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<http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Free-speech-and-public-schools.html>

Free speech and public schools

Students and teachers are free to speak their minds on public school grounds. They can even wear T-shirts with messages, dye their hair funky colors, and wear jewelry or buttons that make a social statement. But, even with First Amendment protection guaranteed by the U.S. Constitution, there are limits in the school setting. And figuring out where the line is drawn is fairly complicated.

The reason is that the First Amendment's Free Speech Clause requires courts and school districts to weigh and balance two forceful ideas that occasionally clash:

- The need for a safe, orderly school environment conducive to learning.
- The guaranteed American entitlement to speak or engage in expressive activity.

Neither interest is trivial. Words and symbols are at the core of American society, and free speech, many believe, separates the United States from oppressive countries. Public schools are society in miniature, with students and school employees representing the full range of beliefs.

It is important to remember that speech, as defined by the Constitution, is not just words. It also includes non-verbal and symbolic expression: clothes, off-campus web sites, dance performances, and art. In today's climate, questions about freedom of speech are amplified. The nation is polarized by matters of war and peace, and in-your-face moral issues provoke car discussions that make parents cringe.

Part of the mission of public schools is to teach children what democracy is all about. Tax-supported schools are also, by their actions, examples of democracy in action. It would be the height of contradiction to teach about the First Amendment and then not follow it. Yet, free speech cannot trump

the main mission. As one federal court put it, “Learning is more important in the classroom than free speech.”

Free speech as a public school guidepost

While the U.S. Constitution applies within schools, **rights are slightly reduced for the following reasons:**

- Students are minors.
- Adults serve as employees.
- A public learning institution requires a peaceful environment to thrive.

Public schools are in a category all their own. They must achieve academic excellence while obeying various laws, rules, and regulations. **Private and parochial schools, however, are not similarly restricted** by ideas of individual rights, free speech, and other liberties. Further, non-public learning places can trample on freedoms with impunity and never face a date in court.

The big idea behind free speech is simply this: Students and teachers are free to reveal their views unless there is a compelling reason to stop it. School officials cannot arbitrarily pick and choose the speech it will allow.

The following examples illustrate this conflict.

OK: Allowing a student to wear a T-shirt that says “I oppose the war on terrorism.” Political statements are permitted in a school environment.

WRONG: Making the student change or cover the shirt because it contains a political message, or because school officials, a majority of students, or the community agree with deployment of troops. The First Amendment is not subject to a popularity contest, and in fact is meant to protect less popular views.

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OK: Exercising editorial control and screening articles for a school-sponsored newspaper. Because such publications bear the implied message of school backing, officials have a right to filter the content.

WRONG: Punishing a student for distributing publications when they are complying with policy and not endangering the safety of other students or employees. If school officials establish the time, place, and manner in which student publications can be distributed they must stick with it. Unless the brochure or pamphlet crosses the line of being inappropriate, public school employees cannot squelch the message simply because they disagree. The Constitution protects unpopular views. If a student is peacefully giving out flyers and following the school rule, then there should be no consequences.

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OK: Reprimanding a teacher for cursing out a colleague or a student. Aggressive, vulgar speech meant to provoke rarely wins First Amendment protection.

WRONG: Transferring a principal who says the K-12 curriculum of the school district is not rigorous. Criticisms that are in the public interest are usually sheltered.

Student speech

Tinker v. Des Moines Independent Community School District is the single most influential U.S. Supreme Court case on school free speech. The memorable line emanating from the case: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The 1969 case involved Iowa students and their right to wear a black armband in school to symbolically protest against the Vietnam War.

The principle outlined in the case that still endures: To prevail, school officials must demonstrate that the speech would provoke "substantial disruption" of school activities or invade the rights of others. Using that measuring stick, the court concluded that wearing armbands is a form of symbolic speech "akin to pure speech" and that the act was a "non-disruptive, passive expression of a political viewpoint." The court said that a fundamental right of freedom of expression cannot be squelched due to "a mere desire to avoid [the] discomfort and unpleasantness that always accompanies an unpopular viewpoint."

In 1986, the Supreme Court decided *Bethel School District No. 403 v. Fraser*, affirming the school district's right to punish a student who gave a lewd, vulgar political speech at a school assembly. The court reasoned that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."

The court was also concerned about the academic aspect of the case. "The freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior," the court wrote.

Two years later, the Court decided *Hazelwood School District v. Kuhlmeier*, a watershed case that lets school districts remove articles from student newspapers and otherwise control activities that are curriculum-related.

Courts need a way of determining whether certain speech is permitted on school grounds and protected under the Constitution or whether schools can place limits. One technique for figuring that

out is the “forum analysis,” which enables school officials to control the time, place, and manner of speech. The three types of forums are:

- Open Forum: A public place, like a park, that is traditionally used as a place of free public discourse.
- Limited forum: Generally a public area, like the common area in a school. It is not open to anyone, but has been made available in limited ways and at limited times for certain speech.
- Closed forum: A private space, not used for an exchange of ideas. In fact, the place’s purpose would be lost if free speech were allowed, such as class time, school plays, or curricular-related activities.

Web-savvy

Students generally have broad freedom under the First Amendment to express themselves on the Internet on their own time, using off-campus computers. The results of that freedom include *Out-of-Bounds* web sites or blogs (both containing personal diaries or posted conversations) that can be course and offensive at best and harbor threats to people and property at worst.

The U.S. Supreme Court has said the Internet is a protected free speech zone, calling it “the most participatory form of mass speech yet developed.” But there is a wide berth between speech that is offensive, obnoxious, and insulting—all of which is protected—and speech that places the safety of others in jeopardy.

One Pennsylvania student’s web site requested \$20 for a hit man. The reaction of that state’s Supreme Court was this: “We believe that the web site, taken as a whole, was a sophomoric, crude, highly offensive, and perhaps misguided attempt to humor or parody. However, it did not reflect a serious expression of intent to inflict harm.”

Another case arose when a Missouri student was suspended for 10 days for a home-based web site that used vulgar language to criticize the principal, teachers, and other things about school. A federal district court in that state ruled that “the public interest is not only served by allowing [the student’s] message to be free from censure, but also by giving the students at [the high school] this opportunity to see the protections of the U.S. Constitution and the Bill of Rights at work.”

Employee speech

Over the years the courts have ruled that school employees are not always free to express their opinions and beliefs. Employees cannot be disciplined or suffer negative consequences for speaking

out on matters of “public concern.” Schools can take action, however, when employees go public with strictly personal concerns.

The main U.S. Supreme Court case is *Pickering v. Board of Education*, which held that freedom of speech—while not absolute—gives employees Constitutional protection if they are speaking about issues of a public nature, rather than those things about which they have a personal stake. Pickering overturned a school district’s decision to fire a teacher for commenting on school expenditures through letters in a local newspaper.

For example, if a teacher criticized a building’s weak leadership and lax coordination between grades, it would likely be considered a comment about matters of public interest. If that same teacher complained publicly that she thought she was being unfairly targeted for classroom observations and undesirable assignments, a school district would likely be within their rights to react.

But even standing on principles of public concern is not sacrosanct. Employees can still be disciplined based on that expression (like publicly criticizing supervisors) if the district believes that it will impede the employee’s ability to perform assigned duties, or the speech will undermine supervisory authority, disrupt the school, or destroy close working relationships.

So when confronted with an employee speech case, the court’s analysis goes like this: Is the speech a matter of public concern? If not, the case ends and the employee loses. If so, then was the employee’s speech outweighed by the state’s interest in promoting efficiency in the delivery of educational services?

The following rulings illustrate the kinds of cases decided by federal courts on this issue.

- A teacher cannot be dismissed for wearing a black armband to class to protest the Vietnam War.
- A teacher can refuse to participate in the flag salute under the First Amendment if she stands silently with her hands by her side.

Teachers are in a particularly special position as classroom leaders. The courts have found that teachers are role models, and when operating in their official capacity become “state actors”—essentially an extension of government power.

For instance, even though teachers may have a free speech right to join students at a student-arranged “Meet me at the Pole” prayer gathering before school, doing so could be seen as official endorsement of religion.

Furthermore, unlike a college setting, K-12 public school instructors do not have a right of academic freedom. Control of the curriculum—both what is taught and how it is taught—is vested with the board of education and the administration. The Court wrote in the Pickering case that “The state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”

References

Center for Public Education (April 5, 2006). *Free Speech and Public Schools*.

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