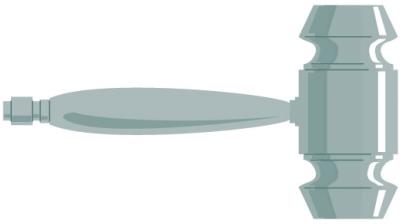
Legal Corner



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The Legal Standards Governing School Districts' Responses to Student Speech On and Off School Property

Recently, in the wake of Parkland, Florida, school shootings, students across the country walked out of class to call attention to gun violence in schools and for the passage of gun control laws. Although the involvement and passion of these students is admirable, the forms of speech in which they are engaging raise issues for school administrators. How should school administrators respond to students' protests and other speech that garners public support and sympathy, but violates school policies and causes disruption to school operations? How do school administrators discipline students engaging in speech in a way that violates rules of conduct while minimizing the risk of the school district being held liable for violating students' First Amendment rights? There are no set answers to these questions as each case depends on its unique facts. But, school administrators can find guidance in the legal precedents and considerations discussed below. They discuss: **(1)** the scope of students' First Amendment rights to engage in speech on and off school property; and **(2)** when it is appropriate for a school to prohibit student speech and impose discipline on students who violate rules of conduct while engaging in speech.

Student Speech on School Property[1]

The following legal framework applies when students engage in speech on school property.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) is the seminal case on students' First Amendment rights while at school.[2] *Tinker* holds that students are permitted to exercise their First Amendment rights on school property if doing so does not "materially and substantially disrupt the work and discipline of the school" or cause an "invasion of the rights of others." *Tinker*, 393 U.S. at 513. In *Tinker*, the court held that, under the disruption standard, students could wear black armbands in school to protest the Vietnam War. *Tinker*, 393 U.S. at 514. Under *Tinker*, a school district is required to make a "showing" of material and substantial disruption to justify the prohibition of student speech. *Id.* at 514. "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.*, at 508. To prohibit student speech requires "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.*, at 509. The *Tinker* rule is grounded on the "special characteristics of the school environment" and balances students' free speech rights with the need for schools to control conduct in school. *Id.*, at 506-507.

There is no definitive rule as to what constitutes a material and substantial disruption within the meaning of *Tinker*. The existence of a material and substantial disruption will depend on the facts of each student speech issue that arises. Take, for example, the following cases.

In *Tinker*, substantial disruption did not exist when the wearing of black armbands "caused comments, warnings by other students, the poking of fun at them, ... a warning by an older football player that other, nonprotesting students had better let them alone" and the "wreck[ing]" of a math teacher's lesson period. *Tinker,* 393 U.S. at 517, (Black, J., dissenting) (bracket added).

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In *B.H. ex rel. Hawk v. Eastern Area School District,* 725 F.3d 293 (3d Cir. 2013), students involved in breast cancer awareness efforts wore bracelets to school inscribed with a phrase that included the word "boobies." Substantial disruption related to the bracelets did not exist based solely on several incidents in which male students, one of whom was suspended for a day, made comments about the word "boobies" to female students. *B.H.*, 725 F.3d at 321.

In *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214 (5th Cir. 2009), it was found that substantial disruption existed with respect to students who wore purses to school adorned with large displays of the Confederate flag. The facts showed that a real risk of racial tension and violence existed based on the reactions of students to the Confederate flag. *A.M.*, 585 F.3d at 222-224.

Since *Tinker*, the U.S. Supreme Court has identified narrow categories of student speech that, even if carried out on school property, do not require substantial and material disruption to be regulated: **(1)** lewd, vulgar, indecent and plainly offensive speech, *Bethel School District No. 43 v. Fraser*, 478 U.S. 675, 683 (1986); **(2)** "school-sponsored" speech that occurs in school publications, theatrical productions and other activities that students, parents and the public may "reasonably perceive to bear the imprimatur of the school," *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988); and **(3)** student expression that could be reasonably regarded as promoting illegal drug use. *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

In addition, the First Amendment does not protect speech that contains insulting or fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and "true threats," *Johnson v. Brighton Area School District*, 2008 WL 4204718, *8 (W.D. Pa. 2008), wherever such speech occurs. *Johnson*, 2008 WL 4204718, *8. "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *Johnson*, 2008 WL 4204718, *8 (*citing, Watts v. United States*, 394 U.S. 705, 708 (1969).

Student Speech off School Property[3]

The following legal framework applies when students engage in speech off school property.

Although there is no U.S. Supreme Court decision that directly applies *Tinker* to a student's off-campus speech, *A.N. by and through Niziolek v. Upper Perkiomen School District*, 228 F.Supp.3d 391, 398 (E.D. Pa. 2017) (*citing*, *Burge ex rel. Burge v. Colton Sch. Dist. 53*, 100 F.Supp.3d 1057, 1062 (D. Or. 2015), federal district and appeals courts have done so.[4]

In *Snyder v. Blue Mountain School District*, 650 F.3d 915, (3d Cir. 2009), the Third Circuit[5] Court of Appeals assumed, without deciding, that *Tinker* applied to a student's off-campus speech. 650 F.3d at 926. The court ruled that the First Amendment prohibits a public school from punishing a student for off-campus speech unless the speech: **(1)** causes an actual disruption to the school environment, or **(2)** reasonably could lead school officials to forecast a substantial disruption at school. *Snyder*, 650 F.3d at 920.

Under this legal standard, a school cannot act against a student regarding that student's off-campus speech when the speech does not cause, or cannot reasonably be forecasted to cause, a substantial and material disruption at school. *Snyder*, 650 F.3d at 933. That is so regardless of whether the off-campus speech is offensive, lewd, involves fighting words or unacceptable to the school on any other grounds.

The following cases illustrate speech off school property that: **(1)** causes a material and substantial disruption on school property, and **(2)** does not cause disruption at school.

In *Snyder*, a student, while off school property, created a fake MySpace profile for a school administrator. The profile contained false and outrageous content about the school administrator that could not be viewed at school because computer security blocked access to MySpace. *Snyder*, 650 F.3d at 921-922. The school district suspended the student based on the MySpace profile. The district argued that it could impose the suspension because the profile caused disruption at school in that the profile aroused suspicion regarding the administrator. *Snyder*, 650 F.3d at 930. But, the court found that the facts did not support that argument as they demonstrated that nobody took the MySpace profile seriously. *Id.*

In *Niziolek*, a student, while off school property, created a video which he posted anonymously to a website. Students and parents who viewed the video interpreted it as possibly making a threat of violence to the school. *Niziolek*, 228 F.Supp.3d at 394-395. The video was reported to the police who contacted the school district. Due to possible threat of violence communicated in the video, a decision was made to close the school district. *Niziolek*, 228 F.Supp.3d at 394-395. The school district suspended the student and then sought to expel him. *Niziolek*, 228 F.Supp. 3d at 395. The district's actions were upheld due to the

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closure of the district, cancellation of buses and the messaging of parents to inform them of the situation. *Niziolek*, 228 F.Supp.3d at 399.

As these cases illustrate, the determination of whether a school district can take disciplinary action regarding a student's speech off school property is fact-intensive. A school district's ability to take disciplinary action as to speech off school property will depend upon the circumstances under which the speech occurs and how the speech affects the school environment.

The Importance of Keeping Records and Information Needed to Defend Claims

When a school district takes disciplinary action against a student for his or her speech, it is critical for the district to maintain records that support the action. This is clear from the fact-intensive nature of a determination that speech, whether on or off school property, caused a material and substantial disruption of the school environment. E-mails, text messages, video footage, photographs, written statements, police reports, notes and other potential evidence, as well as the names of witnesses who support the district's position, should be maintained with care. The absence of such evidence will weaken the school district's ability to prove that it acted based on a material and substantial disruption to the school environment. Moreover, it should be expected that a court will require a school district to make a strong evidentiary showing in support of a decision to impose discipline on a student for what is claimed to be a lawful exercise of First Amendment rights.

Retaliation Claims

A student who has been disciplined for engaging in speech may argue not only that he or she has been prohibited from engaging in protected speech, but also that he or she suffered punishment from the school because of the political or other views expressed in the speech. Such allegations support what is referred to as a First Amendment retaliation claim. The theory of such a claim is that some form of retaliation, like overly harsh discipline, occurred in response to the exercise of First Amendment rights. For example, a student who violates a dress code, attendance policy or other rule of student conduct in advocating for a cause may contend that school administrators imposed harsh discipline on her or him not as punishment for the rule infraction, but rather for views that were expressed. In so arguing, the student may point to other students who have engaged in similar speech, but were not disciplined or were disciplined less severely. For this reason, school administrators should expect that even discipline imposed for what appears to be a clear violation of a rule of student conduct may, nevertheless, give rise to a First Amendment retaliation claim.

The elements of a First Amendment retaliation claim are the following: **(1)** constitutionally protected conduct (i.e., speech); **(2)** retaliatory action sufficient to deter a person of ordinary firmness from exercising his or her constitutional rights; and **(3)** a causal link between the constitutionally protected conduct and the retaliatory action. *Smith v. Allegheny Valley School District*, 2017 WL 6279345, *9 (W.D. Pa. 2017); *Herring v. Chichester School District*, 2008 WL 436910, *6 (E.D. Pa. 2008); *Evans v. Chichester School District*, 533 F.Supp.2d 523, 531 (E.D. Pa. 2008).

Under this legal standard, the focus is on whether retaliatory action was allegedly taken in response to student speech such that a student would be deterred from exercising his or her First Amendment rights. Accordingly, it is possible that a First Amendment retaliation claim can succeed even if the student violated a rule of student conduct.

The following cases illustrate the kind of circumstances that may lead a student to assert a First Amendment retaliation claim.

In *Corales v. Bennett*, 567 F.3d 554 (9th Cir. 2009), students asserted claims, including for First Amendment retaliation, after they were disciplined for leaving school without authorization when they participated in a protest on the issue of immigration. The students claimed that while the discipline was purported to be for leaving school, it really was for the students' "expressive choice to participate in the immigration protests." *Corales*, 567 F.3d at 563.

In *Pinard v. Clatskanie School District*, 467 F.3d 755 (9th Cir. 2006), a group of students on the high school varsity basketball team spoke out against their coach. The students signed a petition asking for the coach to resign. Some students also refused to board a bus for a basketball game, and therefore, did not play in the game. The students who did not board the bus and did not play in the game were permanently suspended from the basketball team purportedly on the basis that they violated a Code of Conduct for athletes. *Pinard*, 467 F.3d at 760-763. The students filed a lawsuit that included a First Amendment retaliation claim on the basis that their suspension was motivated by their petition seeking the resignation of the coach. *Pinard*, 467 F.3d at 770-771. The students who did not board the bus, which allegedly violated a Code of Conduct for athletes, may still have had a First Amendment retaliation claim if the suspension was wholly or partly imposed for their petition to remove the coach. *Pinard*, 467 F.3d at 770.

Given all of this, school administrators who discipline a student for violating a rule of student conduct when he or

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she engaged in speech must anticipate that the student may take legal action, even when there was a rule violation. As noted previously, school administrators should carefully maintain the records and information that support the disciplinary action taken. The absence of such records and information will weaken the defense to a retaliation claim.

Conclusion

When school administrators consider discipline for students who have violated a rule of conduct while engaging in speech that may be protected under the First Amendment, the administrators should be mindful of the legal precedents and considerations discussed in this article. Moreover, administrators should make certain that evidence supporting any disciplinary action is maintained. The absence of such supporting evidence will leave the school district more vulnerable to liability if a lawsuit is filed claiming the violation of First Amendment rights.

End Notes

[1] For the most part, the rules that apply to student speech on school property also apply at school-sponsored events, such as football games, whether those events are on or off school property. *See, Snyder v. Blue Mountain School District*, 650 F.3d 915, 933 (3d Cir. 2011) ("Neither the Supreme Court nor this court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school.").

[2] *Tinker* also applies to teachers. *Tinker*, 393 U.S. at 506.

[3] As used here, off school property means physically outside of school grounds and away from school-sponsored events such as football games.

[4] The cases discussed in this article deal with situations where students were disciplined with respect to school, such as a suspension or expulsion from school. They did not address other forms of actions, such as suspension of extra-curricular privileges. There is currently pending a case where the school district is arguing that districts can disqualify students for off-campus conduct that involves conduct conveying a message - in that case, giving the finger on social media. *See, B.L. by Levy v. Mahanoy Area Sch. Dist.*, 3:17-CV-1734, 2017 WL 4418290 (M.D. Pa. Oct. 5, 2017).

[5] The Third Circuit covers Pennsylvania, New Jersey and Delaware.

WOW! That's Why I Became a Principal

A Feature in The Pennsylvania Administrator Magazine

Pursuing a career in school administration may not be as appealing these days as it once seemed, if you believe all the negative images or controversy over issues related to our public schools. Many influences such as changing demographics, the economy and limited resources, accountability demands and the constant change of politically-driven initiatives impact not only public perception, but the daily operations of our schools. Yet, despite constant changes and public scrutiny of our educational system, educators rise to the challenge of providing all children a quality program for learning and personal growth.

Effective principals take the criticisms and changes in stride as they focus on providing the best services possible for all students. Some days are harder than others to maintain the enthusiasm and stamina needed to be a school leader, but more often than not, something occurs that triggers the heart and mind, reminding us "why I became a principal."

We are seeking short, humorous or uplifting stories that relate to some telling aspect of a school administrator's work life for our feature, *"Wow! That's Why I Became a Principal."* Let's share our stories to encourage, cheer and support each other...lest we forget why we followed this career path.

Articles should be no more than 350-400 words (less if you include a photo and a brief caption). Please include a high-resolution head shot (300 dpi) in an electronic format to accompany your article. Articles and photos should be sent to Sheri Thompson at **sherit@paprincipals.org**.

If time is your obstacle, consider contacting Sheri to set up a phone interview to "tell your story." Then, we will format the article for you. **The deadline for submitting an article for the Fall 2018 issue is July 9, 2018.**

IMPORTANT MEMBERSHIP ANNOUNCEMENT

It is *critical* that members are careful to avoid accidental lapsed membership (lapses after 90 days). Failure to renew membership by your due date can result in loss of NATIONAL LEGAL PROTECTION! If your district business office completes the renewal process, please be sure that they are aware of the critical timeline. PA Principals will accept a P.O. number for membership renewal and will bill the school district to expedite the process. You also have the option to have your membership materials sent to your home to avoid accidental loss of the renewal notice.