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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 freedom to express a particular opinion, whether it be in speech, in writing, or in any other form and whether it be of a religious or non-religious nature, "strikes at the very core of first amendment values."[1] The Supreme Court has emphatically ruled that the Constitution guarantees each student's freedom of speech and expression in public schools.[2] The Court's decisions reflect the principle that students do not "shed their constitutional rights to free speech or expression at the schoolhouse gate."[3] Indeed, school officials "do not possess absolute authority over their students. Students are ?persons? under [the] Constitution."[4] This right to students' free expression applies even to speech which addresses controversial topics such as religion, war, homosexuality, and abortion.

Unless the speech falls within one of the narrow categories listed below, students may freely speak to other students and to teachers, and may distribute literature[5], both religious[6] and secular. The courts have gone further and have construed speech to include expressing a message through symbols and clothing. Therefore, students may also wear clothing or expressive symbols which communicate their message.[7] All of these expressive activities are protected by the United States Constitution, and school officials can be sued in a court of law for denying or abridging these free speech rights.

**Student speech that may be suppressed:**

Student speech may be suppressed only if the speech: (1) is vulgar, lewd, obscene, or plainly offensive; (2) is school-sponsored, (3) materially and substantially interferes with the requirements of appropriate discipline in the operation of the schools; or (4) invades or collides with the rights of others.[8] We will briefly clarify each of these categories. However, be aware that these are not perfect categories and many cases seem to fit under more than one of these exceptions.

**(1) Vulgar, Lewd, Obscene, and Plainly Offensive Speech**

As one court has noted, "school officials may suppress speech that is vulgar, lewd, obscene, or plainly offensive without a showing that such speech occurred during a school-sponsored event or threatened to ?substantially interfere with [the school's] work.?"[9] Bethel School District No. 403 v. Fraser supplies the appropriate standard for vulgar, lewd, obscene, and plainly offensive speech.[10] In Fraser, 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."[11] It 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] The Court recognized that while it had given adults substantial freedom to engage in plainly offensive speech, it would not afford that same latitude to students in the public schools.[13]

Courts are constantly defining the boundaries of this category. 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."[14] The age of the students is also factored into a court's evaluation.[15] Thus, a school might be able to prohibit certain age-inappropriate speech among elementary school students which it could not among older students.

One example of this type of exception is 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.[16] 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.[17] Be aware that other types of cases, like the confederate flag cases discussed below, might also be considered here as well.

**(2) School-Sponsored Speech**

This category involves speech or expressive activity that "students, parents and members of the public might reasonably perceive to bear the imprimatur of the school."[18] Such speech includes school-sponsored publications, theatrical productions, and school elections.[19]

In these cases, schools have substantial latitude in regulating student expression.[20] Federal courts must "defer to [any] school decision to 'disassociate itself' from speech that a reasonable person would view as bearing the imprimatur of the school"[21] as long as that decision is "reasonably related to legitimate pedagogical concerns."[22] In the constitutional scheme, most school decisions easily satisfy this standard.

The Supreme Court?s primary discussion of this type of speech is found in Hazelwood v. Kuhlmeier. In Hazelwood, the Court found 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 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.[23]

**(3) Speech Which Materially Interferes With Appropriate Discipline**

Schools must offer more than mere speculation that a disturbance will occur as evidence to justify any interference with this type of student speech.[24] The First Amendment prohibits schools from banning student expression simply "because of an undifferentiated fear or apprehension of disturbance."[25] School officials also must show more than a desire to avoid possible "discomfort and unpleasantness" accompanying a viewpoint.[26]

A increasingly recurring example of this type of restriction on student speech is the Confederate flag cases. Two federal appeals courts recently found school policies banning the wearing or possession of confederate flags or symbols to be constitutional. Note that although they both deal with prohibitions against the display of the Confederate flag, the courts discuss one case as pertaining to the possibility of school disruption and the other as offensive symbolic speech. In West v. Derby, the Tenth Circuit held that a school policy prohibiting Confederate flags and paraphernalia was constitutional.[27] 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.[28]

Just a few months after West was decided the 11th Circuit rejected a student?s lawsuit against a Florida principal who had suspended the student for displaying a Confederate flag at school in Denno v. School Board of Volusia County.[29] There was no showing of past racial tension as there had arguably been in West case.[30] Thus, the Court did not discuss whether there was a reasonable expectation of ?material and substantial disruption.? Nevertheless, the 11th Circuit, basing its decision on Fraser,

determined that the principal could have reasonably determined that the Confederate flag would be offensive to some students, and that because of this he could constitutionally prohibit students from displaying it.[31] Note that the court did not determine the actual constitutionality of a ban against Confederate emblems absent any showing of expected disturbances. It merely determined that a reasonable principal could believe that this action was constitutional, and dismissed the damages action against the principal on that basis.

**(4) Speech Which Invades the Rights of Others**

Determining whether student expression invades or collides with the rights of others is sometimes difficult.[32] 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. 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 objected to the speech is alone insufficient to justify banning expression under Tinker.[33] If courts were to accept that evidence alone as sufficient, "the officials would have a license to prohibit virtually every type of expression."[34]

In addition, according to one federal district court, a school policy that prohibited attire that depicts messages that harass other students does not survive the Tinker test.[35] The court found that the policy attempted to regulate "the content of speech, not . . . its potential for disruption."[36] 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.[37] 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 speech such as that t-shirt, because it conflicted with this objective.[38] 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.?"[39]

**Conclusion**

The current law confers broad freedom on students to express their opinions in a variety of controversial topics in public schools. Students' speech may be suppressed only in narrow circumstances. The Constitution vests students with the important First Amendment right of freedom of speech, and schools who abridge this right do so at their own legal peril.

**For More Information**.

If you would like to order other educational materials, or need legal assistance, please contact The Rutherford Institute at P.O. Box 7482, Charlottesville, VA 22906-7482, (804) 978-3888 or visit our website at www.rutherford.org.

**ENDNOTES**

1. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 84 (1983).
2. Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).
3. Id. at 506.
4. Id. at 511.
5. Hedges v. Wauconda Comm. Unit School District, 9 F.3d 1298 (7th Cir. 1993).
6. Widmar v. Vincent, 454 U.S. 263, 269 (1981) (observing that private religious speech is as fully protected as other forms of speech under the First Amendment).
7. See Tinker, 393 U.S. 503 (1969).
8. Tinker, 393 U.S. at 513.
9. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992), quoting Tinker, 393 U.S. at 509 (brackets in original).
10. 478 U.S. 675 (1986).
11. Id. at 681.
12. Id. at 683.
13. Id. at 682-83.
14. Broussard v. School Bd., 801 F. Supp. 1526, 1536 (E.D. Va. 1992).
15. See id. at 1537.
16. Boroff v. Van Wert City Board of Education, 2000 U.S. App. LEXIS, 18023 (6th Cir.) (July 26, 2000).
17. Id. at 15.

18. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988); see also Lopez v. Tulare Joint Union High Sch. Dist. Bd. of Trustees, 40 Cal. Rptr. 2d 762, 40 Cal. Rptr. 2d 762 (5th App.Dist. 1995) (upholding on state statutory and constitutional grounds school decision to force students to remove profanity from student film).

19. Id. at 271; Poling v. Murphy, 872 F.3d 757 (6th Cir. 1989), cert. denied, 493 U.S. 1021 (1990).

20. Hazelwood Sch. Dist., 484 U.S. at 271; see also Chandler, 978 F.2d at 529 (discussing the application of Hazelwood Sch. Dist.). But see Desilets v. Clearview Reg. Bd. of Educ., 647 A.2d 150, 152-54 (N.J. 1994) (finding that school had no legitimate educational purpose for removing movie reviews from student newspaper and that school based its decision on subject matter rather than grammatical or style problems).
21. Chandler, 978 F.2d at 529 (quoting Hazelwood Sch. Dist., 484 U.S. at 271).

22. Hazelwood Sch. Dist., 484 U.S. at 273.

23. Id. at 511.
24. Hazelwood, at 570.
25. Chandler, at 508.
26. Id. at 509.
27. West v. Derby Unified School Dist. No. 260, 206 F.3d 1358, 1365 (10th Cir., 2000) (certiorari pending). The category of student speech dealing with vulgar and lewd expression is an off-shoot of this standard.

28. West, 206 F.3d at 1365.

29. 2000 U.S. App. LEXIS 17435 (11th Cir., July 20, 2000).

30. Id. at 34 (Forrester dissenting).

31. Id. at 21.
32. Clark v. North Dallas Indep. Sch. Dist., 806 F. Supp. 116, 120 (N.D. Tex. 1992).

33. Id..
34. 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).
35. Id. at 171.
36. Id. at 172.

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37. Id.

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