

NJPSA EDUCATION LAW PRIMER

PUBLIC SCHOOLS AND THE FIRST AMENDMENT



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by Robert M. Schwartz, Esq.

Introduction

The First Amendment - U.S. Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

N.J.S.A. Const. Article 1, Paragraph 6 – New Jersey Constitution

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press...

Both of the above provisions establish the freedom of individual expression. The First Amendment provides the protection of the federal government, and Article 1 Paragraph 6 sets forth the corresponding state protection. The language found in the First Amendment and in Article 1 Paragraph 6 is straightforward and simple. The government is prohibited from adopting laws that interfere with religious exercise, the right of expression, the right to assemble and the right to bring to any government entity issues of concern. Yet, the language of the First Amendment and the corresponding provision found in New Jersey's Constitution and the principles they embody have inevitably found controversy and have often proved difficult to implement. At their core they both speak to the interest of individual expression. The challenge has always been to balance that interest with the need for the government to maintain order, whether in the case of a member of the general public shouting obscenities at a public official, or students having a "sit-in" protest outside the principal's office. In terms of the general public, the latitude given has always been greater than in the case of the student in the classroom. Still, however mindful the courts have been of the need for schools to maintain discipline to achieve their educational mission, the courts also have found - at least in the last 50 years - that students too have rights; that they do not "shed their constitutional rights at the schoolhouse gate."

This "primer" focuses on how the courts have sought to preserve school authority while protecting student expression; on how courts have sought to protect students' free exercise of religion with the need to maintain government neutrality. If there is a rule established by the cases, it is that student speech that does not disturb or undermine a school's mission, and does not interfere with someone else's right, is to be protected, whereas language or acts that prevent schools from achieving their mission, or which interferes with the rights of others may be regulated or banned altogether.

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Student Speech

Essentially, courts analyze student speech cases in two contexts: first in the context of “political” speech and whether such speech is disruptive, and second in the context of speech found to be lewd and/or offensive. Political speech is accorded constitutional protection, whereas speech determined to be lewd or offensive is not. For political speech to be constrained or regulated a school district must show “substantial” disruption of the school environment justifying the regulation or constraints made. No such justification is necessary for speech found to be lewd, vulgar and/or offensive.

With regard to political speech, because it is accorded constitutional protection, an administrator’s ability to regulate it is dependent on whether it is disruptive of the school environment. The disruption has to be real and discernable. It can’t simply be anticipated because the speech offends the sensibilities of staff or administration. That was made clear by the Supreme Court in 1969 in the landmark case of *Tinker v. Des Moines* where the court said that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression.”

Individual Speech

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

The constitutional right to ‘political expression’ asserted was a right to wear black armbands during school hours and at classes in order to demonstrate opposition to the Vietnam War. School administration became aware of the students’ plan of protest. As a result, the district adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Of the school system’s 18,000 pupils, apparently only a handful refused to obey the school policy. One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker, was 11 years old and in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil. Another student who defied the school policy and insisted on wearing an armband inschool was also an 11th grade pupil. They were all sent home and

suspended from school until they came back without their armbands. They filed a lawsuit claiming, among other things, a violation of their right of free speech under the First Amendment.

Issues presented to the U.S. Supreme Court:

- Were the black armbands worn by the students an expression of speech?
- Were the black armbands disruptive of the school setting?
- Did the school district have the right to prevent the students from wearing black armbands?

The Court concluded that:

(1) wearing black armbands was an expression of speech, (2) there was no evidence to demonstrate that it was sufficiently disruptive to the school setting, and (3) the school district did not have the authority to prevent the students from wearing the armbands.

The Court upheld the “students’ right to [wear black armbands]” because there was no evidence whatsoever of plaintiffs’ interference, “actual or nascent, with the schools’ work or collision with the rights of other students to be secure and to be left alone.” Id. at 508.

The Court concluded that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

Do students in school have the same right of free speech as the general public?

The Court said that the shape of the rights of students and teachers - the extent of their rights - in the public school setting do not always mirror the contours of constitutional protections afforded in other contexts.

“That [schools] are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.’ On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the

exercise of First Amendment rights collide with the rules of the school authorities.” Id. at 507

When can student speech in school be regulated?

In the context of the facts in Tinker - “the wearing of black armbands” - the Court said that “conduct by the student, in class or out of it, which for any reason - whether it stems from time, place or type of behavior - materially disrupts class work or involves substantial disorder or invasion of the rights of others is... not immunized by the constitutional guarantee of freedom of speech.” Id. at 513.

In order for the State “in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.” Id. at 509.

The standard created in *Tinker* is that speech which does not disrupt the school environment and which does not negatively interfere with the rights of others can't be silenced.

However, the Court's decision was not unanimous. Justice Black wrote a vigorous dissent criticizing the majority opinion stating that he believed it ushered in “an entirely new era in which the power to control pupils by the elected ‘officials of state supported public schools’ was being effectively “transferred to the Supreme Court.” Justice Black said that the Court had arrogated “to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are ‘reasonable.’” As he saw it, the “crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech— ‘symbolic’ or ‘pure’— and whether the courts will allocate to themselves the function of deciding how the pupils’ school day will be spent... This case, wholly without constitutional reasons subjects all public schools to the whims and caprices of their loudest- mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the

23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.” *Tinker* at 517- 526

Individual School Sponsored Speech

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).

A public high school student delivered a speech nominating a fellow student for a student elective office at a voluntary assembly that was held during school hours as part of a school sponsored educational program in self-government. It was attended by approximately 600 students, many of whom were 14-year olds. During the speech the student referred to his candidate in terms of an “elaborate, graphic and explicit sexual metaphor.” Some students “hooted” and “yelled” during the speech, some “mimicked the sexual activities alluded to” in the speech, and others appeared to be “bewildered and embarrassed.”

Prior to delivering the speech, the student had discussed it with several teachers, two of whom advised him against giving it.

The morning after the assembly, the assistant principal called the student into her office and notified him that the school considered the speech a violation of the school's “disruptive conduct rule.” This rule prohibited conduct that “substantially” interfered with the educational process, including the use of obscene, profane language or gestures.

The student was told that he would be suspended for three days and that his name would be removed from the list of names for graduation speaker at the school's commencement exercise.

The District Court's decision held in favor of the student. It found the school's disruptive conduct rule unconstitutionally vague and overbroad and the student's removal from the graduation speaker's list a violation of his rights of due process because the disciplinary rule made no mention of such removal as a possible sanction. The student was awarded \$278.00 in damages, \$12,750 in litigation costs, attorney's fees, and the school district was enjoined from preventing the student from speaking at the commencement ceremonies.

The Court of Appeals affirmed the District Court decision. It rejected the school district's argument that it had an interest in protecting the student audience made up of minors from lewd and indecent language concluding that the school district's "unbridled discretion" to determine what constitutes "decent" discourse would "increase the risk of cementing white, middle class standards for determining what is acceptable and proper speech and behavior in our public schools."

The Supreme Court reversed.

Was there a distinction between the "speech" given by Fraser and the "form of speech" exercised by wearing the black armbands in *Tinker*?

The Court described the form of speech exhibited by the students in *Tinker* – wearing the black armbands – as "non-disruptive, passive expression of a political viewpoint" that did not "intrude upon the work of the schools or rights of other students." *Tinker* at 508. In contrast, the Court viewed the speech given by Fraser as "non-political, vulgar and lewd, which undermined the schools basic educational mission." Fraser at 675.

What did the Court say about the authority to regulate student speech?

"The First Amendment does not prevent school officials from determining that to permit a vulgar and lewd speech such as the speech given by Fraser would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students." Id. at 685.

What gives a school the right to regulate student speech?

To fulfill their educational mission. The role and purpose of the public school system is to (1) prepare pupils for citizenship and (2) inculcate the habits and manors of civility indispensable to the practice of self-government in the community and nation. *Id.* at 681.

Bong Hits 4 Jesus

School authorities do not violate the First Amendment when they stop students from expressing views that may be interpreted as promoting illegal drug use.

In *Morse v. Frederick*, 551 U.S. 393 (2007), the United States Supreme Court was asked to consider a student 1st Amendment case. In January 2002, an 18 year old high school student unveiled a 14 foot paper banner on a public sidewalk outside his high school in Juneau, Alaska. The unveiling took place while the Olympic torch relay was moving through the Alaska capital on its way to the Salt Lake City, Utah, Winter Games. The banner read "Bong Hits 4 Jesus." The principal ordered the student to take down the banner and when he refused to do so, the principal suspended him for 10 days. The student challenged his suspension and the case was appealed all the way up to the U.S. Supreme Court. In a 6-3 vote, the Supreme Court ruled that the student's free speech rights were not violated by his suspension. In the majority's written opinion, the Court found that "[i]t was reasonable for (the principal) to conclude that the banner promoted illegal drug use - and that failing to act would send a powerful message to the students in her charge."

School Newspapers - School-Sponsored Speech

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)

The school newspaper, the Spectrum, was written and edited by the journalism II class at Hazelwood East High School. It was published about every three weeks during the 1982-83 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel and members of the community. The Board of Education had allocated funds from its annual budget for the printing of the Spectrum. These funds were supplemented by proceeds from the sale of the newspaper. Costs, such as supplies, textbooks and a portion of the journalism teacher's salary were born entirely by the Board. The practice had been for the journalism teacher to submit page proofs of each issue to the principal for his review prior to publication. On May 10, 1983 proofs were submitted to the principal. The principal objected to two articles, one describing three Hazelwood East students' experiences with pregnancy, and the other with the impact of divorce

on students at the school. The principal said he was concerned that the pregnancy story might lead to the identification of pregnant students though the story itself referred to fictitious names. He also believed that the articles' references to sexual activity and birth control were inappropriate for some of the younger students at the school. As for the divorce story, his concern was that the parents should have been first notified of the student's remarks and that they should have consented to the publications of the remarks which referred to the student's concern that her father was spending too much time away from home. Believing that there was insufficient time to make changes in the stories before the scheduled press run, the principal deleted both stories prior to the newspaper's publication. As it turned out, the principal later learned that the student's name identified in the story had been deleted from the final proofs. The staff of the newspaper, teachers and students included, brought an action against the school district claiming that their first amendment rights had been violated.

When is a public forum created?

School facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for... use by the general public, or by some segment of the public, such as student organizations." Id. at 268.

Was the school newspaper – The Spectrum – deemed to be a public forum?

The Court concluded that the Spectrum was not a public forum because it was a school sponsored publication developed within the adopted curriculum with educational implications in regular classroom activities. As a result, school officials were within their authority to impose reasonable restrictions on what the newspaper could publish.

The Court came to this conclusion because the school had assigned the journalism teacher to act as the advisor to the Spectrum. In this capacity he selected the editors of the paper, scheduled its publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company. He was the final authority with respect to almost every aspect

of the production and publication of the newspaper, including its content. In addition, after each issue had been approved by the advisor, the issue then went to the principal for his review. Id. at 268-269.

Was the First Amendment issue in *Hazelwood* distinct from the one raised in *Tinker*?

In *Tinker*, the issue was the student's personal expression which happened to occur on school premises. In *Hazelwood*, the issue was over educators' authority over school sponsored publications, theatrical productions and other expressive activities that students, parents and members of the public might reasonably perceive to bear the "imprimatur" of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences. Id. at 271.

Do schools have greater authority to regulate school sponsored expression as opposed to students' personal expression?

"Educators are entitled to exercise greater control over school sponsored student expression to ensure that participants learn whatever lessons the activity is designed to teach, that readers and listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or a producer of a school play disassociate itself, not only from speech that would substantially interfere with its work or impinge upon the rights of other students, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." Id. at 271.

What is the standard by which schools may regulate the content of school newspapers?

Educators are permitted to exercise editorial control over the style and content of student speech in school sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns. Id. at 272-273.

Was the principal's action to delete two pages of the newspaper reasonable under the circumstances?

The Court concluded that it was not unreasonable for the principal to conclude that neither the pregnancy article nor the divorce article was suitable for publication in the Spectrum. The Court said that the principal could reasonably have concluded that the students who had written and edited the articles had not sufficiently mastered those portions of the journalism II curriculum that pertained to the treatment of controversial issues and personal attacks. The principal also had a legitimate concern for the need to protect the privacy of the individuals and whether the students understood the legal, moral and ethical restrictions imposed upon journalists within a school community that includes adolescent subjects and readers. Id. at 276.

Desilets on behalf of Desilets v. Clear view Regional Board of Education, 137 N.J. 585 (1994)

Plaintiff was a member of the student staff of the school newspaper, known as the Pioneer Press. Any student could become a staff member. The paper covered topics such as sports, entertainment and news. The staff met after school, and had no set number of issues, which it published. There were no grades or course credit given for participation on the newspaper. Students usually volunteered to type the articles themselves.

Student editors would select pictures that went with the articles. The paper was distributed to all students and staff at the junior high school. Each issue would be reviewed by a faculty advisor assigned to the paper. The paper was totally funded by the School Board. The Board paid the faculty advisor's salary and paid for all the materials and supplies for the newspaper.

In January 1989 plaintiff submitted two movie reviews for publication in the school newspaper - for "Mississippi Burning" and "Rain Man," both of which were R rated. The faculty advisor voiced no objection to the articles. A month later, when the newspaper was distributed, the plaintiff learned that his movie reviews had not been published. The faculty advisor told the plaintiff that the principal had taken the articles out because the movies were R rated. The principal told the faculty advisor that the reviews of the two R rated movies would prompt students under the age of 17 to see them.

The school superintendent testified that he would not permit the paper to publish reviews of R rated

movies while he was superintendent. Prior to his becoming superintendent the paper had published reviews of three R rated movies.

The policy regarding student publications did not contain a specific category or blanket prohibition on R-rated movies.

The Policy

According to the school policy, the following categories of materials were deemed to be unprotected by the right of free expression because they violated the rights of others:

- a. items grossly prejudicial to an ethnic, religious or racial group;
- b. libelous material;
- c. material which sought to establish the supremacy of a particular religious point of view;
- d. material which advocated the use or advertised the availability of any substance believed to constitute a danger to student health;
- e. obscene material or material "otherwise deemed to be harmful to impressionable students who may receive them";
- f. material which advocated violence or force;
- g. advertisements for profit-making organizations;
- h. material which failed to identify the student responsible for its publication;
- i. material offered for sale to other students;
- j. solicitations for other than school organizations, which are not previously approved by the Board; and
- k. material supporting or opposing a candidate for election to the school board, or the adoption of any bond issue.

Was the school newspaper, the *Pioneer Press*, a "public forum?"

The Supreme Court concluded, as had the lower courts, that the student newspaper, the Pioneer Press, was not a public forum. Concededly, students participating in the Pioneer Press, unlike those who participated in the publication of the Spectrum in *Hazelwood*, did not receive grades or academic credit for their participation in the newspaper. In addition, the publication was not part of the regular classroom assignments. However, as in *Hazelwood* the publication was supervised by a designated faculty

member and it was reasonable for students, parents and members of the public to perceive the school sponsored publication to bear the “imprimatur” of the school, “whether or not [such activities] occur in the traditional classroom setting, as long as [those activities] are supervised by faculty members and are designed to impart knowledge or skills to the student participants and/or audiences.” Id. at page 590.

Did the R rated movie reviews in the *Pioneer Press* raise the same educational concerns that called for the editorial control exercised in *Hazelwood*?

The Court said no. In *Hazelwood*, the censorship was based on content and journalistic style. In *Desilets*, the censorship had only to do with subject matter.

The movie reviews contained brief descriptions of both movies with terse recommendations. For “Mississippi Burning” the review read as follows:

Mississippi Burning is about the murder of three civil rights activists in Philadelphia, Mississippi in 1964. Two F.B.I. agents, Hackman and DeFoe, are sent to Mississippi to investigate the disappearance of three men. When they arrive, they find themselves unwanted by the people and the local police. None of the blacks will talk to the men, because they were harassed by the KKK (Ku Klux Klan) for doing so. In the end, the bodies are found, the police and Klan members are jailed and the F.B.I. leaves. The movie is worth the price of the ticket, but if you are looking for facts they are not here.

For “Rain Man” the review read:

In this film, Charlie Babbit (Tom Cruise) finds that he has a brother, Raymond (Dustin Hoffman) that has inherited three million dollars in their father’s will. However, Raymond is autistic and does not understand the concept of money. Charlie then kidnaps “Rain Man” from a mental institution, and the two leave for a week long drive across the country. On this ride the two become great friends and experience many adventures. Dustin Hoffman did an excellent job of playing an autistic savant. The movie is hilariously funny and I think that everyone should see it.

The decision to censor was based solely on the fact that the subject matter of the review was R-rated. “The point of the censorship was not to address the stylistic deficiencies or the words chosen by the writer to convey his information; it was to suppress the idea itself.” Id. at 592.

Was the school’s censorship of the two movie reviews in the *Desilets* matter a violation the student’s First Amendment rights?

The Court concluded that the Board had failed to establish a legitimate educational policy that would govern the publication of the challenged materials and as a consequence, the school authorities had violated the student’s expressional rights under the First Amendment. Id. at 593.

The superintendent had admitted in his testimony that there was no specific policy regarding R-rated movie reviews. Nevertheless, he testified that the reviews needed to be censored because they posed a “danger to student health” by advocating or encouraging having students see R-rated movies. However, neither the superintendent, nor anyone else explained how R rated movie reviews posed a danger to student health. Moreover, the evidence suggested that the policy was often ignored or applied inconsistently because R rated movies were discussed in class and referred to and made available in the school library and in fact had been previously reviewed and published by the student newspaper.

Threatening Speech - Zero Tolerance

Even though the United States Supreme Court has made clear that “true threats” are not protected speech under the First Amendment and are punishable, it has not clearly defined what speech constitutes a “true threat.”

Third Circuit Decision:

S.G. as guardian ad litem of A.G. a minor and individual v. Sayreville Board of Education 333 F. 3d 417 (2003)

A.G. was a 5-year old kindergarten student at the Wilson Elementary School in Sayreville. There were three incidents in early March of 2000. On March 4, 2000 a student told other children that he intended to shoot a teacher. In an unrelated incident the same day, another student told a classmate that he would put a gun in the classmate’s mouth and kill him. On March 10, 2000 a student told another that his mother allowed him to bring guns to school. The students making these statements were each suspended for three days.

After these incidents the principal visited each class and discussed the seriousness of making statements threatening harm with a weapon. On the same day –

March 10 – she sent a letter home with each student asking parents to discuss the issue with their children and stating that immediate disciplinary action would be taken when students make statements referring to violence or weapons. A.G. was absent on March 10th and his parents did not receive the letter.

On March 15, 2000 A.G. and three other students were playing a game of cops and robbers and said “I’m going to shoot you.” Another student told the teacher what A.G. and his friends were doing. The teacher reported some of the students were upset. When A.G. and his friends were taken to the principal’s office, they told her that they were “playing guns.”

There was some dispute as to what affect, if any, the game and the statement made by A.G. had on other students. The principal testified that the students she spoke to were frightened and upset. A.G. testified that the only student who had heard him and his friends was the student who reported on them. A.G. and his friends were suspended for three days. A.G.’s suspension was not part of his permanent scholastic record, but the principal had a record of it in her personal file which she said she “would be free to share with the principal in other schools...” A.G.’s father filed suit against the Board, the principal and the superintendent claiming that A.G. was denied his constitutional rights of free speech.

Is a school’s authority in an elementary setting different from the authority that may exist in a high school setting?

The Court said that a school’s authority to control student speech in an elementary school setting is undoubtedly greater than in a high school setting. “There can be little doubt that speech appropriate for 18-year old high school students is not necessarily acceptable for 7-year old grammar school students.”

Did the school’s action against A.G. violate his freedom of speech?

Sayreville’s action against A.G. did not violate his First Amendment rights because a school’s prohibition of speech threatening violence and the use of firearms is a legitimate decision related to the reasonable pedagogical concerns.

Was the principal acting within her authority?

Like the language found to be vulgar in *Bethel v. Fraser*, it was not unreasonable in this matter for

the principal to have concluded that she had the authority to take action against students for the use of threatening language at school on the basis that it undermined the school’s basic educational mission, particularly because this incident occurred only two weeks after a widely reported fatal shooting of a 6-year old by another 6-year old child at an elementary school in Flint, Michigan. Though the students through their parents contended that they were only playing a game, the Court said that the determination of what manner of speech is inappropriate properly rests with school officials.

Flag Salute

18A:36-3. Display of and salute to flag; pledge of allegiance

Every board of education shall:

- a. Procure a United States flag, flagstaff and necessary appliances therefore for each school in the district and display such flag upon or near the public school building during school hours;
- b. Procure a United States flag, flagstaff and necessary appliances or standard therefore for each assembly room and each classroom in each school, and display such flag in the assembly room and each classroom during school hours and at such other time as the board of education may deem proper; and
- c. Require the pupils in each school in the district on every school day to salute the United States flag and repeat the following pledge of allegiance to the flag: “I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation, under God, indivisible, with liberty and justice for all,” which salute and pledge of allegiance shall be rendered with the right hand over the heart, except that pupils who have conscientious scruples against such pledge or salute, or are children of accredited representatives of foreign governments to whom the United States government extends diplomatic immunity, shall not be required to render such salute and pledge but shall be required to show full respect to the flag while the pledge is being given merely by standing at attention, the boys removing the headdress.

Lipp v. Morris 579 F.2d 834 (3d Cir., 1978)

Plaintiff, Deborah Lipp, a 16-year-old student at Mountain Lakes High School, alleged that because the statute directed that she stand during the recitation of the pledge of allegiance to the flag, compelling her to make what she termed a “symbolic gesture,” it violated her rights under the First and Fourteenth Amendments. Plaintiff emphasized that in her belief, the words of the pledge were not true and she stood only because she had been threatened if she did not do so.

Can a school district enforce the flag salute statute’s section requiring those who choose not to participate to stand while the allegiance is being recited?

The mandatory requirement that Ms. Lipp stand was an unconstitutional requirement that the student engage in a form of speech and may not be enforced.

Note: Despite the fact that the Third Circuit Court of Appeals struck down a portion of N.J.S.A. 18A:36-3 as being unconstitutional, the statute has never been amended to reflect the Court’s decision.

Regulation of School Dress

N.J.S.A. 18A:11-8 Adoption of dress code policy for school permitted.

- a. A board of education may adopt a dress code policy to require that students wear a student uniform if the policy is requested by the principal, staff and parents of an individual school and if the board determines the policy will enhance the school learning environment. Any policy adopted which requires the wearing of a uniform shall include a provision to assist economically disadvantaged students. The board shall hold a public hearing prior to the adoption of the policy and shall not implement the policy with less than three months notice to the parents or guardian of the students. The specific uniform selected shall be determined by the principal, staff and parents of the individual school.
- b. The board of education may provide a method whereby parents may choose not to comply with an adopted school uniform policy. If the board provides such a method, a student shall not be penalized academically or otherwise discriminated against nor denied admittance to school if the student’s parents choose not to comply with the school uniform policy.

- c. (c) A dress code policy adopted pursuant to this section shall not preclude students who participate in a national recognized youth organization which is approved by the board of education from wearing organization uniforms to school on days that the organization has scheduled a meeting.

Points established by the statute:

- a. There must be no less than 3-months advance notice to the parents or guardians of the students and provisions must be made to assist economically disadvantaged students.
- b. Parents may be provided with a method to choose non-compliance with the adopted school uniform policy. If such a method is provided students may not be penalized for non-compliance.
- c. If a dress code policy is adopted, it cannot preclude students who participate in a nationally recognized youth organization from wearing the organization uniform to school on days where the organization has scheduled a meeting.

Note: The NJ statute that allows boards of education to require students to wear uniforms to school does not violate students’ First Amendment rights, and is constitutional. *Dempsey v. Allston* (App. Div. 2009)(Pleasantville BOE)

N.J.S.A. 18A:11-9 Prohibition of gang-related apparel

A board of education may adopt a dress code policy to prohibit students from wearing, while on school property, any type of clothing, apparel or accessory, which indicates that the student has membership in, or affiliation with, any gang associated with criminal activities. The local law enforcement agencies shall advise the board, upon its request, of gangs which are associated with criminal activities.

Dress

Broussard v. School Board of Norfolk, 801 F. Supp. 1526 (Eastern Dist. Va. 1992)

The courts in many jurisdictions have found that disruptive or vulgar dress, or dress signifying gang membership may be prohibited, and pupils wearing such dress may be disciplined. In one instance, even a ban on a T-shirt with an anti-drug message was condoned by a court.

In Broussard, a school district's discipline of a middle school pupil for wearing a T-shirt with the words "drugs suck" was upheld. The court ruled in favor of the school board, noting that although the shirt displayed an anti-drug message, the word "sucks" was a vulgar word with a sexual connotation and therefore not allowed in school.

Chalifoux v. New Caney Indep. Sch. Dist. 976, F. Supp. 659 (S.D. Tex. 1997)

School authorities prohibited a devout Catholic student from wearing rosary beads on the basis that some gangs had adopted rosary beads as their symbol. The court struck down the ban on First Amendment grounds on the basis that the New Caney School District had failed to show that wearing the rosary beads had caused any disruption in the school.

Third Circuit Decision:

Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243 (2002).

The District's history of racial disturbances

"Warren Hills public schools - particularly the high school, were afflicted with pervasive racial disturbances throughout the 2000-2001 school year." 307 F.3d 243, 248. During the 2000-2001 school year some students formed a "gang-like" group known as the "Hicks" which held "White Power Wednesdays" by wearing Confederate flag clothing. In one incident a student waived a large Confederate flag while walking down a main hallway of the high school. The flag was subsequently confiscated, but the student was not disciplined. In another incident, a white student, who had recently enrolled at the high school, was harassed at home apparently in response to his association with several African American students. Numerous instances of racial graffiti were found on school walls, some of which inspired hostile graffiti responses. Near the end of the school year, a fight occurred between a black student and a white student that resulted in one student sustaining a concussion and requiring stitches.

The Warren Hills Regional Board of Education, in response to "significant disruption in the school", adopted a racial harassment policy which provided as follows:

District employees and student(s) shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possessing items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material publications or any items that denotes Ku Klux Klan, Arayan [sic] nationwide supremacy, black power, confederate flags or articles, neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.) As part of the instructional process, professional staff may display and discuss divisive materials and/or symbols when selected and used to enhance knowledge, provided these topics are included in the approved Warren Hills Regional Schools curriculum.

The policy was implemented on March 13, 2001.

The District's dress code policy provided as follows:

Students have the responsibility to dress appropriately and to keep themselves, their clothes and their hair clean. School officials may impose limitations on student participation and the regular instructional program where there is evidence that inappropriate dress causes disruption in the classroom and the lack of cleanliness constitutes a health or safety hazard or disruption of the educational program.

The following is considered inappropriate for school:

- a. Clothing displaying or imprinted with nudity, vulgarity, obscenity, profanity, double-entendre pictures or slogans, including those related to alcohol, drugs and tobacco, or portraying racial, ethnic or religious stereotyping.*
- b. Flip-flops, tongs and other hazardous footwear.*
- c. Clothing which has been intentionally torn, cut or ripped in a fashion, which displays the anatomy.*
- d. Spandex garments without additional outer clothing.*
- e. Clothing deemed gang related, including the way the clothing is worn.*

- f. *Gym type appeal, clothing intended as undergarments worn as outer garments or see through garments without appropriate under garments.*
- g. *Street coats, windbreakers, and head coverings worn in the building. These items should be placed in lockers immediately upon arrival. Exceptions for medical or religious reasons must be referred to the principal.*
- h. *Bare mid-drift clothing.*

Thomas Sypniewski, a senior at the high school, had previously worn a “Foxworthy” t-shirt to school. The shirt had the following text imprinted:

Top ten reasons you might be redneck sports fan...

- 10. *You’ve ever been shirtless at a freezing football game.*
- 9. *Your carpet used to be a part of football field.*
- 8. *Your basketball hoop used to be a fishing net.*
- 7. *There is a roll of duct tape in your golf bag.*
- 6. *You know that Hooter’s [sic] mean by heart.*
- 5. *Your mama is banned from the front row at wrestling matches.*
- 4. *Your bowling team has its [sic]-own fight song.*
- 3. *You think the “bud bowl” is real.*
- 2. *You wear a baseball cap to bed.*
- 1. *You ever told your bookie “I was just kidding.”*

On March 22, 2001, Thomas wore the T-shirt to school for the first time since the school had implemented its harassment policy. He wore the shirt without incident until the last period of the day when he was directed to go to the vice principal’s office by a security guard at the high school. The vice principal told him that the shirt violated the school dress code because of its references to the Bud Bowl and to Hooters restaurant. The vice principal said that it was in violation of the prohibitions on mentioning alcohol and sexual innuendo. He also testified that among his primary concerns was the shirt’s reference to the word “redneck” “because of the troubling history of racial tension at [the] school and the possibility that the term ‘redneck’ would incite some form of violence and at a minimum be offensive and harassing to our minority population.” The vice principal gave Sypniewski the option of turning the shirt inside out. When he refused, the vice principal suspended him for three days.

Apparently wishing to refrain from imposing the stiffer penalties associated with the racial harassment policy, Vice Principal Griffith did not mention the harassment policy as a basis for his action, even though he thought the shirt was also prohibited by that policy.

The following day, Brian Sypniewski, Thomas’ younger brother, wore his Foxworthy shirt to the middle school. The vice principal of the middle school told Brian he had spoken with the superintendent and that they had determined the shirt was neither offensive nor in violation of the dress code.

Thomas Sypniewski appealed his suspension to the board of education. The board denied the appeal and upheld the suspension. The board based its decision on the dress code and insubordination—not on the racial harassment policy. Referring to Thomas’ brother, Brian, wearing the shirt without penalty, the board stated “in hindsight action should have been taken with respect to this incident as well.”

Shortly after Thomas Sypniewski graduated from the high school, he and his brothers filed a lawsuit.

Under the dress code, could the Foxworthy t- shirt be banned?

Yes, but only if it was found to substantially disrupt school operations or interfere with the rights of others.

The Board sought to ban the shirt on the basis that its content was offensive - that because of racial troubles at the Warren Hill Schools, the word “red neck” had come to connote racial intolerance. Based on the evidence there was little if any history that the word itself caused disruption.

The Court said that where a school seeks to suppress a term merely related to an expression that has proven to be disruptive, it must do more than simply point to a general association. It must point to a particular and concrete basis for concluding that the association is strong enough to give rise to well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others. It is not enough that speech is generally similar to speech involved in past incidents or disruptions. It must be similar in the right way.

Did the school district have the authority to tell Sypniewski not to wear the T-shirt based on the racial harassment policy?

The vice principal claimed that it did because of the word “redneck” on the shirt, the troubling history of racial tension in the school and the possibility that the term “redneck” would incite some form of violence and at a minimum be offensive and harassing to the minority population.

However, the Court concluded that there was not enough in evidence to demonstrate the district’s authority to ban the Foxworthy shirt based on the racial harassment policy.

Can the district take preemptive action?

Yes. If there is a basis for a well-founded expectation of disruption a school district has the power to act to prevent problems before they occur.

Additional Student Dress Cases:

In *DePinto v. Bayonne Board of Ed.*, 514 F.Supp.2d 633 (D.N.J., Sept. 17, 2007), students wore buttons protesting a required school uniform policy. The writing on the buttons overlaid a historical photograph that appeared to portray Hitler youth. The picture depicted dozens of young boys dressed in the same uniforms and all facing the same direction. But there were no visible Swastikas or any other definitive indication that the boys were members of the Hitler youth. However, no one denied that the picture portrayed was an assemblage of the Hitler youth. Believing that the button and what it portrayed would be offensive to many Bayonne residents, the Bayonne Board sent letters to each of the students parents stating that the background images on the buttons were objectionable and threatened the students with suspension in the event they wore the buttons again. Though the court did not rule on the merits of the case, it granted a preliminary injunction against Bayonne prohibiting the district from carrying out any disciplinary measures against the students.

C.H. v. Bridgeton Bd. of Ed. (D.N.J. 2010):

A high school student wore an armband saying “Life” and distributed anti-abortion flyers during non-instructional time for Pro-Life Day of Silent Solidarity; school prohibited armband as a dress code violation, and flyers as violating distribution

policy. Applying *Tinker*, the court held that the high school could not show disruption to school from armbands or literature; thus, court ordered school district to allow these activities unless there was a well-founded expectation of disruption.

I ♥ Boobies! Bracelets:

B.H. v. Easton Area School District, 725 F.3d 293 (3d. Circuit 2013)

The Easton Area School District suspended two female middle school students for refusing to remove cancer awareness bracelets bearing the message “Save the Tata’s. I love Boobies.” The students were asked to remove the bracelets on the middle school’s “Breast Cancer Awareness Day.” When the students’ appeal reached the Federal District Court, the Court ruled in their favor, concluding that: (1) the bracelets worn by the students were not lewd in any way and (2) wearing the bracelets caused no disruption, much less the “substantial disruption” that a school district typically must show in order to ban this type of expression.

Length of Hair

Pelletreau v. New Milford Bd of Ed., 1967 S.L.D. 35

The Commissioner stated that a board may not promulgate a dress code which is designed simply to produce conformity among students, or which attempts to impose its own standards of good taste. As to the school regulation forbidding long hair, the State Board of Education found it to be invalid on the basis that it did not have a substantial relationship to a legitimate purpose.

Note: In addition, students cannot be barred from participating in school activities, such as band or athletics, because of their hairstyle or because they have a mustache or beard.

Transgender Students

The NJ Law Against Discrimination was enacted to prevent and eliminate practices of discrimination against persons based on race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional orientation, genetic information, pregnancy, sex, gender identity or expression, and disability.

Today, alleged transgender discrimination has been increasingly placed in the spotlight.

In the summer of 2014, it was reported that a 13-year-old transgender student was prevented from returning to school dressed as and identifying as a girl, even though the student said that coming out as transgender earlier in the year had helped relieve her depression. Further, according to the report, the school did not provide accommodations for the student's gender identity, including use of the school bathroom.

As school districts across the state and country are beginning to encounter issues related to transgender students, some districts have proactively enacted policies. For example, in 2014, the Hazlet School District introduced a policy giving transgender students the right to assert their preferred gender identity, as long as the students are consistent and sincere with their choices and they provide notice in writing. The superintendent of schools in the Hazlet School District reportedly said, "we want to make sure all of [the students] feel comfortable and are able to access all [that] public education has to offer." The intent of the Hazlet policy is to set a framework for school officials, students, and parents to discuss issues like bathroom use, locker room selection, physical education classes and other school issues tied to gender.

More recently, we received a question from an administrator regarding what the roommate situation should be for an 18-year-old transgender student on an overnight field trip.

Predictably, the policy debate concerning transgender issues is playing "catch-up" with the rapidly evolving changes in social norms. At the moment, there is little guidance being given by the State. In fact, the only New Jersey source of guidance on this issue has come from the New Jersey Interscholastic Athletic Association ("NJSIAA"), which provides that transgender students identifying with a gender different from the students' birth gender "shall" be eligible to participate in school athletics in a manner consistent with the students' "identified" gender if:

1. The student provides an official record - new birth certificate, driver's license or passport - demonstrating the legal recognition of the student's reassigned sex; or
2. A physician certifies that the student has had appropriate clinical treatment for transition to the reassigned sex; or

3. A physician certifies that the student is in the process of transition to the reassigned sex.

The NJSIAA policy only offers guidance and is by no means legally binding on a school district. However, it does recognize that the student's "identified" gender should be the student's recognized gender.

(Note - for purposes of issuing a high school diploma, the diploma should be issued in the student's legal name regardless of the gender with which the student presently identifies. If the student's legal name is officially changed, the diploma should be issued in the student's new official legal name.)

In contrast with New Jersey's lack of guidance on transgender issues, the New York City Department of Education recently adopted broad transgender guidelines which state, among other things, that:

As a general rule, in any circumstances where students are separated by gender in school activities (i.e., overnight field trips), students should be permitted to participate in accordance with their gender identity consistently asserted at school.

Thus, under such a guideline, in order for the transgender student to be assigned a roommate of the genetically opposite sex, it must be generally known within the school population (students and administrators alike) that the student identifies with his/her genetically opposite sex. For example, for a female student identifying as a male to have a male roommate on an overnight field trip, it must be generally known that the female consistently identifies as a male.

The New York City guidelines also address restroom and locker room accessibility aimed "to support transgender students while also ensuring the safety and comfort of all students." The guidelines provide:

The use of restrooms and locker rooms by transgender students requires schools to consider numerous factors, including, but not limited to: the transgender student's preference; protecting student privacy; maximizing social integration of the transgender student; minimizing stigmatization of the student; ensuring equal opportunity to participate; the student's age; and protecting the safety of the students involved.

A transgender student who expresses a need or desire for increased privacy should be provided with reasonable alternative arrangements. Reasonable alternative arrangements may include the use of a private area, or a separate changing schedule,

or use of a single stall restroom. Any alternative arrangement should be provided in a way that protects the student's ability to keep his or her transgender status confidential.

A transgender student should not be required to use a locker room or restroom that conflicts with the student's gender identity.

None of these issues has an easy solution, but we can be certain that school leaders will be on the frontlines of the ever-changing gender and transgender equality landscape. As these issues begin to unfold with some regularity, districts should begin to craft policies addressing transgender student issues. As with the New York City Department of Education, New Jersey districts should bear in mind the need for these issues to be addressed on a case-by-case basis based on, but not limited to, the following factors:

- The transgender student's preference;
- protecting student privacy;
- maximizing social integration of the transgender student;
- minimizing stigmatization of the student;
- ensuring equal opportunity to participate;
- the student's age; and
- protecting the safety of the students involved.

Trenton Central High School's Homecoming Queen

In October 2015, Trenton Central High School crowned its first transgender homecoming queen. Student J.A. was born a male but had been identifying as a female for about one year. J.A.'s friends and teachers encouraged her to enter the balloting for homecoming queen. She ended up winning and was crowned homecoming queen at Trenton Central High School's football game.

After winning, J.A. said "I wanted to make a difference, to show not only the city and world that it's 2015 and things are changing and progressing. I am so happy that I won, it's been amazing."

After J.A.'s win, Principal Hope Grant refuted rumors on social media and in the *Trentonian* newspaper claiming the ballot was manipulated to guarantee that J.A. win and that the teacher responsible for overseeing the vote left the ballot box unsecured. Principal Grant said that "[t]here were loud cheers when thjs was announced Friday. There was cheering from the classrooms." Principal Grant also said that "[w]e need to be embracing this student. As a public institution, we have a moral and legal responsibility to accept, embrace and be non-judgmental."

Not everyone was accepting of J.A.'s win. The elected homecoming king refused to "walk with another male." Some parents also complained about J.A.'s win, claiming it would negatively impact the self esteem of girls in the school. The school district supported J.A. and Principal Grant and kept J.A.'s victory intact.

J.A. was not the only transgender homecoming queen in 2015. Transgender student L.P. from Oak Park High School in Missouri was elected homecoming queen in September 2015. In 2013, transgender teen C.C. was crowned homecoming queen at a California high school.

Internet - Home Use

The United States Supreme Court has ruled that internet speech has the same high level of constitutional protection as what is written in a newspaper or other written media. See, *Reno v. ACLU* (1997). That being said, there is a distinction between what students may put on the Internet while at home using their personal computers and what they may put on the Internet while at school on a school computer.

Beussink vs. Woodland R-IV School District, 30 F. Supp. 2d 1175 (ED Mo. 1998)

Beussink, while a junior at the Woodland High School, created a home page, which he posted on the internet. The information on the home page could be accessed by other internet users. Beussink did not use school facilities or school resources to create the home page. It was created at his home on his home computer. Beussink's home page, highly critical of the school's administration, contained vulgar language to convey Beussink's opinion regarding teachers and the principal. The readers of the home page were invited to contact the school principal and communicate their own opinions regarding the high school.

Soon after Beussink established his home page, another student accessed the home page during the school day and showed it to a computer teacher at the school. The computer teacher became upset and told the high school principal what he had read. The principal then returned to the computer lab with the computer teacher and viewed the home page for himself. He too was upset by what was contained on the home page.

The principal decided to discipline Beussink because he was upset that the home page message had been accessed and displayed in the classroom. The decision to discipline Beussink was made on the same day that the home page had been accessed, but before the principal was able to discern whether other students had seen it.

Initially, Beussink was suspended for 5 days. Later that same day, the principal reconsidered the 5 day suspension and increased it to 10 days.

Did the principal's discipline of Beussink violate his First Amendment right of free speech?

When may a student's speech be limited? When there is a reasonable fear that it may disrupt the operation of the school. However, for the fear to be reasonable it must be quantifiable, not just a general feeling. Following the *Tinker* standard, the school authorities must be able to demonstrate that the speech in class or out of it - materially disrupts class work or involves substantial disorder or invasion of the rights of others *Tinker* at 513.

In the *Beussink* matter the principal acknowledged that he decided to discipline Beussink immediately after seeing the home page. He said that he was upset that the message had found its way into the school's classrooms. He didn't testify that he was afraid that Beussink's home page would disrupt or interfere with school discipline. What motivated him to discipline Beussink was his disapproval of the content of the home page.

The court said that while it was sympathetic to the necessity of instilling and maintaining discipline and respect for teachers in high school classrooms, as the home page was not found to have materially and substantially interfered with school discipline, and because there was no evidence to support a particularized reasonable fear of such interference, the disciplinary action imposed was in violation of Beussink's right of free speech.

Could the district refer to Beussink's prior disciplinary record to support the decision to suspend him?

The Board contended that Beussink's home page at least had the potential to cause disruption in the school because of his previous discipline record which included at least one unrelated incident in which he had been "violent and disrespectful to

the school librarian." The court said that it did not believe that Beussink's prior unrelated improper conduct could serve to justify the school-imposed suspension for the entirely separate home page incident. Whether Beussink had been a model student or not, the fact remained that he had a right to exercise free speech so long as it was not disruptive of the school in general, or more specifically, disruptive of his classes.

J.S. v. Bethlehem Area School District 757 A. 2nd 412 (Pa. Cmwlth. 2000)

A high school student created a home website that made derogatory remarks about a teacher and a principal, saying both should be fired. The site also communicated specific threats against the teacher, offering to pay a "hit man" to kill her. The site contained an image of the same teacher with her head severed. After learning of the web site the teacher became terrified, developed emotional and physical problems and became unable to teach. The student was expelled.

Was the student's home web site protected by the First Amendment?

No, because of the school disruption it caused by making the teacher fearful for her safety resulting in her having both physical and emotional problems.

Recent Third Circuit Cases

In *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011), an eighth grader created a Myspace page at her home, away from the school. Using her home computer, the student created a "fictional" Myspace page about her school principal. The page displayed the principal's picture from the district website and depicted him as a sex addict and pedophile.

The principal, obviously upset about the profile, investigated the incident and ultimately found and met with the student responsible for it. After the student apologized for her actions, the principal suspended her for 10 days. *Id.* at 922. The principal took this disciplinary action because he found that in creating the profile the student violated the school's disciplinary code. *Id.* at 921.

The student's parents challenged the suspension. They sued the school district in federal court,

alleging that the suspension imposed violated their child's free speech and due process rights guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. Id. at 920.

After an appeal and a rehearing en banc, the Third Circuit Court of Appeals ultimately ruled that the school's suspension was unconstitutional and violated the child's First and Fourteenth Amendment rights. Id. at 932-33. The en banc panel reasoned that because the Myspace page could not be accessed in school due to the school's web-filter and because the profile was set to private ensuring that only "friends" of the fictitious account could access it, the speech "indisputably caused no substantial disruption in school and... could not reasonably have led school officials to forecast substantial disruption in school." Id. at 920. Accordingly, the court ruled that the school's disciplinary action was unconstitutional.

In a similar case, the Third Circuit ruled that a school district lacked the authority to punish its students for expressive conduct occurring off school grounds, even if the school district concluded that the conduct was lewd and offensive. In *Layshock ex rel. Layshock v. Hermitage School District*, 650 F.3d 205 (3rd Cir. 2011), the Third Circuit again dealt with the issue of punishing a public school student for out of school conduct that portrayed his principal in a negative light on the Myspace social networking website.

In *Layshock*, a high school senior created a "parody profile" of his principal using the picture from the school district's website. Id. at 207-08. Using the principal's picture, the student added fictional and offensive information in this "parody profile." Id. at 208. "[W]ord of the profile, 'spread like wildfire' and soon reached most, if not all, of...[the] student body." Ibid. Moreover, after the student body discovered the "parody profile", three other students created similar profiles about the school's principal - each of the profiles was more vulgar and offensive than the first. Ibid.

The school district conducted an investigation and met with one of the suspected students. During the meeting, the student admitted to creating the first Myspace page and, without any prompting, apologized to the principal. Id. at 209. Initially, the school took no disciplinary action. However, soon after, the school charged the student with violating certain provisions of the district's disciplinary code and scheduled an informal hearing on those

charges. Ultimately, the student was found guilty of all charges against him and the district took disciplinary action.

The student received a 10 day, out-of-school suspension; placement in the school's Alternate Education Program for the remainder of the school year; he was barred from all extracurricular activities; and prevented from participating in his graduation ceremony. Id. at 210. The student's parents challenged the district's disciplinary action, claiming that the disciplinary action violated their child's First Amendment rights.

The Third Circuit panel ultimately ruled that despite the student's use of the principal's picture from the district website, the student's actions - or speech - in creating the profile ultimately took place off school grounds. As a result, the court said that it could not punish the student for his off-school actions. The court concluded that "[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities." Id. at 216. The court ruled that because allowing the district to punish this student for his actions would create such a precedent, the district's disciplinary actions violated the student's First Amendment rights under the United States Constitution. Ibid. The court came to this conclusion despite the fact that the website was accessed within the school by many of its students. Id. at 219. Importantly, however, the court noted that the school district never argued that the student's actions caused any substantial disruption within the school. Ibid. Had this speech substantially disrupted and interfered with the school's ability to advance its educational aims, the result may have been different. See *ibid.* ("[W]e have found no authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school.")

Disclosure of Student Information

N.J.S.A. 18A:36-35 - Disclosure of certain student information on Internet prohibited without parental consent

The board of education of each school district and the board of trustees of each charter school that establishes an Internet web site, shall not

disclose on that web site any personally identifiable information about a student without receiving prior written consent from the student's parent or guardian on a form developed by the Department of Education. The written consent form shall contain a statement concerning the potential dangers of personally identifiable information about individual students on the Internet.

As used in this act, "personally identifiable information" means student names, student photos, student addresses, student e-mail addresses, student phone numbers, and locations and times of class trips.

Family Educational Rights and Privacy Act (FERPA)

Students' rights to privacy are defined in the Family Educational Rights and Privacy Act (FERPA) and the corresponding federal regulations. FERPA allows schools to publish or release a student's education record to other institutions as "directory information" or with a parent's written consent. Student photos are recognized by FERPA as directory information. Before student information is disclosed FERPA requires that the school complete a formal procedure to ensure parental consent. The First Amendment of the United States Constitution also protects a student's privacy. Discretion should be used when publishing student information on a district Web page. Student privacy is violated when a school staff member posts a student's name, class work, or photo on a district web site without parental consent.

Children's Online Privacy Protection Act of 1998 (COPPA)

Under this Act, commercial websites which are directed to, or knowingly collect information from, children under age 13 must take steps to obtain parental consent before collecting, using or disclosing personal information from children.

Children's Internet Protection Act (CIPA)

This Act requires that K-12 schools and libraries in the United States use Internet filters and implement other measures to protect children from harmful online content as a condition for federal funding. It was signed into law on December 21, 2000, and was found to be constitutional by the United States Supreme Court on June 23, 2003.

N.J.S.A. 18A:36-34 —Surveys - parental consent required prior to acquisition of certain survey information from students.

(A) Unless a school district receives prior written informed consent from a student's parent or legal guardian and provides for a copy of the document to be available for viewing at convenient locations and time periods, the school district shall not administer to a student any academic or non-academic survey, assessment, analysis or evaluation which reveals information concerning:

1. political affiliations;
2. mental and psychological problems potentially embarrassing to the student or the student's family;
3. sexual behavior and attitude;
4. illegal, antisocial, self-incriminating and demeaning behavior;
5. critical appraisals of other individuals with whom a respondent has a close family relationship;
6. legally-recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
7. income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program; or
8. social security number.
 - a. The school district shall request prior written informed consent at least two weeks prior to the administration of the survey, assessment, analysis or evaluation.
 - b. A student shall not participate in any survey, assessment, analysis or evaluation that concerns the issues listed in subsection A of this section unless the school district has obtained prior written informed consent from that student's parent or guardian.
 - c. A school district that violates the provisions of this act shall be subject to such monetary penalties as determined by the commissioner.

Religious Speech

Third Circuit Decision:

Walz v. Egg Harbor Township Board of Education 342 F. 3d 271 (2003)

Daniel Walz was a student in pre-kindergarten in the spring of 1998. His school held seasonal in-class parties several times a year. They were organized by teachers and students' parents. The parties generally consisted of a parent-provided snack, parent-sponsored exchange of small gifts, followed by games and activities. Prior to Easter, Daniel's class had a seasonal party. The children's parents were encouraged to donate gifts to the local parent/teacher organization, which brought the gifts to the holiday party. This ensured that all the kids received a gift. At this particular holiday party, immediately before the Easter break; Daniel Walz brought his gift directly to the class. It consisted of pencils with the imprint "Jesus loves the little children." Daniel's teacher noticed the pencils and confiscated them. When told of the incident, the superintendent determined that the pencils should not have been distributed to the young children because their parents might perceive the message as being endorsed by the school.

Six months later, the Egg Harbor Township Board of Education adopted a policy which provided in part that "no religious belief or non-belief shall be promoted in the regular curriculum or in district-sponsored courses, programs or activities, and none shall be disparaged." The policy stated that religion may be acknowledged in the course of school activities if presented "in an objective manner and as a traditional part of the culture and religious heritage of the particular holiday." The school also maintained an "unwritten policy on student expression" which, according to the superintendent, precluded the distribution in class during school hours of items with political, commercial or religious references.

After the policy was adopted, Daniel's class had another seasonal holiday party, this time immediately before the Christmas break. Daniel brought candy canes to the party to which a story was attached. The story explained that candy canes, shaped in the letter J, spoke to the "birth, ministry and death of Jesus Christ."

Daniel's mother stated that she had been informed that the candy canes with the story could be distributed, but only before school, during recess,

or after school, and not during the classroom party itself.

A year later, Daniel again brought the candy canes with the attached religious story to a holiday party. He was not permitted to distribute the candy canes in class, but was permitted to distribute them in the hallway outside of the classroom, at recess, or after school as students were boarding buses.

Contending that his First Amendment right of free expression and free exercise of religion were violated because he was not permitted to distribute the candy canes during the holiday party, Daniel, through his mother, filed suit.

Was Walz's freedom of expression violated?

Walz, through his mother, contended that handing out the pencils which stated "Jesus loves the little children" was no different than if Walz had turned to his classmate during snack time and said "Jesus loves the little children." The court did not agree. "Where a student speaks to his classmates during snack time, he does so as an individual. But absent disruption, this is fundamentally different from a student who controverts the rules of a structured classroom activity with the intention of promoting an unsolicited message. In short, Daniel Walz was not attempting to exercise a right to personal religious observance... His mother's stated purpose was to promote a religious message through the channel of a benign classroom activity. Id. page 280.

Was the school's restriction on how and when the pencils and/or candy canes could be distributed appropriate?

In the context of its classroom holiday parties, the school's restrictions on this expression were designed to prevent proselytizing speech that, if permitted, would be at cross purposes with its educational goal and could appear to bear the school seal of approval. Id. at page 281.

Is the age of the student a factor in the school's authority to restrict a student's freedom of expression?

In conventional elementary school activities, the age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: As a general matter, the younger the students, the more control a school may exercise.

Moment of Silence

May v. Cooperman, 780 F.2d 240 (3d. Cir. 1985)

The court declared a state statute allowing for a moment of silence in public schools to be unconstitutional. The statute, N.J.S.A. 18A:36-4, provided as follows:

Principals and teachers in each public elementary and secondary school of each school district in this state shall permit students to observe a one-minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for a quiet and private contemplation or introspection.

The test used to determine the constitutionality of this provision was whether the law had a (1) secular legislative purpose, (2) whether its principal or primary effect neither advanced nor inhibited religion, and (3) whether it fostered an excessive government entanglement with religion.

The court found that the statute did not have a bona fide secular purpose; that in fact it had a religious purpose. It also found that the law both advanced and inhibited religion. Lastly, the court concluded that the law would promote divisiveness among and between religious groups. A required moment of silence would put children and parents who believe in prayer in the public schools against children and parents who do not. The divisiveness that the law would in gender would foster excessive government entanglement.

NOTE: Despite the fact that the Third Circuit Court of Appeals struck down N.J.S.A. 18A:36-4 as being unconstitutional, the statute has never been amended to reflect the Court's decision.

Religious Speech - Graduation Exercises

Lee v. Weisman, 505 U.S. 577 (1992)

For many years, principals of public middle and high schools in Providence, Rhode Island, were permitted to invite clergy to give invocations and benedictions at their schools' graduation ceremonies. A middle school principal invited a Rabbi to offer the invocation and benediction at the middle school graduation in June 1989. The invocation read as follows:

God of the free, home of the brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected we thank you. May these young men and women grow up to enrich it.

For the liberty of America, we thank you. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may see justice, we thank you. May those we honor this morning always turn to it in trust.

For the destiny of America we thank you. May the graduates of Nathan Bishop Middle School so live that might help to share it. May our aspirations for country and for these young people, who are our hope for the future, be richly fulfilled. Amen.

The benediction read as follows:

Oh God, we are grateful to you for having endowed us with the capacity for learning, which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send your blessings upon the teachers and administrators who help prepare them.

The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what you require of us all: to do justly, to love mercy, to walk humbly.

We give thanks to you, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. Amen.

Did a member of the clergy delivering a benediction and invocation at a public school graduation violate the Establishment Clause of the First Amendment?

The Court concluded that it did because of the direct role played by the principal in inviting the clergy member, the invocation and benediction was given at a public, state sponsored event, and student attendance while not formally required, was nonetheless compelled by peer pressure.

The decision focused on the following facts:

1. The principal decided that an invocation and benediction should be given. The principal as the representative of a public school, essentially acted on behalf of the "State" to decree that the prayers must occur.

2. The principal chose the religious participant, the rabbi, and that choice also attributable to the state.
3. The principal also gave the rabbi a copy of the “guidelines for civic occasions” and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. As a result, the Court found that the invocation and benediction given at this middle school graduation ceremony violated the Establishment Clause of the First Amendment.

What facts dominated the court’s decision?

1. A state official – the principal – directed the performance of a formal religious exercise – the benediction and the invocation.
2. The religious exercise took place at a graduation ceremony for a public secondary school – a state-sponsored function.
3. With the invocation and benediction coming at the invitation and direction of the principal, the public school graduation became a state- sponsored religious activity to which attendance and participation, while not a condition for receipt of a diploma, was, in a fair and real sense, obligatory.

Religious Speech - Prayer at Public School Events

United States Supreme Court Decision:

Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)

Prior to 1995, the Santa Fe high school student who occupied the school’s elective office of student council chaplain delivered a prayer over the public address system before each varsity football game for the entire season. This was challenged in the district court as a violation of the Establishment Clause of the First Amendment. The school district then adopted a different policy that permitted, but did not require, prayer initiated and led by students at all home games. The decision whether to deliver a student initiated prayer was made by a majority vote of the entire student body, followed by a choice, also by majority vote, of the speaker - student to

give the prayer. Though the words to be used by the speaker were not determined by the election, the school policy mandated that the “statement or invocation” be “consistent with the goals and purposes of the policy,” which are “to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. Id. at page 306.

Was the invocation student led or school sponsored?

School sponsored, because the school, by its policy, involved itself in the selection of the speaker. It promoted the election. By the terms of its policy, “it invited and encouraged a religious message.” According to the policy the purpose of the message was to “solemnize the event...to promote good sportsmanship” and “establish the appropriate environment for competition.” The court said that a religious message is the most obvious method of solemnizing an event. “The only type of message... expressly endorsed... is an invocation - a term that primarily describes an appeal for divine assistance. In fact, as used in the past at Santa Fe High School, an invocation has always entailed a focused religious message. Thus, the express purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy. Id. at 306 -307.

Was attendance at a football game any less “voluntary” than attendance at a graduation ceremony?

No, because the same peer pressure that compels a student to attend graduation exercises affects student attendance at football games. “High school football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not as important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution... demands that the school... not force this difficult choice upon students for it is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights in benefits as a price of resisting conformance to State sponsored religious practice... Even if we regard every high school student’s decision to attend a home

football game is purely voluntary, we are nevertheless persuaded that the delivery of a pre- game prayer has the improper effect of coercing those present to participate in an act of religious worship.” Id. at 312.

School Clubs - Equal Access

Equal Access Act - 20 U.S.C. Sec. 4071(a)

It shall be unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.”

What is a limited open forum?

Section 4071(b)

A limited open forum exists whenever a public secondary school grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time.

Under the Equal Access Act what is a meeting?

Section 4072(3)

A meeting is defined to include those activities of student groups, which are permitted under a school’s limited open forum and are not directly related to the school curriculum.

What is non-instructional time?

Section 4072(4)

Time set aside by the school before actual class instruction begins or after actual classroom instruction ends.

When are the obligations of the Equal Access Act triggered?

Even if a public secondary school allowed only one non-curriculum related student group to meet, the Act’s obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during non-instructional time.

When is a school deemed to have offered a fair opportunity to students who wish to conduct a meeting within its limited open forum?

Section 4071(c) (1), (2), (4), and (5).

When the school uniformly provides that the meetings are voluntary and student initiated; are not sponsored by the school, the government or its agents or employees; do not materially and substantially interfere with the orderly conduct of educational activities within the school; and are not directed, controlled, conducted, or regularly attended by non-school persons.

What does “sponsorship” entail?

Sponsorship is defined to mean the act of promoting, leading or participating in a meeting. The assignment of a teacher, administrator or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

When can school employees or agents attend a club meeting whose content is religious?

Section 4071(c)(3)

Employees or agents of a school or government entity may attend only in a non-participatory capacity.

How is a school constrained from assigning one of its agents or employees to attend a student club meeting whose content is religious?

Section 4071(d)(1), (2) and (4)

A State may not influence the form of any religious activity, require any person to participate in such activity or compel any school agent or employee to attend the meeting if the content of the speech of the meeting is contrary to the person’s beliefs.

What constitutes a “non-curriculum related student group?”

A non-curriculum related student group does not directly relate to the body of courses offered by the school. A student group directly relates to a school’s curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required

for a particular course; or if participation in a group results in academic credit. This would include a French club, which directly relates to the curriculum or a school's student government that generally relates directly to curriculum, or a school band or orchestra if required for band or orchestra classes. On the other hand, unless a school can show that groups such as a chess club, a stamp collecting club, a community service club falls within a description of groups that directly relate to the curriculum, such groups may be considered "non-curriculum related school groups" for purposes of the act.

Are there any exceptions to access under the Equal Access Act?

Yes. Exceptions to access may be made for groups that "materially and substantially interfere with the orderly conduct of educational activities within the school." Additionally, a school can technically "opt out" of the Act by prohibiting all non-curriculum clubs.

What effect does the existence of non-curriculum related groups have?

The existence of such groups creates a limited open forum under the Act and prohibit the school from denying equal access to any other student group on the basis of the content of the group's speech.

Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990)

Westside High School, a public secondary school that received federal financial assistance, permitted its students to join on a voluntary basis, a number of recognized groups and clubs, all of which met after school hours on school premises. Citing the Establishment Clause of the First Amendment and school board policy requiring clubs to have faculty sponsorship, school officials denied the request of Bridget Mergens for permission to form a Christian club that would have had the same privileges and met on the same terms and conditions as other Westside student groups, except that it would not have had a faculty sponsor. There was no written school board policy concerning the formation of student clubs. Rather, students wishing to form a club presented their request to a school official who determined whether the proposed clubs

goals and objectives were consistent with school board policies and with the school district's mission and goals that expressed the district's commitment to teaching academic, physical, civic and personal skills and values.

The clubs that existed at Westside Community Schools

Chess club, sub-surfers club for students interested in scuba diving, photography club, national honors society, welcome to Westside club (a club to introduce new students to the school), future business leaders of America, student advisory board (student government).

What effect if all of these clubs were related to the curriculum?

The school would not have a limited open forum.

What affect if one or more of these clubs were not curriculum-related?

A limited open forum would exist requiring the school to give the same opportunity to any other club, including clubs whose content is religious.

Does this have the effect of advancing religion?

Plaintiffs in the Westside Community Schools contended that an objective secondary school student would perceive official school support for such a religious club because it would be held under "school aegis, and because the State's compulsory attendance laws bring the students together (and thereby provide a ready-audience for student evangelists)" Id. at 249.

What was the court's response?

The Court said that there was a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. The Court said that it believed that secondary school students were mature enough and were likely to understand that if a school does not endorse or support student speech that it merely permits to take place on the premises on a non-discriminatory basis. Id. at 250.

What is the role of a school employee or agent who is assigned to attend such a meeting and when may such a meeting take place?

The Equal Access Act expressly limits participation by school officials at meetings of student religious groups. A teacher or agent assigned is not to actively participate in the meeting. Such meetings must be held during non-instructional time.

What is a school’s obligation when a limited open forum exists?

Under the Act, a school with a limited open forum may not lawfully deny access to religious clubs, as it may not deny access to a Young Democrat’s Club, or a philosophy club devoted to the study of Nietzsche. To the extent that a religious club is merely one of many different student initiated voluntary clubs, students should perceive no message of government endorsement of religion. *Id.* at 252.

Pope v. East Brunswick Board of Ed., 12 F. 3d 1244 (1993)

The plaintiff and other students met informally in the cafeteria before the start of Wednesday classes. The group of students was known within the school as the bible club. The East Brunswick Board of Education did not give the bible club any official recognition. The club was precluded from using the public address system, bulletin boards and other club facilities commonly used by other groups. In 1988 the bible club sought official recognition from the Board. It was denied. Subsequently, the Board adopted a policy requiring that all clubs and other extra-curricular activities were to be related to the curriculum, or to have a faculty advisor who supervised the meetings and were to be approved by the board before being permitted to function.

Did East Brunswick create a limited open forum by allowing at least one non-curriculum related student group?

Yes. It allowed the Key Club to meet on school premises which the court said was insufficiently related to the high school curriculum. East Brunswick had sought to relate the Key Club to portions of the history course taught at the high school. Quoting from the Westside Community Schools matter, the court said that a curriculum

related student group is one that has “more than just a tangential or attenuated relationship to courses offered by the school.” *Id.* at 1253.

Donovan v. Punxsutawney Area Sch. Bd., 341 F.3d 234 (3d Cir. 2003)

This case decided by the Third Circuit Court of Appeals involved the request of a high school senior to convene a Bible club during her school’s morning “activity period.” During the “activity period”, other non-curriculum related student groups met. Litigation ensued after the student was denied the opportunity to convene the Bible club during the “activity period.” The Third Circuit held that a limited open forum existed for the purpose of the Equal Access Act since the school permitted meetings of other non-curriculum groups during the “activity period.”

First Amendment Rights of Elementary School Students

In *K.A. v. Pocono Mountain School District* (2013), the Third Circuit was called upon to address the 1st Amendment rights of a fifth grade elementary school student. Student K.A. brought fliers to school and sought to distribute them to students. The fliers advertised her church’s upcoming Christmas party. Other students had brought fliers to school in the past and distributed them to students. Those fliers advertised non-religious items. K.A. was told that the Christmas event fliers could not be distributed at school.

A district court found that the policies cited by the Pocono Mountain School District in silencing K.A.’s speech were unconstitutional. The school district appealed that decision to the Court of Appeals (Third Circuit), which upheld the lower court’s ruling and held that 1) elementary students do have rights of free speech, and 2) district officials had no right to silence K.A.’s speech simply because they disagreed with it.