



Student Protests

Published online in [TASB School Law eSource](#)

Students are prone to strong opinions about their world, whether the topic is U.S. foreign policy or the lunch options in the cafeteria. Strong opinions can turn into protected speech. The First Amendment states: “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. Const. amend. I. This article addresses some of the issues that schools encounter when dealing with student protests and other free speech issues that may occur on campus.

1. Can school districts prohibit all student protests on campus?

No. Students maintain their constitutional rights while they are in school, including the right to peacefully assemble and the right to free speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Schools may, however, take reasonable action to maintain a safe and functioning learning environment.

2. What is the difference between protected speech and unprotected speech?

Pure speech: Speech that is political, religious, or expresses an opinion through spoken or written words is considered pure speech and is protected expression under the First Amendment. Students may express pure speech when they carry signs that display a certain point of view, e.g. “Vote Republican,” “Black Lives Matter,” or “Not My President.”

Expressive conduct and symbolic speech: Expressive conduct and symbolic speech may also be protected expression under the First Amendment. Expressive conduct or symbolic speech involve actions or conduct intended to convey a message. Some examples include wearing a cross or a confederate flag, refusing to stand during the pledge of allegiance, or taking part in a march or a walkout. Expressive conduct and symbolic speech are protected by the First Amendment if the person who displays the symbol or engages in the conduct intends to convey a particularized message and there is a great likelihood that the message will be understood by those observing it. *Spence v. Washington*, 418 U.S. 405 (1974). For example, in *Corales v. Bennett*, the Ninth Circuit Court of Appeals held that four students intended to show their opposition to proposed immigration reform by participating in a walkout, even though they did not wear t-shirts bearing any slogans or display their group’s message in any other explicit way. *Corales v. Bennett*, 567 F.3d 554 (9th Cir. 2009).

Non-expressive conduct: Non-expressive conduct is conduct that does not express a message to a reasonable viewer or listener. Students sometimes claim that they are expressing themselves through a certain style or behavior. If the clothing or behavior that the district seeks to prevent is neither pure speech nor expressive conduct, then it is not protected by the First Amendment. *See, e.g., Oleson v. Bd. of Educ. of Sch. Dist. No. 228*, 676 F. Supp. 820 (N.D. Ill. 1987) (mem.) (wearing an earring to convey individuality was not protected expressive conduct because no one seeing the earring would comprehend the message).

Unprotected speech: Schools can prohibit vulgar or offensive speech. They may also prohibit fighting words, inciting criminal activity, extortion or threats, or lewd or indecent speech, as those terms are defined by law. Schools may consider the age, maturity, and impressionability of other students who will hear or see the expression. *See Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942) (holding statute that prohibited addressing another person with offensive or derisive language did not infringe on First Amendment freedom of expression); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding school acted within its authority in sanctioning student for lewd speech during school assembly). A school may discipline a student if the student's threats to individuals or groups could reasonably be seen as causing a substantial disruption, even if the threats were part of speech that was otherwise protected. *See Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (upholding student discipline for off-campus speech involving a YouTube video that accused high school coaches of inappropriate sexual conduct and included vulgar and threatening language).

3. **When can a district restrict student protests or expressive conduct?**

A school may prohibit otherwise protected expression if a school official has reason to believe that the expression will materially and substantially interfere with school operations or the rights of others.

The U.S. Supreme Court developed this standard in a case involving a protest of the Vietnam War. The Court determined that students protesting the war by wearing black armbands during the school day did not cause a material and substantial disruption, and therefore, the high school violated the students' First Amendment rights by disciplining the students. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Many cases involving schools have since helped define what may be considered material and substantial disruption, but the *Tinker* analysis remains a strong and protective standard for student rights at school. *See B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293 (3rd Cir. 2013) (holding school district failed to show that bracelets with "I 'heart' boobies" message could reasonably be expected to cause a material and substantial disruption to school operations); *see also A.M. ex rel. McAllum v. Cash*, 585 F.3d 214 (5th Cir. 2009) (upholding ban on display of confederate flag based on a reasonable forecast of substantial disruption in a school with a history of racial tension).

In 2021, the Supreme Court confirmed the material and substantial disruption standard established in *Tinker*, while also recognizing that schools have diminished authority to address off-campus expression. *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021). Consequently, schools should be cautious and consider consulting with legal counsel before disciplining a student for off-campus behavior, particularly when the behavior is protected speech.

4. What other types of restrictions can a district impose on expressive conduct?

In certain circumstances, districts may impose reasonable content-neutral restrictions on expressive conduct.

Content-neutral regulation of expressive conduct: In the school context, school administrators may impose content-neutral regulations on expressive conduct that is normally protected by the First Amendment if: (1) the regulation furthers an important or substantial governmental interest; (2) the interest is unrelated to the suppression of student expression; and (3) the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest. *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001) (relying on *United States v. O'Brien*, 391 U.S. 367 (1968)). For example, a school district dress code that prohibits any messages on student clothing is a permissible content-neutral restriction on expressive conduct. *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502 (5th Cir. 2009). Reasonable time, place, and manner restrictions, such as restrictions to limit noise while school is in session, may be permissible if the activity restricted would materially disrupt classwork and school activities. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding city ordinance prohibiting a person from willfully making noise or diversion that disturbs school while in session).

Content-based regulation of expressive conduct: In order to impose discipline based on the content of students' expressive conduct, the district must be able to show a clear link between the expressive conduct and a potential disruption. See *Sypniewski v. Warren Hills Reg'l Bd. Of Educ.*, 307 F.3d 243 (3d Cir. 2002) (holding district's ban on written material that creates "ill will" unconstitutional when not limited to disruptive expression). Determining whether an expression is disruptive, or whether the expression is protected but viewers are responding in a way that causes disruption, requires a case-by-case determination. Expression may be deeply offensive and still entitled to First Amendment protection. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968) (extending free speech protection to the symbolic act of burning a draft card).

5. When can a student be disciplined for expressive conduct?

If a student protest causes a substantial disruption of school operations, then a court is likely to uphold the administration's decision to discipline students who participate in a student protest.

Discipline for walkouts: Like other expressive conduct, walkouts and similar demonstrations, such as sit-ins, may provide a basis for student discipline if they cause a substantial disruption or material interference with school operations. In *Madrid v. Anthony*, Cypress-Fairbanks Independent School District students protested proposed immigration legislation by wearing "We Are Not Criminals" t-shirts to school and staging a walkout. The principal did not discipline the students who participated in the initial walkout, but instead gathered the students in the auditorium, gave them time to voice their opinions, then told them not to walk out again. The following school day, teachers were instructed to send students to the office if they were wearing protest-related t-shirts. The school also restricted bathroom passes in an effort to keep students in class. Despite these precautions, a second walkout occurred, and participating students were suspended. In a suit involving the disciplined students, the federal district court ruled in the school district's favor. The court found the high school principal acted reasonably by prohibiting certain t-shirts considering the likelihood of disruption. It was also relevant that teachers did not retaliate against students expressing political views by denying opportunities to go to the bathroom during classes; and the school did not violate the assembly rights of parents by ordering them off school premises when they attempted to protest the students' suspension. *Madrid v. Anthony*, 510 F. Supp. 2d 425 (S.D. Tex. 2007).

Discipline for other expressive and symbolic conduct: With exceptions for religious expression, schools can discipline for content-neutral violations of the student code of conduct or the school's dress code. If a student's expressive conduct is not in violation of the dress code but could be reasonably calculated to cause a substantial disruption to the school operations, districts may ask the students to change. If the student refuses, the school may discipline accordingly. Districts should determine whether a particular message from student dress or appearance could reasonably be expected to cause a material and substantial disruption on a case-by-case basis. If school administrators are not sure that they can document a material and substantial disruption, or a reasonable expectation of such a disruption, they would be wise to consider alternatives to formal discipline, such as meeting with the student or contacting the student's parent to discuss the school's concerns.

6. How should a school treat walkouts for attendance and truancy purposes?

Students do not have a First Amendment right to disrupt school operations by scheduling a walkout. *Murray v. West Baton Rouge Parish Sch. Bd.*, 472 F.2d 438 (5th Cir. 1973). A student who is absent from class due to a walkout may be treated the same

as any other student who is absent from class. Schools should look to their attendance and truancy policies when determining consequences for students who miss class due to walkouts. See *Corales v. Bennett*, 567 F. 3d 554 (9th Cir. 2009) (finding students disciplined for a walkout can be disciplined under the general content-neutral rule that students are not allowed to leave campus without permission).

7. Can we discipline students who opt out of or protest the pledge or the national anthem?

Probably not. Students have a well-established right not to participate in the pledge of allegiance. In 1943, the U.S. Supreme Court decided that a regulation requiring children in public schools to participate in the pledge of allegiance violated a Jehovah's Witness student's rights to free speech and free exercise of religion. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Texas law also specifies that parents are entitled to excuse their child from the pledge of allegiance upon written request. Tex. Educ. Code § 25.082(c). The same principle applies to the national anthem. Under a different statute, Texas law gives parents the right to present a written statement authorizing the removal of the child from the class or other school activity, which may include the national anthem or other patriotic gestures. Tex. Educ. Code § 26.010.

8. How does the free speech analysis differ when students protest during an extracurricular activity?

Students maintain their constitutional rights when participating in extracurricular activities. In 2021, the U.S. Supreme Court examined a case involving a student in Pennsylvania who had signed an extracurricular code of conduct in which she promised to refrain from vulgar expression and to be respectful of teammates and coaches. After being upset for not making the varsity cheer team as well as a local softball club, the student took to Snapchat to air her concerns. While off campus, after school hours, she published a message to her followers that used a vulgar term in reference to softball, cheer, and "everything," and included an image of her with her middle finger raised. As a result, she was suspended from the cheerleading team for the school year. The Supreme Court held that the district's discipline violated the student's First Amendment right to free speech.

Extracurricular codes of conduct that set standards of conduct higher than the school code of conduct have been upheld by numerous courts. However, in areas of constitutionally protected conduct or expression, districts should apply the same standards in extracurricular and general codes of conduct. In other words, signing a cheerleader constitution, or other extracurricular rulebook, cannot require a student to forfeit their constitutional rights. *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021).

In certain extracurricular activities, a student has agreed to perform a “job” where compelled speech may be included as part of that job. For example, in an unpublished decision the Fifth Circuit Court of Appeals held that a school district could discipline a cheerleader who refused to cheer for a certain basketball player. *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App’x 852 (5th Cir. 2010) (not designated for publication). This analysis should be applied carefully. In another case involving the free speech of cheerleaders, a Texas court of appeals held that the banners cheering for the football team were created as private speech. As such, the court found that the district could not prohibit the cheerleaders from holding run-through banners with religious messages at football games. The court held these banners to be private speech because the students selected the message each week with little school involvement, the banners were made after hours and with private funds, and a reasonable observer would not attribute the speech to the school. According to the court, because the district did not argue that the banners created a substantial disruption, limiting the private speech was unjustified. *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, No. 09-13-00251-CV, 2017 WL 4319908 (Tex. App.—Beaumont Sept. 28, 2017, pet. denied) (mem. op).

For student athletes who choose to protest with expressive conduct during the pledge or national anthem, the district should apply a *Tinker* analysis to analyze if the conduct is causing substantial disruption. In one case, the *Tinker* analysis was applied to football players who had signed a petition stating they did not want to play under the current coach. Only the students who apologized for signing the petition were allowed to continue to play. The Sixth Circuit held that it was reasonable for the high school officials to find that the petition would disrupt the team and that the district did not violate the students’ rights by disciplining accordingly. *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007). If a student is silently taking a knee or refusing to stand during the pledge or national anthem, the expressive conduct is less likely to substantially disrupt school activities than behavior that includes desecrating the flag or actively disrupting others during the pledge or national anthem.

Districts should be careful when analyzing substantial disruption under *Tinker*. After a district instituted rules stating athletes must stand for the national anthem, a California federal district court found in favor of the protesting high school athletes even though the protest caused unrest and complaints among other students, staff, and the community. *V.A. v. San Pasqual Valley Unified Sch. Dist.*, No. 17-CV-02471-BAS-AGS, 2017 WL 6541447 (S.D. Cal. Dec. 21, 2017).

Conclusion

Although students no longer protest the Vietnam War, the effect of *Tinker v. Des Moines* continues to reverberate in public schools. When faced with the decision of how to respond to a student protest, campus administrators may feel like they need a class in constitutional law. This should not be the case. Principals can keep their cool in the midst of student controversies by remembering a few key points:

- First, not all student speech is protected. Schools can discipline students for expression that falls into legally recognized categories (vulgarity, obscenity, true threats, school-sponsored speech, and speech advocating illegal drug use).
- Administrators may be able to minimize the disruption of a student protest by working with the students to develop a plan, ensure the protest complies with district and campus policies, and set clear parameters.
- When student expression is protected by the First Amendment, consider what concrete evidence exists that a material and substantial disruption occurred or is reasonably expected to occur.
- If the district's jurisdiction to discipline students under the student code of conduct is unclear, consider alternative ways to address the problematic behavior, such as calling a student's parents, a behavior improvement plan, or restorative practices.
- Finally, when student expression turns into bullying or harassment, remember the district's duty to prevent and respond to this behavior in accordance with district policies. See TASB policies FFH and FFI for more information.

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Published January 2023