

The First Amendment: Legal and Practical Considerations for Schools in 2020

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Practice Area: School Law

Amidst a global pandemic, a presidential election is on the horizon, which, coupled with a variety of social movements, has created the perfect environment for a number of First Amendment issues to arise in schools. From the political – MAGA and Build Back Better – to social movements, such as Black Lives Matter, Antifa, and the neo-Confederate movement, the magnitude of the societal and political forces at play have increased tensions and spurred protests and activism. The current cultural and political landscape has had a significant impact on communities across our nation this summer. Such issues will inevitably make their way through the schoolhouse gates. Is your school district prepared?

As students and staff look for ways to express their personal beliefs through apparel, masks, signs, and protests, school districts must be ready to address these matters once they cross the threshold into schools. This *Legal Update* addresses various scenarios that school districts have encountered, or likely will encounter, while providing legal guidance and practical considerations for response.

1. How may a school district respond to students who wear political apparel (shirts, face masks, pins/buttons, etc.) in school?

A school district must address these incidents on a case-by-case basis to determine whether the apparel worn by the student constitutes protected speech under the First Amendment. Generally speaking, students have the ability to express their political views through their dress.

As established by *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), a school district may only regulate student speech if the district can show that the student's speech would cause a "substantial disruption" or if the school district could forecast substantial disruption or material interference with school activities. Under *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1968), the Supreme Court held that a school district may regulate speech that is considered "vulgar, offensive, lewd and indecent," regardless of whether the student's speech creates a substantial disruption. Finally, a school district may regulate speech that promotes illegal activities, as established by the Supreme Court in *Morse v. Frederick*, 551 U.S. 393 (2007).

Applying this First Amendment framework, a school district likely will not be able to prohibit student apparel featuring social and political images or messaging unless the apparel in question has caused, or is reasonably likely to cause, a "substantial disruption," if the image or messaging is "vulgar, offensive, lewd and indecent," or if the speech promotes illegal activities. Generally speaking, a shirt or face mask donned by a student which supports the political campaign of a particular candidate will be protected under the First Amendment.

School districts must proceed with caution in applying the *Tinker* “substantial disruption” standard to student attire. School administrators must demonstrate facts that might reasonably lead them “to forecast substantial disruption of or material interference with school activities” before prohibiting a particular expression of opinion. A clothing item that merely makes others uncomfortable or upset will generally not meet the “substantial disruption” standard established by *Tinker*. To help illustrate what type of speech has received First Amendment protection, consider that courts have held school districts were not able to prohibit students from wearing the following:

- black armbands protesting the Vietnam war (*Tinker*);
- breast cancer awareness bracelets with the slogan “I ♥ Boobies! (KEEP A BREAST)” (*B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013), cert. denied, 134 S. Ct. 1515 (2014));
- a t-shirt with a picture of a U.S. president and the words “International Terrorist” (*Barber v. Dearborn Public Schs.*, 286 F.Supp.2d 847 (E.D. Mich. 2003));
- a t-shirt spelling out the word “LOVE” using images of guns and other weapons and a t-shirt with the phrase “Celebrate Diversity” with images of a variety of guns (*Schoenecker v. Koopman*, 349 F.Supp.3d 745 (E.D. Wis. 2018)); and
- a t-shirt with an image of guns supporting the National Rifle Association (*Newsom v. Albermarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003)).

If the speech is protected under a First Amendment analysis, then a school district may not regulate the speech by banning the apparel in question. However, if the speech is not protected by the First Amendment, then a school district may prohibit the student from wearing the item in question, and a school may follow its student discipline policy for any refusal to follow such directives. School districts should consult with legal counsel regarding the fact-specific First Amendment analysis.

School districts are also encouraged to proactively review their policies, including student dress codes, to determine how images and messaging related to the social and political messages should be treated under the school district’s existing policies. School districts may impose dress codes and uniform policies, but such codes and policies may not be discriminatory or censor student expression. A dress code which restricts certain dress based upon content neutral restrictions may pass constitutional muster and allow school districts to provide an environment free from social and political messages. School districts that enact such dress codes must do so carefully and ensure their dress codes do not discriminate or otherwise censor student expression.

2. How should a school district respond to staff who want to wear Black Lives Matter apparel or display Black Lives Matter signs in classrooms?

While staff members generally have the right to speak as private citizens on matters of public concern, statements made by staff members pursuant to their official job duties are not protected by the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

The First Amendment also does not entitle teachers to advocate for a particular viewpoint while teaching to a captive audience of students. *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007). If a teacher wears a shirt or face mask featuring statements or images related to the Black Lives Matter movement while teaching a classroom of students, the teacher is likely considered to be speaking as an employee of the district with the non-verbal speech of the words and images expressed on his or her apparel or face mask. Therefore, a school district may prohibit the teacher from engaging in such expression during the work day when the teacher has a captive audience. A school district may establish policies prohibiting staff members from wearing clothing featuring political statements, and a district has the right to discipline staff members who fail to comply with such policies or directives.

Likewise, signs posted by a teacher in a classroom constitute speech by the teacher in the course of the teacher’s professional job duties, as those signs would be visible to a captive audience of students during instructional time. Thus, a school district may also regulate the teacher’s speech within the physical classroom by mandating whether staff can display social and political messages in areas where those messages are visible to students.

School districts should ensure that any policies regarding the ability of staff members to wear or display social and political related images are enforced equally among all staff and with respect to all viewpoints to avoid claims that such policies were enacted or enforced in a discriminatory manner.

3. What if a staff member displays the social or political message electronically via a virtual learning platform instead of in the physical classroom space?

This is an issue that has yet to be decided by the courts. However, a strong argument can be made that the portion of the teacher's home that is visible to students via a virtual platform is a "classroom" during the time instruction is occurring. Just as a school district may regulate what speech the teacher displays in the physical classroom environment, a school district can likely also regulate the expressions of speech that are visible to students when teachers are engaged in instructing students via a virtual learning platform.

4. What if a teacher wishes to speak with students about the state of politics in the U.S.?

Teacher-led discussions during class time regarding the state of politics in the U.S. are appropriate, depending on the circumstances. School districts should ensure such discussions only occur in classes where the topic is appropriate as part of the established curriculum, that any discussions are age-appropriate, and that such discussions do not promote or advocate for a particular viewpoint. For instance, discussing the presidential election may be consistent with the curriculum for a high school civics or government class, but such a discussion would likely not be appropriate in a math or science class. Teachers should be reminded that any curriculum-related political discussions should be presented to students in a purely informational way, as a teacher may not advocate for his or her personal viewpoint before a captive audience. Should a teacher ignore the directive to hold only informational, curriculum-related discussions with students regarding current political topics, the school district may impose disciplinary action.

5. What if students or staff plan to participate in a protest or a walkout in support of the Black Lives Matter movement during the school day?

All staff and students should be held to a school district's current policies and procedures for attendance, which should be consistently applied. Staff members are expected to work their entire work day, including any routine after school duties, unless they are approved to take any appropriate available leave that may apply. Staff members who leave work early to participate in a protest or walkout may be subject to disciplinary action. Likewise, students should not be allowed to leave school to participate in a protest or walkout unless they are properly excused by a parent or guardian in accordance with the school's attendance policy.

6. How should a school address use of district email by staff or students seeking to organize protest activity and solicit participation?

School districts should examine their technology use policies for staff and students to determine whether school resources (*i.e.*, email and devices) may be used in this manner. Technology use policies may prohibit the use of district email for sending political or campaign materials. However, school districts must ensure that any prohibition against using district email for political purposes does not interfere with an employee's right to engage in protected concerted activity.

7. What if staff members plan to wear their school staff shirts to a protest?

School districts should proceed with caution with respect to staff dress while attending or participating in protest activities. Wearing a school staff shirt is expression under the First Amendment. The question is whether such expression is protected. A staff member dressed in a staff shirt may give the impression that the staff member is speaking as an employee of the district at the protest. While staff members have the right to free speech under the First Amendment, this protection only applies when the staff member is speaking as a private citizen. If the speech occurs in a staff member's capacity as an employee of the school district, the staff member would lose the First Amendment protection and the speech may be subject to discipline. An outright prohibition on a staff member wearing a staff shirt to a protest will implicate the First Amendment and may open a school district to liability. A more practical approach may be for school districts to remind school staff of the perception created by a staff member participating in a protest in a staff shirt—the perception that the staff member speaks for the school district with respect to the nature of the protest. Such proactive discussion with school staff serves to protect both the school district and individual employees.

8. How should a school district handle comments posted by community members regarding political or social topics on the school district's official Facebook page?

By choosing to allow the public to post comments on a school's public Facebook page, a school district has likely created a public forum for First Amendment purposes. If a public forum has been established, the result is that a school district cannot discriminate on the basis of an individual's viewpoint when administering the Facebook page by regulating or removing the comments that are posted by members of the public. While certain speech, such as racist, threatening, or obscene comments, likely would not receive First Amendment protection and thus could be removed, districts are encouraged to consult with legal counsel prior to removing specific comments. If a school district is concerned about the challenges of monitoring comments on its Facebook page, an alternative is to set up the Facebook page to be non-interactive where no comments by the public are permitted.

9. May a school district prohibit the Confederate flag from being worn or displayed by students?

It is unsettled in federal courts as to whether school districts may prohibit the Confederate flag in schools. It is clear that under the Tinker standard, where a school district can show that displaying the Confederate flag would cause a "substantial disruption" or the school district could forecast substantial disruption or material interference with school activities, a school district may ban the Confederate flag from school. This analysis should be undertaken based on the current local environment of a school district, rather than events occurring on the national or statewide stage.

School districts may also be able to prohibit the display of the Confederate flag on the basis that the symbol of the Confederate flag itself is contrary to the civil discourse schools strive to teach students such that the symbol (the flag) is unsuitable for the school environment. This approach is fraught with potential legal risk and should be carefully considered with legal counsel.

The current political and social climate will no doubt impact school districts in a myriad of ways this school year and beyond. School districts are encouraged to proactively review their policies and plan for how their districts will respond to the many ways in which students and staff may seek to express their support or personal beliefs.

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