

No One-Size-Fits-All Approaches: Public Schools Must Ban T-Shirts with Caution

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School Boards and Administrators received an important reminder on June 15, 2022 from the United States Court of Appeals for the Seventh Circuit regarding limitations on banning student t-shirts containing images of weapons and other potentially offensive pictures or slogans. Schools cannot broadly ban all clothing containing a particular image or slogan under a theory that all such images or slogans are inappropriate or violate Board policy. Instead, schools must approach offensive t-shirts and other student clothing on a case-by-case basis utilizing the *Tinker* analysis to determine whether, in addition to being inappropriate or otherwise violating Board policy, the clothing images or slogans have created a substantial disruption or may be reasonably forecasted to create a substantial disruption to the educational environment.

In the Court's decision (*N.J. v. Sonnabend*), two students (N.J. and A.L.) from two separate school districts sued their districts after the students were instructed to take off or cover up their t-shirts that displayed an image of a firearm. The Court determined N.J.'s claim was moot due to the student's transition from middle school to high school; however, the Court pressed forward with A.L.'s First Amendment claim.

In A.L.'s case, the Court focused on the policy language. The language did not contain an express prohibition against clothing depicting firearms. Instead, the policy generally prohibited clothing with inappropriate messages or images. Upon viewing A.L.'s t-shirt, the District determined the t-shirt's depiction of a firearm was inappropriate and, therefore, in violation of its dress code policy. A.L. was not disciplined, but was instructed to cover the image. A.L.'s parents sued the District, alleging a violation of A.L.'s First Amendment rights.

In finding for A.L., the Court noted the United States Supreme Court has only identified three exceptions to applying the *Tinker* standard to student speech: (1) speech that is lewd and sexual in nature; (2) speech that is promoting the use of illegal drugs; and (3) speech that can be reasonably viewed as bearing the imprimatur of the school. According to the Court, A.L.'s t-shirt did not fall under any of these three exceptions and, therefore, *Tinker* must be applied.

The Court reaffirmed that, under *Tinker*, public schools cannot address student speech with a one-size-fits-all approach. Rather, public schools must assess each instance of speech and determine if actual disruption has occurred or whether disruption can reasonably be forecasted to occur. The Court stated forecasted disruption does not require that actual disruption is certain to occur absent stopping the speech in question; however, there is a no "hurt feelings" defense under *Tinker* such that mere expressions from other students or staff as to the offensive nature of another's speech is enough to qualify as disruption or forecasted disruption. Instead, much more must occur for disruption under *Tinker* to apply, such as rumors of, or actual disruption to, the educational environment through the conduct or speech of others in reaction to the speech at issue.

The Court instructed school districts that when evaluating whether actual or reasonably forecasted disruption is present, districts should consider the age of the students involved and the temporal proximity of the speech to related, local community events (e.g., a local school shooting that recently occurred). Nonetheless, the core issue to determine is whether actual or reasonably forecasted disruption is present.

Because the lower court did not apply *Tinker* to A.L.'s claim, the Seventh Circuit required the lower court to issue a new decision utilizing the *Tinker* analysis. Nonetheless, the Seventh Circuit expressed skepticism as to whether the reaction to A.L.'s shirt was sufficient to permit covering the image as a lawful speech prohibition under *Tinker*.

In light of the *Sonnabend* decision, public school boards and administrators should keep the following considerations in mind:

- Review Policies. Review student dress code policies to ensure they do not prohibit broad classes of clothing that may constitute protected speech, such as "any clothing depicting a weapon." Revise policies as appropriate to bring them into compliance with the First Amendment.
- Train and Implement. Once your policy is updated:
 - Discuss with your Board and Administration how the policy is to be interpreted and applied when potential violations are reported or observed.
 - Consider implementing a decision-tree within the District for purposes of addressing potential dress code violations given the constitutional rights involved with such decisions.
 - Train any other District staff on the agreed-upon interpretation and application of the dress code policy.
 - Provide information to students so good choices within the constraints of policy are made before coming to school.
- Identify Basis for Disruption. Discuss with relevant District officials and staff what actual and forecasted disruption looks like and what it does not look like. Be clear with staff that other students merely stating they find a piece of clothing to be offensive is likely not enough to trigger a policy violation under *Tinker* without other factors present.
- Understand Actions and Consequences. Understand non-disciplinary actions taken by a school district can result in an actionable First Amendment claim and subject a district to liability and educate your workforce accordingly. When in doubt, contact legal counsel to work through potential applications of a dress code policy.

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