Students continue to test the limits of their personal freedoms in public schools, frequently colliding with educators’ efforts to maintain an appropriate school environment. This chapter addresses students’ substantive rights regarding First Amendment freedoms of speech and press and closely related association rights.

FREEDOM OF SPEECH AND PRESS

Students have the right to express nondisruptive ideological views at school, but restrictions can be placed on their expression that represents the school.

The First Amendment, as applied to the states through the Fourteenth Amendment, restricts governmental interference with citizens’ free expression rights, which are perhaps the most precisely guarded individual liberties. The government, including public school boards, must have a compelling justification to curtail citizens’ expression, even of unpopular viewpoints. The First Amendment also shields the individual’s right to remain silent when confronted with an illegitimate government demand for expression, such as mandatory participation in saluting the American flag in public schools. But free speech guarantees apply only to conduct that constitutes expression. Where conduct is meant to communicate an idea that is likely to be understood by the intended audience, it is considered expression for First Amendment purposes.

1See, e.g., Texas v. Johnson, 491 U.S. 397 (1989) (upholding political protesters’ right to burn the American flag). Yet free expression rights can be restricted. As Justice Holmes noted about a century ago, freedom of speech does not allow an individual to yell “fire” in a crowded theater when there is no fire. Schenck v. United States, 249 U.S. 47, 52 (1919).


3For a discussion of these requirements, see Johnson, 491 U.S. at 404. In the school context, see, e.g., Jarman v. Williams, 753 F.2d 76 (8th Cir. 1985) (holding that social and recreational dancing in public schools is not expression that enjoys First Amendment protection).
STUDENT EXPRESSION, ASSOCIATION, AND APPEARANCE

Even if specific conduct qualifies as expression, it is not assured constitutional protection. The judiciary has recognized that defamatory, obscene, and inflammatory communications are outside the protective arm of the First Amendment. In addition, as discussed below, lewd and vulgar comments and expression that promote illegal activity for minors are not protected in the public school context. Also, commercial expression, although constitutionally protected, has not been afforded the same level of First Amendment protection as has speech intended to convey a particular point of view.

Where protected expression is at issue, an assessment of the type of forum the government has created for expressive activities has been important in determining whether the expression can be restricted. The Supreme Court has recognized that public places, such as streets and parks, are traditional public forums for assembly and communication where content-based restrictions cannot be imposed unless justified by a compelling government interest. In contrast, expression can be confined to the governmental purpose of the property in a nonpublic forum, such as a public school. Content-based restrictions are permissible in a nonpublic forum to ensure that expression is compatible with the intended governmental purpose, provided that regulations are reasonable and do not entail viewpoint discrimination.

The government can create a limited public forum for expression on public property that otherwise would be considered a nonpublic forum and reserved for its governmental function. For example, a student activities program held after school might be established as a limited forum for student expression. A limited forum can be restricted to a certain class of speakers (e.g., students) and/or to specific categories of expression (e.g., noncommercial

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4For a discussion of spoken and written defamation in the school setting, see section entitled “Defamation” in Chapter 2.
5The judiciary has held that individuals cannot claim a First Amendment right to voice or publish obscenities, although there is no bright-line rule regarding what expression falls in this category. See Miller v. California, 413 U.S. 15, 24 (1973) (identifying the following test to distinguish obscene material from constitutionally protected material: “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interests; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value”) (citations omitted). The Supreme Court has recognized the government’s authority to adjust the definition of obscenity as applied to minors. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968) (upholding a state law prohibiting the sale to minors of magazines depicting female nudity).
6Courts have differentiated fighting words and other expression that agitate, threaten, or incite an immediate breach of peace from speech that conveys ideas and stimulates discussion. See infra text accompanying notes 28–37 for a discussion of litigation pertaining to student expression considered inflammatory or threatening.
7Bd. of Trs. v. Fox, 492 U.S. 469 (1989). Courts generally have also upheld regulations prohibiting sales and fund-raising activities in public schools as justified to preserve schools for their educational function and to prevent commercial exploitation of students.
9Cornelius, 473 U.S. at 800. Some speech in public schools, such as that related to the curriculum, is considered government speech that is not subject to First Amendment analysis. See Nelda Cambron-McCabe, When Government Speaks: An Examination of the Evolving Government Speech Doctrine, 274 EDUC. L. REP. 753–73 (2012).
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speech). Otherwise, expression in a limited forum is subject to the same protections that govern a traditional public forum.

Legal Principles

This section reviews the four Supreme Court decisions that have established the legal principles governing student expression rights in public schools. Application of these principles is addressed in subsequent sections.

In 1969, the Supreme Court rendered its landmark decision, Tinker v. Des Moines Independent School District, the Magna Carta of students’ expression rights. In Tinker, three students were suspended from school for wearing black armbands to protest the Vietnam War. Hearing about the planned silent protest, the school principals met and devised a policy forbidding the wearing of armbands at school. Concluding that the students were punished for expression that was not accompanied by any disorder or disturbance, the Supreme Court ruled that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”

In Tinker, the Supreme Court echoed statements made in an earlier federal appellate ruling: A student may express opinions on controversial issues in the classroom, cafeteria, playing field, or any other place, so long as the exercise of such rights does not “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school” or collide with the rights of others. The Supreme Court emphasized that educators have the authority and duty to maintain discipline in schools, but they must consider students’ constitutional rights as they exert control.

The Supreme Court did not decide another student expression case until 1986. In a significant opinion, Bethel School District No. 403 v. Fraser, the Supreme Court granted school authorities considerable latitude in censoring lewd, vulgar, and indecent student expression. Overturning the lower courts, the Supreme Court upheld disciplinary action against a student for using a sexual metaphor in a nomination speech during a student government assembly. Concluding that the sexual innuendos were offensive to both teachers

10See R.O. ex rel. Ochshorn v. Ithaca City Sch. Dist., 645 F.3d 533, 539 (2d Cir. 2011) (noting that in a limited forum, school authorities can restrict speech in a viewpoint-neutral manner that is reasonable in light of the forum’s purpose), cert. denied, 132 S. Ct. 422 (2011); infra text accompanying note 24.


12Id. at 508.

13Id. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). Debate surrounds whether the two prongs of this standard are independent guarantees or linked, in that evidence of a disruption is required for the expression to collide with others’ rights. See Martha McCarthy, Curtailing Student Expression: Is a Link to a Disruption Required? 38 J. Law & Educ. 607–21 (2009).

14478 U.S. 675 (1986). Throughout his speech, Fraser employed a sexual metaphor to refer to the candidate, using such phrases as “he’s firm in his pants … his character is firm,” “a man who takes his point and pounds it in,” “he doesn’t attack things in spurts—he drives hard, pushing and pushing until finally he succeeds,” and “a man who will go to the very end—even the climax, for each and every one of you.” Id. at 687 (Brennan, J., concurring). Fraser was suspended for two days and disqualified as a candidate for commencement speaker. However, he did eventually deliver a commencement speech, so his claim that the disqualification violated due process rights was not reviewed by the appellate court.
and students, the Court majority held that the school’s legitimate interest in protecting the captive student audience from exposure to lewd and vulgar speech justified the disciplinary action.

The Court in Fraser reiterated that speech protected by the First Amendment for adults is not necessarily protected for children, reasoning that in the public school context, the sensibilities of fellow students must be considered. The majority recognized that an important objective of public schools is the inculcation of fundamental values of civility and that the school board has the authority to determine what manner of speech is appropriate in classes or assemblies.15

Only two years after Fraser, the Court rendered a seminal decision further limiting, but not overturning, the reach of Tinker. In Hazelwood School District v. Kuhlmeier, the Court held that school authorities can censor student expression in school publications and other school-related activities so long as the censorship decisions are based on legitimate pedagogical concerns.16 At issue in Hazelwood was a high school principal’s deletion of two pages from the school newspaper because of the content of articles on divorce and teenage pregnancy and fears that individuals could be identified in the articles.

Rejecting the assertion that the school newspaper had been established as a public forum for student expression, the Court declared that only with school authorities’ clear intent do school activities become a public forum.17 The Court drew a distinction between a public school’s toleration of private student expression, which is constitutionally required under some circumstances, and its promotion of student speech that represents the school. Reasoning that student expression appearing to bear the school’s imprimatur can be censored, the Court acknowledged school authorities’ broad discretion to ensure that such expression occurring in school publications and all school-sponsored activities (including extracurricular) is consistent with educational objectives. The Court’s expansive interpretation of what constitutes school-sponsored expression has narrowed the circumstances under which students can prevail in First Amendment claims.

Almost two more decades passed before the Supreme Court rendered its fourth decision pertaining to public school student expression rights. In 2007, the Court in Morse v. Frederick held that given the special circumstances in public schools, students can be disciplined for expression reasonably viewed as promoting or celebrating illegal drug use; incitement to lawless conduct is not required.18 Morse focused on a banner containing the phrase, “BONG HITS 4 JESUS,” which Joseph Frederick and some friends unfurled across the street from their school as the Olympic torch relay passed by. The Supreme Court reasoned that the students were under the school’s control when they were allowed to cross the street and watch the torch relay because it was a school-authorized event supervised by school personnel.

15Id. at 683 (rejecting also the contention that the student had no way of knowing that his expression would evoke disciplinary action; teachers’ admonitions that his planned speech was inappropriate and violated a school rule provided adequate warning).
17Id., 484 U.S. at 267.
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Reversing the Ninth Circuit, the Supreme Court majority emphasized the importance of deterring drug use by students and concluded that Frederick’s action violated the school board’s policy of prohibiting expression advocating the use of illegal substances.19 The Court declared that its earlier Fraser decision stands for the proposition that considerations beyond the Tinker disruption standard are appropriate in assessing student expression in public schools. However, a majority of the Justices declined to extend school authorities’ discretion to the point that they can curtail any student expression they find “plainly offensive” or at odds with the school’s “educational mission.”20 All Justices agreed that students can be disciplined for promoting the use of illegal drugs, but they differed regarding whether the banner at issue actually did so.

Lower courts have rendered a range of decisions in applying these legal principles articulated by the Supreme Court. Some of these rulings are reviewed below in connection with school-sponsored expression; threats and other inflammatory expression; prior restraints versus punishment after the fact; anti-harassment and anti-bullying provisions; electronic expression; and time, place, and manner restrictions. For the questions that must be answered in assessing student expression rights, see Figure 5.1.

School-Sponsored Expression

During the 1970s and early 1980s, many courts broadly interpreted the circumstances under which limited forums for student expression were created in public schools. School-sponsored newspapers often were considered such a forum, and accordingly, courts held that articles on controversial subjects such as the Vietnam War, abortion, and birth control could not be barred from these publications, placing the burden on school authorities to justify prior administrative review of both school-sponsored and nonsponsored literature.

However, since Hazelwood, expression appearing to bear the school’s imprimatur can be censored for pedagogical reasons. The Tinker standard applies only to protected private expression, and some lower courts have broadly interpreted student expression that might be perceived as representing the school.21 Relying on Hazelwood, the Ninth Circuit rejected Planned Parenthood’s claim that a school district’s denial of its request to advertise in school newspapers, yearbooks, and programs for athletic events violated free speech

19 Id. All of the Justices concurred that the principal should not be held liable for violating clearly established law, and Justice Breyer thought the decision should have focused only on this issue. See id. at 425–33 (Breyer, J., concurring in part and dissenting in part).

20 See Morse, 551 U.S. at 423. Justices Alito and Kennedy emphasized that this decision is restricted to the promotion of illegal drug use and does not extend to censorship of expression on social or political issues that may be viewed as inconsistent with the school’s mission. Id. at 422 (Alito, J., joined by Kennedy, J., concurring).

21 In response to Hazelwood, a number of state legislatures considered, and several enacted, laws granting student editors of school-sponsored papers specific rights in determining the content of their publications. As of 2012, ten states (Arkansas, California, Colorado, Illinois, Iowa, Kansas, Oregon, Massachusetts, Pennsylvania, and Washington) had laws or state board of education regulations in this regard. See Student Press Law Ctr., State Legislation (Mar. 2012), http://www.splc.org/knowyourrights/statelegislation.asp.
rights, concluding that the school district could bar advertisements inconsistent with its educational mission. The Eighth Circuit similarly relied on Hazelwood in upholding a principal’s decision to disqualify a student council candidate who handed out condoms with stickers bearing his campaign slogan (“Adam Henerey, the Safe Choice”), noting that Hazelwood grants school authorities considerable discretion to control student expression.

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FIGURE 5.1  Assessing Student Expression Rights

<table>
<thead>
<tr>
<th>Is the conduct expression?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the student intend to communicate something, and would a reasonable person understand what is being communicated?</td>
</tr>
</tbody>
</table>

**YES**

Does the expression originate off school grounds or on campus?

Off Campus

Does the expression threaten a substantial disruption of the work of the school?

**YES**

Students probably can be disciplined for the expression.*

On Campus

Is the expression defamatory, obscene, lewd, or inflammatory or does it promote unlawful activity?

**YES**

Students can be disciplined for such expression that is not protected.

**NO**

The expression is protected. Is it private or school sponsored?

Private (Tinker Standard)

Is the expression likely to disrupt the educational process or collide with the rights of others?

**YES**

Students can be disciplined for the expression.

**NO**

Students cannot be disciplined for the expression.

School Sponsored (Hazelwood Standard)

Does the school have a legitimate pedagogical interest in regulating the expression?

**YES**

Students can be disciplined if viewpoint discrimination is not involved.

**NO**

Students cannot be disciplined for non-disruptive expression.

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*The Supreme Court has not clarified whether standards beyond Tinker’s disruption standard apply to off-campus student expression.

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22 Planned Parenthood v. Clark Cnty. Sch. Dist., 887 F.2d 935, 942 (9th Cir. 1989), rehearing en banc, 941 F.2d 817 (9th Cir. 1991).
in school-sponsored activities. More recently, the Second Circuit applied *Hazelwood* in ruling that school authorities were justified in prohibiting students from running a lewd, sexually explicit cartoon in the school-sponsored paper, as the decision was reasonably related to legitimate pedagogical concerns. Even though students wrote the paper’s content, its operation was supervised by the faculty advisor, so the paper was not considered a limited forum for student expression.

Courts have reasoned that the school has the right to disassociate itself from controversial expression that conflicts with its mission and have considered school-sponsored activities to include student newspapers supported by the public school, extracurricular activities sponsored by the school, school assemblies, and classroom activities. The key consideration is whether the expression is viewed as bearing the school’s imprimatur; only under such circumstances is *Hazelwood’s* broad deference to school authorities triggered.

Ironically, since *Hazelwood*, student expression in underground (not school-sponsored) student papers distributed at school enjoys greater constitutional protection than does expression in school-sponsored publications. The former is considered private expression governed by the *Tinker* principle, whereas the latter represents the school and is subject to censorship under *Hazelwood*. As discussed in Chapter 3, most courts have treated the distribution of religious literature by secondary students like the distribution of other material that is not sponsored by the school.

There are limits, however, on school authorities’ wide latitude to censor student expression that bears the public school’s imprimatur. For example, blatant viewpoint discrimination in a nonpublic forum abridges the First Amendment. And even if viewpoint discrimination is not involved, censorship actions in a nonpublic forum still must be based on legitimate pedagogical concerns. A Michigan federal district court found no legitimate pedagogical reason to remove from the school newspaper a student’s article on a pending lawsuit alleging that school bus diesel fumes constituted a neighborhood nuisance.

Furthermore, a school-sponsored publication might be considered a forum for student expression under certain circumstances. In a Massachusetts case, school authorities had given students editorial control of school publications, so independent decisions of the students could not be attributed to school officials. In this situation, the student editors of the school newspaper and yearbook rejected advertisements from a parent who was a leading opponent of the district’s condom-distribution policy. The First Circuit concluded that school officials, who had recommended that the students publish the ads, could not be held liable for the students’ decisions because the student editors were not state actors.

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23Henery v. City of St. Charles Sch. Dist., 200 F.3d 1128 (8th Cir. 1999).
24R.O. ex rel. Ochshorn v. Ithaca City Sch. Dist., 645 F.3d 533 (2d Cir. 2011) (holding also that school authorities could bar distribution on campus of an independent student publication with the same cartoon, which was considered lewd and vulgar and thus not protected), cert. denied, 132 S. Ct. 422 (2011).
25See, e.g., Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989) (placing the burden on school authorities to justify viewpoint discrimination against a peace activist group that was not allowed to display its literature on school premises or participate in career day when military recruiters were allowed such access).
26Dean v. Utica Cmty. Schs., 345 F. Supp. 2d 799 (E.D. Mich. 2004) (ruling that the censorship was based on the superintendent’s disagreement with the views expressed about the lawsuit against the school district).
27Yeo v. Town of Lexington, 131 F.3d 241 (1st Cir. 1997).
Threats and Other Inflammatory Expression

The U.S. Supreme Court has not addressed the application of the First Amendment to alleged threats made by students toward classmates or school personnel, but there is a growing body of lower court litigation. In determining if a true threat has been made, courts consider a number of factors, such as:

- reactions of the recipient and other listeners;
- whether the maker of the alleged threat had made similar statements to the victim in the past;
- if the utterance was conditional and communicated directly to the victim; and
- whether the victim had reason to believe that the speaker would engage in violence.

In an illustrative case, the Fifth Circuit held that a student’s notebook, outlining a pseudo-Nazi group’s plan to commit a “Columbine shooting,” constituted a “terroristic threat” that was not protected by the First Amendment. The Eleventh Circuit similarly ruled that a student’s story about shooting her math teacher was a threat of violence; her suspension was justified because she shared the story with another student. Citing Morse, the court reasoned that disciplining students for threats of violence is even more important than curtailing their promotion of illegal drug use.

Also finding a threat, the Eighth Circuit reversed the lower court and upheld expulsion of a student for writing a letter indicating he was going to rape and murder his former girlfriend. The court was convinced that the writer intended to communicate the threat because he shared the letter with a friend whom he assumed would give it to his former girlfriend. In 2011, the same court found a true threat in a student’s online instant message sent from home to a classmate in which he mentioned getting a gun and shooting other students at school. The serious statements were communicated to a third party, and combined with the speaker’s admitted depression and access to weapons, the appeals court reasoned that school authorities did not need to wait until the threat was carried out before taking action.

Utterances can be considered inflammatory, and thus unprotected, even if not found to be true threats or fighting words. The Ninth Circuit ruled that a student could be subject to emergency expulsion, with a hearing occurring afterward, for writing a poem about someone who had committed multiple murders in the past and decided to kill himself for fear of murdering others. The poem was not considered a true threat or to contain fighting words. The Wisconsin Supreme Court similarly held that school authorities had more

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28United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996).
29Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 767 (5th Cir. 2007).
30Boim v. Fulton Cnty. Sch. Dist., 494 F.3d 978 (11th Cir. 2007).
31Id. at 984 (citing Morse v. Frederick, 551 U.S. 393 (2007)).
32Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002).
34LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001) (holding, however, that the placement and maintenance of negative documentation in the student’s file after he was readmitted to school and the concern about harm had subsided went beyond the district’s documentation needs).
than enough reason to suspend a student for his creative writing assignment, describing a student removed from class for being disruptive (as he had been) who returned the next day to behead his teacher. But the court found no true threat that would justify prosecution of the student for disorderly conduct.

The Second Circuit in 2011 ruled in favor of school authorities who detained a middle school student to determine if he posed a danger to himself or others and reported his parents to Child and Family Services for possible neglect in connection with an essay he wrote that included discussion of illegal acts, violence, and his own suicide. The court reasoned that school authorities did not violate the student’s expression rights or his parents’ substantive due process rights by taking precautionary actions. The following year, the same court ruled that school authorities reasonably could forecast a disruption from an elementary school student’s picture expressing a desire to blow up the school and its teachers. Upholding the student’s six-day suspension, the appeals court reasoned that the student’s actual intent and capacity to carry out the threat were irrelevant. Courts generally seem more inclined to uphold school disciplinary action, in contrast to criminal prosecution, for students’ alleged threats or other inflammatory expression.

Prior Restraints versus Punishment After the Fact

When determined that protected private expression is at issue, courts then are faced with the difficult task of assessing whether restrictions are justified. Under the Tinker principle, private expression can be curtailed if it is likely to disrupt the educational process or intrude on the rights of others. For example, bans on wearing buttons at school have been upheld where linked to an interference with the educational process.

The imposition of prior restraints on student speech must bear a substantial relationship to an important government interest, and any regulation must contain narrow, objective, and unambiguous criteria for determining what material is prohibited and procedures that allow a speedy determination of whether materials meet those criteria. Recognizing that the Constitution requires a high degree of specificity when imposing restrictions on private expression, the Ninth Circuit held that school authorities in a Washington school district could not suspend students for distributing a student paper produced off campus and could not subject the paper’s content to prior review under a policy

35In re Douglas D., 626 N.W.2d 725 (Wis. 2001); see also S.G. v. Sayreville Bd. of Educ., 333 F.3d 417 (3d Cir. 2003) (upholding suspension of a kindergarten student for saying, “I’m going to shoot you,” during a game at recess, which violated the school’s prohibition on speech threatening violence and the use of firearms); Wynar v. Douglas Cnty. Sch. Dist., No. 3:09-cv-0626-LRH-VPC, 2011 WL 3512534 (D. Nev. Aug. 10, 2011) (upholding a student’s ninety-day expulsion for sending instant messages with assertions that he would do bodily harm toward other students; school personnel could reasonably expect a substantial disruption).

36Cox v. Warwick Valley Cent. Sch. Dist., 654 F.3d 267 (2d Cir. 2011) (noting that the student had a history of misbehavior and was on probation and under a behavior contract when the essay was written).


38See, e.g., Guzik v. Drebush, 431 F.2d 594 (6th Cir. 1970) (upholding ban on button soliciting participation in antiwar demonstration); Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966) (upholding prohibition on students wearing freedom buttons that distracted classmates and disrupted instruction).
that was overbroad.\textsuperscript{39} But more recently, the Tenth Circuit endorsed a policy requiring prior approval of all materials distributed at school and upheld administrators in halting an anti-abortion student group’s distribution of rubber doll fetuses.\textsuperscript{40}

The burden is on school authorities to justify policies requiring administrative approval of unofficial (underground) student publications, but such prior review is \textit{not unconstitutional per se}. Of course, courts are more inclined to support disciplinary action and confiscation of materials \textit{after} the expression has occurred, if it is considered unprotected (i.e., comments that are libelous, inflammatory, vulgar, or promote illegal activity), threatens a disruption of the educational process, interferes with the rights of others, or represents the school. To illustrate, students can be disciplined after the fact for expression advocating the destruction of school property in publications they distribute at school, even though the anticipated destruction of school property never materializes.\textsuperscript{41} Also, the Second Circuit upheld school authorities in sending a student home for allegedly making a racial slur and in denying the student’s request to return to school to explain his version of events to classmates, given the significant threat of a disruption. In light of the racial tensions created by the situation and concern for the student’s safety, his expulsion for the remainder of the school year was considered reasonable.\textsuperscript{42}

Sometimes state law has a bearing on whether students can be disciplined after the fact for their expression. States can be more protective of students’ expression rights, but they cannot drop below federal constitutional minimums. A California appeals court ruled that a school district violated a student’s expression rights when it refused to publish his caustic editorial about immigration. The appeals court held that the expression was not prohibited under the state law that bars student speech inciting others or creating a clear and present danger of disrupting the schools. Noting that the article was politically charged because it suggested that individuals who do not speak English are illegal immigrants and likely to turn to crime, the court did not find the speech so inflammatory that it would incite a disturbance, even though opponents of the expression might cause a disruption.\textsuperscript{43}

Courts have condoned disciplinary action against students who have engaged in walkouts, boycotts, sit-ins, or other protests involving conduct that blocks hallways, damages property, causes students to miss class, or interferes with essential school activities in other ways. The Sixth Circuit held that a petition circulated by four football players, denouncing the head coach, justified their dismissal from the varsity football team. The court reasoned that the petition disrupted the team, and athletes are subject to greater restrictions than are applied to the general student body.\textsuperscript{44} The Ninth Circuit also ruled

\textsuperscript{39}Burch v. Barker, 861 F.2d 1149, 1155 (9th Cir. 1988).
\textsuperscript{40}Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25 (10th Cir. 2013).
\textsuperscript{41}See, e.g., Boucher v. Sch. Bd., 134 F.3d 821, 828 (7th Cir. 1997) (upholding expulsion of a student for distributing at school an article that contained information about how to disable the school’s computer system).
\textsuperscript{42}DeFabio v. E. Hampton Union Free Sch. Dist., 623 F.3d 71 (2d. Cir. 2010), cert. denied, 131 S. Ct. 1578 (2011).
\textsuperscript{43}Smith v. Novato Unified Sch. Dist., 59 Cal. Rptr. 3d 508 (Ct. App. 2007); see \textit{infra} text accompanying note 60 for a discussion of the “hecklers’ veto.”
\textsuperscript{44}Lowery v. Euverard, 497 F.3d 584 (6th Cir. 2007); see also Corales v. Bennett, 567 F.3d 554 (9th Cir. 2009) (holding that students could be disciplined for leaving school to engage in a political protest).
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that student athletes could be disciplined for protesting actions of the coach by refusing to board the team bus and to play in a basketball game, which substantially disrupted a school activity.\(^45\) However, this court departed from the Sixth Circuit in finding that the students’ petition requesting that the coach resign because of derogatory remarks he made toward players was protected speech.

**Anti-Harassment and Anti-Bullying Policies**

A number of school districts have adopted policies prohibiting expression that constitutes verbal or physical harassment based on race, religion, color, national origin, sex, sexual orientation, disability, or other personal characteristics. Also, forty-nine states and the District of Columbia have anti-bullying provisions that often share similar language with anti-harassment policies.\(^46\) In some of these provisions, the terms “harassment” and “bullying” are used interchangeably, even though “harassment” is associated with specific legal liability under federal civil rights laws that do not apply to bullying.\(^47\)

The public school policies prohibiting bullying and harassment traditionally have not appeared vulnerable to First Amendment challenges, whereas “hate speech” policies have been struck down in municipalities and public higher education. Public schools have been considered a special environment in terms of government restrictions on private expression because of their purpose in educating America’s youth and inculcating basic values, such as civility and respect for others with different backgrounds and beliefs.

A growing body of cases interpreting anti-harassment provisions has focused on students displaying Confederate flags, and some courts have upheld restrictions on such displays. In a typical case, the Sixth Circuit in 2010 upheld a student’s suspension for wearing clothing depicting the Confederate flag in violation of the school’s dress code. The court held that school officials reasonably could forecast a substantial disruption from such displays but noted that a link to a disruption was not required to curtail displays that

\(^45\) Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755 (9th Cir. 2006) (remanding the case for a determination of whether the students were impermissibly removed from the basketball team in retaliation for their petition).

\(^46\) As of this writing, Montana is the only state that does not have a law prohibiting bullying, though legislation has been proposed. All but two of the laws prohibit electronic harassment, and sixteen specifically address cyberbullying. See Cyberbullying Research Ctr. (Feb. 2013), http://www.cyberbullying.us/cyberbullying-laws. New Jersey’s Anti-Bullying Bill of Rights, enacted in 2011, is among the most comprehensive laws in prohibiting bullying, harassment, or intimidation that disrupts the school or interferes with the rights of others. Under the law, each school district must have an anti-bullying specialist, complaints must be investigated within ten days, schools are graded on how they handle such complaints, and school principals can be disciplined for failure to comply with this law. N.J. Stat. Ann. § 18A:37-13 (West 2012).

convey racial hostility. The same court previously upheld a school district’s ban on students displaying the Confederate flag, again finding the potential for a school disturbance but acknowledging that school authorities could ban this symbol without having to forecast a school disruption. The Tenth Circuit also upheld disciplinary action against a Kansas middle school student for drawing a Confederate flag during math class in violation of the school district’s anti-harassment policy. The court was persuaded that the school district had reason to believe that the display of the Confederate flag might cause a disruption and interfere with the rights of others because the school district had already experienced some racial incidents related to the Confederate flag.

A few courts, however, have struck down such restrictions on Confederate flag displays. These courts have reasoned that students should prevail in the absence of a link to disruption or if the policies were applied inconsistently. For example, the Sixth Circuit found no evidence that a shirt with a country singer on the front and the Confederate flag on the back, worn to express Southern heritage, would cause a disruption and furthermore questioned whether there may have been viewpoint discrimination in applying the school’s prohibition on emblems with racial implications.

Several cases have focused on the conflict between expressing religious views and promoting civil expression; these cases are particularly sensitive because they pit free speech and free exercise guarantees against the school’s authority to instill basic values, including respect for others. The Third Circuit struck down a Pennsylvania school district’s anti-harassment policy challenged by plaintiffs who feared reprisals for voicing their religious views about moral issues, including the harmful effects of homosexuality. The court found no evidence that the policy was necessary to advance the recognized compelling government interests in maintaining an orderly school and protecting the rights of others. Concluding that the policy was unconstitutionally overbroad, the court reasoned that the policy went beyond expression that could be curtailed under the Tinker disruption standard.

Yet most other anti-harassment or anti-bullying policies have not been struck down, even if the students have prevailed on their free speech claims. To illustrate, a year after the Third Circuit decision discussed above, the same court upheld a school district’s


49 Barr v. Lafon, 538 F.3d 554 (6th Cir. 2008).

50 West v. Derby Unified Sch. Dist., 206 F.3d 1358 (10th Cir. 2000) (noting that the student had been disciplined numerous times and accused of using racial slurs).

51 See, e.g., Bragg v. Swanson, 371 F. Supp. 2d 814 (S.D. W. Va. 2005) (overturning disciplinary action against a student for wearing a T-shirt displaying the Confederate flag in observance of his Southern heritage; finding overbroad the policy that prohibited displays of the Rebel flag within the category of racist symbols).


anti-harassment policy enacted to respond to incidents of race-based conflicts and narrowly designed to reduce racially divisive expression. Although finding that the policy as applied violated the students’ expression rights in this case, the court voiced approval of the school’s anti-harassment provision.54

The Ninth Circuit found the second prong of the Tinker standard to be controlling when it ruled that a student wearing a T-shirt degrading homosexuality “collides with the rights of other students in the most fundamental way.”55 The court reasoned that the school is allowed to prohibit such expression, regardless of the adoption of a valid anti-harassment policy, so long as it can show that the restriction is necessary to prevent the violation of other students’ rights or a substantial disruption of school activities. The court disagreed with the suggestion that injurious slurs interfering with the rights of others cannot be barred unless they also are disruptive, reasoning that the two Tinker prongs are independent restrictions.56

But other courts have applied the Tinker disruption standard in ruling that students have a right to express their religious views that denounce homosexuality.57 The Seventh Circuit found a T-shirt with “Be Happy, Not Gay” to be much less offensive than the expression in the Ninth Circuit case above and not linked to a substantial disruption.58 Thus, the court ruled that school authorities could not bar students from wearing the shirt because “people in our society do not have a legal right to prevent criticism of their beliefs or for that matter their way of life,” reasoning that in the absence of fighting words, schools cannot impair students’ free expression rights based on their targets’ “hurt feelings.”59 The court recognized that the expression could not be curtailed based on the hecklers’ veto, or those opposing the expression could always stifle speakers simply by mounting a riot.60 Yet the court did not enjoin enforcement of the school’s rule that prohibited students from making derogatory comments referring to race, ethnicity, religion, gender, sexual orientation, or disability. Since the Supreme Court has not rendered an opinion in these sensitive cases, the collision of religious views and anti-harassment policies seems destined to remain controversial.

54Sypniewski v. Warren Hills Reg’l Bd. of Educ., 307 F.3d 243 (3d Cir. 2002) (upholding the policy but ordering the phrase banning speech that “creates ill will” to be eliminated as reaching some protected expression). See infra text accompanying note 90 for a discussion of the application of the policy.


57See, e.g., Nixon v. N. Local Sch. Dist., 383 F. Supp. 2d 965, 971–74 (S.D. Ohio 2005) (rejecting school administrators’ assertion that a shirt denigrating homosexuality, Islam, and abortion was “plainly offensive” under Fraser; applying Tinker instead and finding no disruption or evidence that the expression interfered with the rights of others).

58Zamecnik v. Sch. Dist. #204, 636 F.3d 874 (7th Cir. 2011).

59Id. at 876.

60Id. at 877.
Electronic Expression

The most volatile current disputes involve Internet expression, particularly pertaining to social networks. These cases are particularly troublesome because students often prepare and disseminate the materials from their homes, but their expression is immediately available to the entire school population and beyond. Although the judiciary has not spoken with a single voice on the First Amendment issues raised in these cases, most courts have applied the *Tinker* disruption standard in assessing Internet expression. With the increasing use of cellular phones and the amount of material posted on Facebook, Myspace, and other social networking sites, legal activity in this arena is bound to increase. A 2011 report indicated that teens on average sent more than 100 text messages per day. And concerns over students sending sexually explicit or suggestive messages electronically are resulting in legislative responses to curtail such “sexting.”

Students have prevailed in several challenges to disciplinary actions for the creation of web pages or postings on social networks that have originated from their homes. For example, the full Third Circuit in 2011 rendered decisions favoring students’ expression rights in two cases that had generated conflicting decisions by different Third Circuit panels. At issue were mock Myspace profiles of the school principals that were vulgar and linked the principals to drugs, alcohol, sexual abuse, and other degrading activities. Finding no disruption of the educational process, the appeals court required off-campus expression to be linked to a school disruption to justify disciplinary action. However, the school policies requiring students to express their ideas in a respectful manner and to refrain from verbal abuse were not found to be overbroad.

Not all courts have agreed with the Third Circuit’s stand that a link to a disruption is required for students’ off-campus Internet expression to be curtailed. The Second Circuit ruled in favor of school authorities who prevented a student from running for senior class president because she had posted on Facebook a picture of herself at a slumber party and posted them on the Internet; reasoning that the photos did not constitute child pornography under state law or pose a threat of a school disruption. See *Snyder v. Blue Mountain Sch. Dist.*, 711 F. Supp. 2d 1097 (C.D. Cal. 2010) (finding a violation of a student’s free speech rights in disciplinary action imposed for posting a YouTube video that was disparaging toward a classmate because there was not a sufficient link to a school disruption); *R.S. v. Minnewaska Area Sch. Dist.*, 894 F. Supp. 2d 1128 (D. Minn. 2012) (finding a valid claim that school officials violated a middle school student’s free speech rights by disciplining her for Facebook posts critical of a school employee and whoever alerted authorities; Fourth Amendment rights were also implicated by school personnel’s search of her Facebook posts against her will).

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61 393 U.S. 503, 508 (1969); *supra* text accompanying note 13.


64 Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom. J.S. ex. rel. Snyder v. Blue Mountain Sch. Dist.*., 132 S. Ct. 1097 (2012); *J.S. ex. rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); *see also* J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010) (finding a violation of a student’s free speech rights in disciplinary action imposed for posting a YouTube video that was disparaging toward a classmate because there was not a sufficient link to a school disruption); *R.S. v. Minnewaska Area Sch. Dist.*, 894 F. Supp. 2d 1128 (D. Minn. 2012) (finding a valid claim that school officials violated a middle school student’s free speech rights by disciplining her for Facebook posts critical of a school employee and whoever alerted authorities; Fourth Amendment rights were also implicated by school personnel’s search of her Facebook posts against her will).
secretary because of a vulgar blog entry she posted from home that urged others to com-
plain to the school administrators about a change in scheduling an event, Jamfest, an annual
battle of the bands concert.\textsuperscript{65} The court reasoned that school officials reasonably could
conclude that the expression might disrupt student government functions. Also at issue
were T-shirts supporting her freedom of speech that students planned to wear to the school
assembly where candidates for the class offices were to give their speeches. \textbf{Acknowledging that the shirts might be protected under Tinker if not linked to a disruption,}
the court held that the school defendants were entitled to qualified immunity on this
claim as well because the rights at issue were not clearly established.

In 2011, the Fourth Circuit upheld West Virginia school authorities in suspending a
student for creating a website primarily used to ridicule a classmate with accusations that
she was a slut with herpes. The disciplined student alleged that the suspension violated
her free speech rights because the expression was private speech initiated from her home.
But the court sided with the school administrators who reasoned that the student had cre-
dated a “hate website” in violation of the school’s policy forbidding “harassment, bullying,
and intimidation.”\textsuperscript{66} The court concluded that the student’s website “materially and sub-
stantially interferes with the requirements of appropriate discipline in the operation of the
school and collides with the rights of others,” seeming to rely on both prongs of the
\textit{Tinker} standard.\textsuperscript{67} The court emphasized that conduct does not have to physically originate in the
school building or during the school day to adversely affect the learning environment and
the rights of others.

In 2012, the Eighth Circuit also sided with school authorities in declaring that the
lower court should not have enjoined the suspension of students for creating a racist and
sexist website and blog.\textsuperscript{68} Finding the students’ punishment appropriate for producing a
disruptive website, the court did not address whether the website also collided with the
rights of others.

In these cases, \textbf{the key determinant of disciplinary action appears to be whether the material created off campus has a direct and detrimental impact on the school.}
But since the Supreme Court has refused to review appeals of these decisions, and federal

\textsuperscript{65}Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011); see also Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir.
2007) (upholding a semester expulsion of a student for displaying in his instant messaging buddy icon a draw-
ing of a pistol firing at a person’s head, with the caption “Kill Mr. VenderMolen,” his English teacher); Bell v.
for the Internet posting of a vulgar rap song that accused two school coaches of improper contact with female
speech rights, in addition to racial discrimination, in the suspension of a student who possessed a rap song with
offensive lyrics because there was no evidence that the lyrics created a distraction).

student originally was suspended for ten days, which was reduced to five days, and she received a ninety-day
social suspension from school-related activities.

\textsuperscript{67}Id. at 572 (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 513 (1969)). The Fourth Circuit rea-
soned that expression interfering with another’s rights \textit{creates} the necessary disruption to trigger \textit{Tinker}’s exclud-
ion from constitutional protection.

\textsuperscript{68}S.J.W. \textit{ex rel.} Wilson v. Lee’s Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012).
appellate courts have rendered a range of opinions, school personnel have insufficient guidance as to the application of the First Amendment to electronic expression that originates off school grounds. Given students’ preference to communicate electronically and the growing popularity of social networking sites, texting, and blogs, Supreme Court clarification of the First Amendment standard is sorely needed.

The National School Boards Association (NSBA), joined by several other professional education organizations, has argued that the Internet has blurred the line between off-campus and in-school expression. The NSBA has contended that if the expression pertains to members of the school community, it should be considered in-school speech and subject to sanctions, regardless of its origin.⁶⁹ In the absence of a Supreme Court ruling, the only consolation for school authorities is that they likely can claim immunity for disciplining students for their electronic expression because the law on this topic is far from clearly established.

**Time, Place, and Manner Regulations**

Although private expression enjoys greater constitutional protection than does school-sponsored expression, the judiciary consistently has upheld reasonable policies regulating the time, place, and manner of private expression. For example, students can be prohibited from voicing political and ideological views and distributing literature during instructional time. Additionally, to ensure that the distribution of student publications does not impinge upon other school activities, school authorities can ban literature distribution near the doors of classrooms while class is in session, near building exits during fire drills, and on stairways when classes are changing. The Fifth Circuit reasoned that student literature distribution could be prohibited in the cafeteria to maintain order and discipline because ample other opportunities were available for students to distribute their materials at school.⁷⁰

**Time, place, and manner regulations, however, must be reasonable, content neutral, and uniformly applied to expressive activities.** Also, they cannot restrict more speech than necessary to ensure nondisruptive distribution of materials. School officials must provide students with specific guidelines regarding when and where they can express their ideas and distribute materials. Moreover, literature distribution cannot be relegated to remote times or places either inside or outside the school building, and regulations must not inhibit any person’s right to accept or reject literature that is distributed in accordance with the rules. Policies governing demonstrations should convey to students that they have the right to assemble, distribute petitions, and express their ideas under nondisruptive circumstances. If regulations do not precisely inform demonstrators of behavior that is prohibited, the judiciary may conclude that punishment cannot be imposed.

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⁶⁹Amicus Brief of Nat’l Sch. Bds. Ass’n in Support of Petition for Certiorari, Blue Mountain School District v. Snyder, No. 11-502 (2011). If the Supreme Court would consider student electronic expression to be “in school” so long as it targets the school community, this would resolve the debate over whether Fraser’s exclusion of lewd and vulgar expression from constitutional protection applies to Internet expression.

STUDENT-INITIATED CLUBS

Public schools can deny access to all noncurriculum student clubs during noninstructional time but cannot discriminate against specific groups based on the content of their meetings.

Free expression and related association rights have arisen in connection with the formation and recognition of student clubs. Freedom of association is not specifically included among First Amendment protections, but the Supreme Court has held that associational rights are “implicit in the freedoms of speech, assembly, and petition.” The word *association* refers to the medium through which individuals seek to join with others to make the expression of their own views more meaningful.

Public school pupils have not prevailed in asserting that free expression and association rights shield student-initiated social organizations or secret societies with exclusive membership usually determined by a vote of the clubs’ members. In contrast, prohibitions on student-initiated organizations with *open* membership are vulnerable to First Amendment challenge. Even before Congress enacted the Equal Access Act (EAA), it was generally accepted that public school access policies for student meetings must be content neutral and not disadvantage selected groups. *The EAA, enacted in 1984, stipulates that if federally assisted secondary schools provide a limited open forum for noncurricular student groups to meet during noninstructional time, access cannot be denied based on the religious, political, philosophical, or other content of the groups’ meetings.*

The EAA was championed by the Religious Right, but its protection encompasses far more than student-initiated religious expression.

As discussed in Chapter 3, the Supreme Court in 1990 rejected an Establishment Clause challenge to the EAA in *Board of Education of the Westside Community Schools v. Mergens.* The Court held that if a federally assisted secondary school allows even one noncurricular group to use school facilities during noninstructional time, the EAA guarantees equal access for other noncurricular student groups. Of course, meetings that threaten a disruption can be barred. Moreover, school authorities can decline to establish a limited forum for student-initiated meetings and thus confine school access to student organizations that are an extension of the curriculum, such as drama groups, language clubs, and athletic teams.

Controversies have surfaced over what constitutes a curriculum-related group, since the EAA is triggered only if noncurriculum student groups are allowed school access during noninstructional time. Many of these cases have focused on the Gay-Straight Alliance (GSA). To illustrate, after the Salt Lake City School Board implemented a policy denying school access to all noncurriculum student groups, it rejected the GSA’s petition to hold meetings in a public high school. The GSA then asserted that it was related to the

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73 496 U.S. 226 (1990) (rejecting the contention that only noncurricular, *advocacy* groups are protected under the EAA).
STUDENT EXPRESSION, ASSOCIATION, AND APPEARANCE

Curriculum and should be treated like other curriculum-related groups. The federal district court ultimately enjoined school authorities from denying access to the student club because it addressed content in the school’s history and sociology courses, even though the club’s major focus was on the rights of lesbian, gay, bisexual, and transgender (LGBT) persons. Also, the Eighth Circuit addressed a Minnesota school district’s distinction between curricular student groups that were allowed to use the public address system and other forms of communication and noncurricular groups that could not use such communication avenues or participate in fundraising activities or field trips. Concluding that some groups identified as curricular, such as cheerleading and synchronized swimming, were not related to material regularly taught in the curriculum, the court enjoined the district from treating the club, Straights and Gays for Equality, differently from other student groups. Even if agreed that a secondary school has not established a limited forum, it still cannot exert viewpoint discrimination against particular curriculum-related groups.

STUDENT APPEARANCE

Restrictions can be placed on student grooming and attire if based on legitimate educational and safety objectives and not intended to suppress expression.

Fads and fashions in hairstyles and clothing have regularly evoked litigation as educators have attempted to exert some control over pupil appearance. Courts have been called upon to weigh students’ interests in selecting their hairstyle and attire against school authorities’ interests in preventing disruptions and promoting school objectives.

Hairstyle

Considerable judicial activity in the 1970s focused on school regulations governing the length of male students’ hair. The Supreme Court, however, refused to hear appeals of these cases, and federal circuit courts reached different conclusions in determining the legality of policies governing student hairstyle. If school officials have offered health or safety reasons for grooming regulations, such as requiring hair nets, shower caps, and other hair restraints intended to protect students from injury or to promote sanitation, the policies typically have been upheld. Furthermore, restrictions on male students’ hairstyles at vocational schools have been upheld to create a positive image for potential employers visiting the school for recruitment purposes. Special grooming regulations have been endorsed as

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75Straights & Gays for Equality (SAGE) v. Osseo Area Schs., 471 F.3d 908 (8th Cir. 2006); see also Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135 (N.D.N.Y. 2011) (finding, among claims of differential treatment based on sexual orientation, a sufficient EAA claim that the school district did not give equal access and benefits to the GSA compared to other student groups). For a discussion of public school access for meetings of community religious groups, including the Good News Club, see text accompanying note 71, Chapter 3.
conditions of participation in extracurricular activities for legitimate health or safety reasons, and, in some instances, to enhance the school’s image. Of course, students can be disciplined for hairstyles that cause a disruption, such as hair groomed or dyed in a manner that distracts classmates from instructional activities.

But hairstyle regulations cannot be arbitrary or devoid of an educational rationale. A Texas federal district court ruled that school officials failed to show a valid justification to impair Native American students’ protected expression right to wear long hair that posed no disruption. More recently, the Fifth Circuit relied on a Texas law protecting religious liberties in ruling that a school district violated a Native American student’s rights to express his religious beliefs by requiring him to wear one long braid tucked in his shirt or a bun on top of his head instead of wearing his two long braids in plain view.

Attire

Although public school students’ hair length has subsided as a major subject of litigation, other appearance fads have become controversial as students have asserted a First Amendment right to express themselves through their attire at school. Some courts have distinguished attire restrictions from hair regulations because clothes, unlike hair length, can be changed after school. Even in situations where students’ rights to govern their appearance have been recognized, the judiciary has upheld restrictions on attire that is immodest, disruptive, unsanitary, or promotes illegal behavior.

If school authorities can link particular attire to gang activities or other school violence, restrictions likely will be upheld. A Nebraska federal district court in 2012 supported school authorities in suspending students for wearing bracelets and T-shirts with the phrase, “Julius RIP” (rest in peace) in remembrance of their friend who had been shot at his apartment complex allegedly for gang-related reasons. The court agreed with school authorities that the attire could be banned in the interest of safety because it might trigger violence at the school. Two years earlier, a West Virginia federal district court upheld a student’s suspension for writing a slogan on his hands about freeing a classmate who was accused of shooting a police officer. The court agreed with school officials’ prediction that the expression would contribute to gang-related disturbances.

Some recent controversies have addressed school prohibitions on students wearing cancer awareness bracelets with the message, “I love Boobies (Keep a Breast).” School authorities have argued that the bracelets are vulgar and can be banned under Fraser. But a Pennsylvania federal district court found no evidence that these bracelets were linked to a disruption and did not consider the word “boobies” to be vulgar in this context, so it granted a preliminary injunction against the school district’s ban on wearing the bracelets.

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76 Ala. & Coushatta Tribes v. Trs., 817 F. Supp. 1319 (E.D. Tex. 1993), remanded per curiam, 20 F.3d 469 (5th Cir. 1994).
Dress Codes. Under the principle established in \textit{Fraser}, lewd and vulgar expression is outside the protective arm of the First Amendment. Thus, \textbf{indecent attire can be curtailed regardless of whether the attire would meet the Tinker test of threatening a disruption}. For example, an Idaho federal district court held that a school could prevent a student from wearing a T-shirt that depicted three high school administrators drunk on school grounds, noting that the student had no free expression right to portray administrators in a fashion that would undermine their authority and compromise the school’s efforts to educate students about the harmful effects of alcohol.\footnote{\textit{Gano v. Sch. Dist. No. 411}, 674 F. Supp. 796 (D. Idaho 1987); \textit{see also \textit{Madrid v. Anthony}, 510 F. Supp. 2d 425 (S.D. Tex. 2007) (upholding a ban on students, who were mostly Hispanic, wearing T-shirts with the statement “We Are Not Criminals” to protest pending immigration legislation; school authorities instituted the ban to curb the escalating racial tension in the school that threatened student safety).} A Georgia federal district court also upheld the suspension of a student who wore a T-shirt with the phrases “kids have civil rights too” and “even adults lie.”\footnote{\textit{Smith v. Greene Cnty. Sch. Dist.}, 100 F. Supp. 2d 1354 (M.D. Ga. 2000).} The court ruled that wearing the shirt was the last incident in a series of disruptions justifying the student’s suspension.

A few courts have upheld dress codes that prohibit male students from wearing earrings, rejecting the assertion that jewelry restrictions must be applied equally to male and female students. In an illustrative case, an Illinois federal district court found the school district’s ban on male students wearing earrings rationally related to the school’s legitimate objective of inhibiting the influence of gangs, as earrings were used to convey gang-related messages.\footnote{\textit{Olesen v. Bd. of Educ.}, 676 F. Supp. 820 (N.D. Ill. 1987); \textit{see also \textit{Barber v. Colo. Indep. Sch. Dist.}, 901 S.W.2d 447 (Tex. 1995) (upholding earring as well as hair-length restrictions applied only to male students).} Also, while acknowledging the absence of a gang-related justification, an Indiana appeals court nonetheless upheld a school district’s ban on male students wearing earrings in elementary schools as advancing legitimate educational objectives and community values supporting different attire standards for males and females.\footnote{\textit{Hines v. Caston Sch. Corp.}}, 651 N.E.2d 330 (Ind. Ct. App. 1995). \textit{But see \textit{McMillen v. Itawamba Cnty. Sch. Dist.}}, 702 F. Supp. 2d 699 (N.D. Miss. 2010) (upholding a female student’s right to wear a tuxedo to the prom and bring her girlfriend as her date).}

In a New Mexico case, the federal district court upheld a student’s suspension for wearing “sagging” pants in violation of the school’s dress code.\footnote{\textit{Madrid v. Anthony}, 510 F. Supp. 2d 425 (S.D. Tex. 2007) (upholding ear-rings, rejecting the assertion that jewelry restrictions must be applied equally to male and female students).} Rejecting the student’s contention that his attire conveyed an African-American cultural message, the court noted that “sagging” pants could as easily be associated with gang affiliation or simply reflect a fashion trend among adolescents. The Seventh Circuit found no First Amendment right for gifted students to wear a T-shirt they had designed that depicted in a satirical manner a physically disabled child with the word “gifties.” The students wore their shirt to protest the election to select a class shirt, which they alleged was rigged because school authorities did not like their design.\footnote{\textit{Bivens ex rel. Green v. Albuquerque Pub. Schs.}, 899 F. Supp. 556 (D.N.M. 1995), \textit{aff'd mem.}, 131 F.3d 151 (10th Cir. 1997).}

In one of the most expansive interpretations of \textit{Fraser}, the Sixth Circuit upheld a school district’s decision to prohibit students from wearing Marilyn Manson T-shirts.\footnote{\textit{Brandt v. Bd. of Educ.}, 480 F.3d 460 (7th Cir. 2007).}
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The appeals court agreed with school authorities that the shirts were offensive, promoted destructive conduct, and were counter to the school’s efforts to denounce drugs and promote human dignity and democratic ideals. The court held that under Fraser, schools can prohibit student expression that is inconsistent with its basic educational mission even though such speech might be protected by the First Amendment outside the school environment.

Several restrictive dress codes have received judicial endorsement. The Fifth Circuit upheld a dress code prohibiting any clothing with printed words except for school logos as content neutral. Also upholding a restrictive dress code as reasonable to create unity and focus attention on learning, the Sixth Circuit found no violation of a student’s free expression rights, her right to wear clothes of her choice, or her father’s right to control his daughter’s attire.

However, like hairstyle regulations, school authorities must have an educational rationale for attire restrictions, such as enhancing learning or preventing class disruptions. The Third Circuit struck down a prohibition on wearing T-shirts with the comedian Jeff Foxworthy’s “red-neck sayings” as not sufficiently linked to racial harassment or other disruptive activity. A student also prevailed in wearing a T-shirt depicting three black silhouettes holding firearms with “NRA” and “Shooting Sports Camp” superimposed over the silhouettes. School authorities asked the student to change the shirt, contending that it conflicted with the school’s mission of deterring violence. Applying Tinker instead of Fraser, the Fourth Circuit held that the student’s free expression rights were overriding because the shirt was not disruptive and did not promote gun use.

In addition, dress codes must not be discriminatorily enforced. In a case mentioned previously, the Sixth Circuit ordered a school district to reconsider suspensions of two students who refused to change or turn inside out T-shirts with a country singer on the front and the Confederate flag on the back. School authorities asserted that the shirts violated the school’s dress code prohibiting clothing or emblems that contain slogans or words depicting alcohol or tobacco or have illegal, immoral, or racist implications, but the court found no indication of racial tension in the school or that the shirt would likely lead to a disruption. There was also evidence that the dress code had been selectively enforced in a viewpoint-specific manner; students had been allowed to wear shirts celebrating Malcolm X. Thus, the court remanded the case to determine if the students’ First Amendment rights had been violated.

87Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465 (6th Cir. 2000); see also Dariano v. Morgan Hill Unified Sch. Dist., 822 F. Supp. 2d 1037 (N.D. Cal. 2011) (rejecting First Amendment challenge to dress code that barred American flag emblems where there had been conflicts between Hispanic and Caucasian students).


89Blau v. Ft. Thomas Pub. Sch. Dist., 401 F.3d 381 (6th Cir. 2005); see also Long v. Bd. of Educ., 121 F. Supp. 2d 621 (W.D. Ky. 2000), aff’d mem., 21 F. App’x 252 (6th Cir. 2001) (upholding a restrictive student dress code devised by a Kentucky school-based council that limits the colors, materials, and type of clothing allowed, and bars logos, shorts, cargo pants, jeans, and other specific items; the court found legitimate safety justifications and no intent to suppress free speech).


92Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd., 246 F.3d 536 (6th Cir. 2001). Most courts, however, have upheld restrictions on Confederate flag displays under anti-harassment policies, finding no viewpoint discrimination; see supra text accompanying note 48.
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Additionally, students cannot be disciplined for expressing their disagreement with a dress code in a nondisruptive manner. Applying Tinker, the Eighth Circuit ruled that students had a First Amendment right to wear black armbands to protest the district’s student apparel policy.93

The Second Circuit relied on Tinker in protecting a student’s right to wear a shirt expressing political views; the shirt depicted George W. Bush negatively (i.e., calling him “Chicken Hawk in Chief” and linking him to drinking, taking drugs, and being a crook and draft dodger).94 Reasoning that simply because the expression is in poor taste is not sufficient grounds to curtail students’ expression rights, the appeals court concluded that student expression would have to contain sexual innuendos or profanity to be censorable as plainly offensive under Fraser. Since neither was at issue, the court applied the Tinker disruption standard and found that the controversial shirt was not linked to any disruption.

Student Uniforms. Many attire controversies might be avoided if public school students were required to wear uniforms as they do in many countries. Voluntary and mandatory student uniforms increasingly are being adopted by school districts nationally, especially those in urban settings.95 Advocates assert that student uniforms eliminate gang-related attire, reduce violence and socioeconomic distinctions, and improve school climate by placing the emphasis on academics rather than fashion fads. And the line is not always clear between restrictive dress codes and student uniforms.

Courts have upheld uniform policies so long as there are waivers for those opposed to uniforms on religious or philosophical grounds and provisions are made for students who cannot afford the uniforms.96 Courts have not been persuaded that any rights are violated because a stigma is associated with exercising the First Amendment right to be exempt from uniform requirements.97

Since the federal judiciary has recognized that public schools can impose restrictive dress codes and even mandate uniforms for students, perhaps this is depressing challenges to attire regulations. Nonetheless, school officials would be wise to ensure that they have a legitimate educational justification for any grooming or dress restrictions. Policies designed to protect students’ health and safety, reduce violence and discipline problems, and enhance learning usually will be endorsed. Given the current student interest in tattoos, body piercings, and other fashion fads and school authorities’ concerns about attire linked to gangs and violence, controversies over student appearance in public schools seem likely to persist.

94Guiles v. Marineau, 461 F.3d 320, 322 (2d Cir. 2006).
97See, e.g., Wilkins v. Penns Grove-Carneys Point Reg’l Sch. Dist., 123 F. App’x 493 (3d Cir. 2005).
CONCLUSION

Student expression and association rights have generated a significant amount of school litigation. In the late 1960s and early 1970s, the federal judiciary expanded First Amendment protections afforded to students following the Supreme Court’s landmark *Tinker* decision. Yet the reach of the *Tinker* standard was narrowed somewhat after the Supreme Court ruled in *Fraser* and *Hazelwood* that lewd or vulgar speech and attire are not protected by the First Amendment and that school authorities can censor student expression that appears to represent the school. The Supreme Court in *Morse* again restricted use of the disruption standard if expression can be viewed as promoting or celebrating illegal activity. *Tinker* has not been overturned, but it governs more limited circumstances than was true in the 1970s.

Students do not need to rely solely on constitutional protections because federal and state laws, most notably the Equal Access Act, also protect students’ expression and association rights. And *Tinker* has been revitalized as the primary standard used in First Amendment challenges to anti-harassment and anti-bullying policies and electronic expression. Important questions persist regarding whether school authorities can discipline students for vulgar and hurtful electronic expression that originates from their homes but can reach the entire school community instantaneously. Judicial criteria to weigh the competing interests of students and school authorities under statutory and constitutional provisions continue to be refined.

POINTS TO PONDER

1. Students opposed to the United States’ military involvement in the Middle East organized several activities to protest the government’s policy. The students:
   a. distributed flyers condemning the war to classmates at school;
   b. posted flyers on school bulletin boards that announced an antiwar rally to be held after school;
   c. led students in walking out of a school assembly to meet with protesting adults who were holding a rally across from the school; and
   d. held a rally in front of the county courthouse after school.

   Could school authorities legally curtail any of these activities? Which activities implicate students’ First Amendment rights?

2. Students developed a newspaper in their homes and distributed it at a local store. The articles were critical of school administrators and contained vulgar language. Can school authorities discipline the students for their expression? Would your conclusion be different if the paper were distributed over the Internet?

3. A high school allows a chess club to meet in a classroom after school. Three other student clubs—the Gay-Straight Alliance, the Fellowship of Christian Athletes, and the Young Neo-Nazis—have asked for similar privileges. Must each of these groups be provided school access? Why or why not?

4. A school-based council has decided to adopt a policy requiring students to wear uniforms. What features should the policy include to survive a legal challenge?

5. Students wore T-shirts condemning homosexuality. Can school authorities ban such attire? Why or why not?