



Student Protests

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Whether it's U.S. foreign policy or the lunch options in the cafeteria, students may have strong opinions about and dissatisfaction with their current world. Strong opinions can turn into protected speech and protected conduct. 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 may 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, which include the right to peacefully assemble and the right to free speech, while they are in school. *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 sit-in. 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 walk-out, 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.) (holding 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 prohibiting 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 could 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 accusing high school coaches of inappropriate sexual conduct and including 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 arm bands 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 breast cancer 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 the display of the confederate flag based on a reasonable forecast of substantial disruption in a school with a history of racial tension).

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 standardized 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 on sidewalks outside of the schools 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 in application to disruptive expression). Determining whether an expression is disruptive in its own right, 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?

Every situation will have different facts, but 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 walk-outs or sit-ins: Like other expressive conduct, walk-outs and sit-ins can be cause for student discipline if they cause a substantial disruption or material interference with school operations. In *Madrid v. Anthony*, a case arising in the Cypress-Fairbanks Independent School District, students who were protesting proposed immigration legislation wore T-shirts to school that said "We Are Not Criminals" and staged a walk-out during school. The principal did

not discipline students who participated in the initial walk-out 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. In response, 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 no policy or custom of suppressing free speech by the district; the high school principal acted reasonably by prohibiting certain t-shirts considering the likelihood of disruption; 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 and his or her parent to discuss the school's concerns.

6. How should a school treat walk-outs for attendance and truancy purposes?

Students do not have a First Amendment right to disrupt school operations by scheduling a walk-out. *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 walk-out may be treated as any other student who is absent from class. Schools should determine if the student had parental permission and look to their attendance and truancy policies when determining consequences for students who miss class due to walk-outs. See *Corales v. Bennett*, 567 F. 3d 554 (9th Cir. 2009) (finding students disciplined for a walk-out 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 to not 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 remove their child temporarily from a school activity that conflicts with their religious or moral beliefs if the parent presents a written statement authorizing the removal of the child from the class or other school activity. School activities may include patriotic activities such as the pledge of allegiance or the national anthem.

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

In certain extracurricular activities, the student has agreed to perform a "job" where compelled speech may be included as part of that job. For example, 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). But 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 select 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. The *Tinker* analysis was applied in a case involving football players who had signed a petition stating they did not want to play football under the current football coach. Only 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 held 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. The district should be careful in the application of 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.

This document is continually updated, and references to online resources are hyperlinked, at tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/student_protests.pdf. For more information on this and other school law topics, visit TASB School Law eSource at schoolawesource.tasb.org.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

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