountain SD (3rd Cir, 2013)*
Court addressed two questions:
 - Does the *Tinker* 'substantial disruption' standard still apply in elementary school context, where kids are more impressionable?
 - Yes, while the analysis of what causes or constitutes a substantial disruption may differ in lower versus higher grades, the same general concept applies.
 - Distribution of the invitations here did not cause a substantial disruption
 - When a student distributes materials prepared by outside entity, is the speech governed by *Tinker's* 'substantial disruption' standard (as student speech) or by a 'forum analysis' (governing regulation of outsiders' speech)?
 - *Tinker* standard. This is still student speech regardless of where it originated or who encouraged it.

Walkouts – promotion of event

- *K.A. v. Pocono Mountain SD (3rd Cir, 2013)*
Application to Walkouts
 - School may not regulate/prohibit distribution of materials promoting events or causes, so long as
 - During non-instructional time
 - No substantial disruption
 - No lewdness or drug/alcohol advocacy
 - Analysis of 'substantial disruption' may differ based on grade level, but be careful
 - Speaker's intent not relevant, even if proselytizing, controversial, generally objectionable, etc.

Kneeling / Anthem / Pledge

- *Minersville v. Gobitis (US 1940)* – Schools can require students (including the Jehovah's Witness plaintiffs) to recite Pledge of Allegiance
- *West Virginia State Board of Education v. Barnette (US 1940)* – Overturned *Minersville* – Free speech clause of First amendment prohibits schools from requiring Schools students to recite Pledge of Allegiance
 - *"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."*
- What about regulating expression during privileged activities like sports, as compared to compelled activities like the classroom?
 - Hold that thought...

Out of School Expression

"At the outset, we note that our ability to decide with confidence whether [a student's out of school] speech [is] 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."

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

Out of School Expression

- *Bell v. Itawamba County School Board (5th Cir, 2015)*
 - Bell, an 18-year old high school student, heard rumors of gym teachers sexually harassing female students
 - Bell wrote and recorded rap song about the rumors and posted the video on Facebook and YouTube – all outside of school time
 - Song contained lyrics like, "betta watch your back," and "going to get a pistol down your throat"
 - No evidence Bell viewed videos at school or encouraged anyone else to do so
 - School officials saw the video, suspended Bell, and sent him to alternative school for remainder of marking period.

Out of School Expression

- *Bell v. Itawamba County School Board (5th Cir, 2015)*
Court upheld the suspension, answering several questions:
 - *Does Tinker's "substantial disruption" standard apply to off-campus speech?* Yes, because of "the paramount need for school officials to be able to react quickly and effectively to protect students and faculty from threats, intimidation, and harassment intentionally directed at the school community." (emphasis added)
 - There can be a substantial disruption "when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher." (emphasis added)
 - *Was there a substantial disruption?* Yes. Could be reasonable to forecast a substantial disruption, since the rap identified specific individuals

Out of School 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."

Out of School 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

Out of School 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

Out of School 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."

Out of School 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

Out of School 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.'"

Out of School Expression

"Reasonable forecast" of substantial disruption

- Remember R.L. v. Central York Court said must be "specific and significant fear of disruption, not just some remote apprehension of disturbance."
- In all of these examples, the "specific and significant fear" came from concrete elements:
 - Naming of specific individuals
 - Description of specific conduct (shooting, bombing, etc.)
 - Designation of specific date in near future
- Absent those details, vague threats likely will NOT be considered enough to reasonably forecast a "specific and significant fear."

Right vs. Privilege?

B.L. v. Mahanoy Area Sch. Dist. (M. D. Pa., 2017)

- B.L., a high school cheerleader, posted a 'Snap' featuring a photo of her with and a friend holding up their middle fingers with the text, "f*** school f*** softball f*** cheer f*** everything" superimposed on the image.
- Snap was taken on weekend, at a convenience store, and shared with friends (not shared publicly)
- No specific reference was made to the school, the team, or any individuals
- B.L. dismissed from cheerleading squad for use of profanity, based on coach's conduct policy
- B.L. sued, alleging violation of free speech

Right vs. Privilege?

B.L. v. Mahanoy Area Sch. Dist. (M. D. Pa., 2017)

- District argument 1: This is not "expressive speech" so not protected by the 1st Amendment.
 - Court: Wrong. This is "expressive speech"
- District argument 2: Fraser applies to out of school lewdness just like in school.
 - Court: Wrong. J.S. v Blue Mountain and Layshock v Hermitage say exactly the opposite.

Right vs. Privilege?

B.L. v. Mahanoy Area Sch. Dist. (M. D. Pa., 2017)

- District argument 3: Out of school lewdness can be considered on-campus speech if intentionally directed at school activity (like off-campus speech can create disruption on campus if directed at school)
 - Court: Wrong. Again, that argument was rejected by Layshock. If off-campus lewdness reaches campus AND creates disruption, then maybe can be regulated but still only under Tinker and not Fraser.
- District argument 4: B.L. was only removed from cheerleading, which is a privilege, and was not denied any educational program, which is a right.
 - Court: Prior cases make no such distinction. Punishment is punishment.

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
- How would you react if the speech was not on social media or not permanently recorded (i.e. if two kids were sitting in their basement having a conversation and saying the same things)
- If ACLU contacts you, take advantage of the opportunity to engage

A Note About Employees

- Different rules apply to employees than apply to students. Why?
- Still need to be mindful of whether and when an employee's 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.
- 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