Education Law/Constitutional Law

Can Schools Limit Student Speech? Should They?

In the wake of so many recent tragedies involving school violence in this sharply divided political climate, it is no surprise that students across the country are testing the limits of their free speech rights. For example, on March 14, 2018, students across the country engaged in a walkout during school hours to protest gun violence and commemorate the 17 lives lost during the school shooting in Parkland, Florida. Less than two months later, on May 2, 2018, another nationwide student walkout took place in support of Second Amendment gun rights.

Are student protests even allowed during the school day? Should they be? What if the student protest supports something that the rest of the community does not? This article reviews the basics of student free speech rights, and explores the boundaries of those rights in the public school setting.

First Amendment Case Law

The law is clear that public school students enjoy a degree of First Amendment free-speech rights in the school setting. The general rule is that school districts may not prevent students from expressing their personal political or religious views or opinions on school premises, or discipline students for doing so.[1]

In *Tinker v. DeMoines*, the U.S. Supreme Court famously held that suspending high school students for wearing black armbands in protest of the Vietnam War violated their First Amendment rights. The Court explained that, while students do not shed their "constitutional rights to freedom of speech or expression at the schoolhouse gate," student free speech rights must be "applied in light of the special characteristics of the school environment."

Christie R. Jacobson

Generally, four main types of student speech may be regulated, as set forth below.

Speech Leading to Material and Substantial Disruption

Notwithstanding the above, school districts *may* limit student speech if they reasonably believe that a student's expression of such views is likely to – or actually does – "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "impinge upon the rights of other students."[2] For example, students may wear expressive clothing (*e.g.*, armbands, bracelets and t-shirts) as long as it does not disrupt the school setting.

In one local case, *Saad-El-Din v. Steiner*, a student on school property stated that he was going to "blow the school up," and recommended to other students and a teacher that they not "come to school on Friday."[3] The court rejected the parents' argument that the school could not discipline the student because the statements were not a true threat. The court explained, "[t]he relevant inquiry focuses on whether the student's conduct 'might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.'"[4]

Although witnesses testified that they did not think that the student was serious, "it was nevertheless reasonably foreseeable that such a threat to blow up the school would create a substantial disruption within the school."[5] In this regard, it is important to note the U.S. Constitution does not protect true threats of violence, regardless of whether the speaker intends to carry out the threat.[6]

Vulgar, Lewd and Indecent Speech

The First Amendment does not protect vulgar, lewd or indecent speech, or speech that is "plainly offensive."[7] In *Bethel v. Fraser*, a student was suspended after giving a sexually suggestive speech at a school assembly. The U.S. Supreme Court explained that "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions." Rather, the "inculcation of these values is truly the 'work of the schools.'" [8]

School-Sponsored Speech

Districts may exercise editorial control over the style and content of student speech that is "school-sponsored" if the school's actions are reasonably related to legitimate pedagogical concerns.[9] In *Hazelwood v. Kuhlmeier*, the school was permitted to prevent publication of articles in school newspaper regarding certain controversial issues. This case affirms that "First Amendment rights of students in the public schools ... must be applied in

See LIMIT, Page 12

LIMIT ...

Continued From Page 5

light of the special characteristics of the school environment." A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school."

Speech Promoting Illegal Drug Use

School administrators may restrict student speech that promotes illegal drug use.[10] In *Morse v. Fredrick*, the district was permitted to discipline students who displayed a banner that read "Bong Hits 4 Jesus" across the street from an event that was sanctioned and supervised by the school. The U.S. Supreme Court held that schools may limit such speech due to the special characteristics of the school environment and the compelling government interest in stopping drug abuse.

State Laws

On the State level, the New York State Dignity for All Students Act ("DASA") prohibits harassment and bullying in the school context.[11] DASA defines such terms as "the creation of a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying, that:

(a) Has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being; or
(b) Reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; or
(c) Reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or
(d) Occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property."[12]

As mentioned above, even *off-campus* speech can be limited when it is "reasonably foreseeable" that the misconduct will "create a risk of a material and substantial disruption" in the school setting.[13]

Local Regulation

Various school district policies also regulate speech-related activities in public schools. Student protest activities that violate a school district's code of conduct are not protected and, as such, carry disciplinary consequences.

For example, the New York State Commissioner of Education (Commissioner) has upheld the five-day suspension of a student who admittedly left the classroom, joined students in a walkout, and failed to return to the classroom.[14] In *Appeal of Durkee*, the Commissioner explained that "faculty and staff had been advised in advance of the walkout and the consequences of student participation," and explained that the student "could have avoided suspension had he returned to his classroom instead of leaving school grounds."[15] That case highlights the school district's authority to implement its code of conduct regardless of whether the violation relates to a speech-related activity.[16]

Finally, when dealing with speech-related activities, districts should apply their codes, policies and regulations in a neutral manner, and may not engage in viewpoint discrimination.[17] Any actions taken with regard to student speech must be viewpoint neutral. Districts should not take any action that appears to either endorse or oppose a particular viewpoint, no matter how popular – or unpopular – it may appear to be at the time.

Student "Walkouts" and Other Mass Protests

Generally, school districts may discipline students for planning, participating in or encouraging other students to plan or participate in "en masse" protests as long as the *Tinker* standard is met (i.e., the district reasonably believes that the protest-related activity is likely to result in substantial disruption). A student walkout that involves a large number of students who are planning to walk out of a school building, or even just their class, would likely constitute a material and substantial disruption to the extent that the educational process is being disrupted.

Districts should not take any action that appears to either endorse or oppose a particular viewpoint, no matter how popular – or unpopular – it may appear to be at the time.

Notwithstanding this clear right to regulate student protests, the issue is almost never that simple. The message behind student protests can often seem so universally laudable that the school community wishes to support the protest in good faith. In fact, it is fairly common for teachers, principal and school employees to sympathize with students and their desire to protest.

Nonetheless, school employees should think twice before taking any active role in any student protest. While it is true that public employees do maintain the right to engage in speech on matters of public concern, those rights do not apply in the same manner when they are acting in the scope of their employment.

For example, the Commissioner has held that one teacher's conduct in "absenting himself from his assigned duties and leading students away from their classes" in a mass walkout protesting alleged police brutality was not protected by the First Amendment.[18] The Commissioner explained that the content of the teacher's expressions about the particular student protest was not in issue; rather, it was "his action in leading the walkout which clearly disrupted the educational process at Morris High School."[19]

There is no question that a walkout during school hours would clearly undermine a teacher's ability to complete his or her regularly scheduled lesson plan or assignment. In addition, encouraging such a disruption would clearly undermine the educational process. Moreover, districts should avoid setting a precedent that could compromise the district's position in future protests that the school board or administration may find itself unable to support.

Finally, it has been argued that students who leave their classrooms to participate in a mass protest are learning another – and perhaps equally important – lesson regarding civil disobedience. Most school districts and school attorneys alike acknowledge that there is real value in the exercise and the firsthand civics lesson. Of course, it makes sense that a full lesson in civil disobedience would require the implementation of civil consequences that would naturally flow from such "disobedience."

No matter where a school board member, teacher or parent falls on the political spectrum, it is almost universally accepted that schools should be safe places for children to learn, play and speak. *Would it were so for all places everywhere…*

Christie R. Jacobson, Esq., is a Partner at Frazer & Feldman, LLP, in Garden City, where she practices Education Law. She also serves as the Chair of the NCBA Women in the Law Committee. Christie can be reached at cjacobson@ffedlaw.com or (516)742-7777.

1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503(1969).
2. *Id.*
3. 101 A.D.3d 73 (2012); *appeal dismissed by* 20 N.Y.3d 1032 (2013).
4. *Id.*, (quoting *Tinker, supra).*
5. *Id.*
6. *See Watts v. United States*, 394 U.S. 705 (1969).
7. *Bethel School District v. Fraser*, 478 U.S. 675 (1986).
8. *Id.*
9. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).
10. *Morse v. Frederick*, 551 U.S. 393 (2007).
11. N.Y. Educ. Law, Art. 2.
12. N.Y. Educ. Law §11 (7).
13. *See Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008).
14. *See Appeal of Wolfe,* 39 Ed. Dept. Rep. 653 (2000).
15. *Id.*
16. *See also, Appeal of Durkee*, 20 Ed. Dept. Rep. 94 (1980)(Commissioner upheld five-day suspension resulting from a mass walkout by approximately 125 students).
17. *See Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005).
18. *See Appeal of Dick*, 24 Ed. Dept. Rep. __, Dec. No. 11,331 (1984).
19. *Id.*

HARASSMENT ...

Continued From Page 7

few months, it behooves institutions to, once again, review their existing policies and procedures in order to confirm that they are in compliance with the current law and guidance and/or make any necessary changes as soon as practical. Institutions should also provide training to students, employees, and all members of the community as to how to properly recognize, prevent, and respond to allegations of sexual misconduct. Institutions are advised to pay close attention to this area of the law, as it has the potential to have significant practical as well as legal implications.

Hayley Dryer is an Associate in the Commercial Litigation Department at Cullen and Dykman LLP. She can be reached at Hdryer@cullenanddykman.com

Thank you to Victoria Jaus, a law clerk with Cullen and Dykman LLP, for her assistance with this article.

1. Sandra Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, NY Times (Oct. 20, 2017), www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html.
2. *Id.*
3. Sarah Almukhtar, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, NY Times (Feb. 8, 2018), www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html.
4. *Id.*
5. Stephanie Zacharek, Eliana Dockterman and Haley Sweetland Edwards, *The Silence Breakers*, Time Magazine (last visited May 23, 2018), www.time.com/time-person-of-the-year-2017-silence-breakers/.
6. *Id.*
7. New York City employers may be subject to additional laws.
8. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*
9. N.Y. Exec. L. §§ 290 *et seq.*
10. N.Y. City Admin Code §§ 8-101 *et seq.*
11. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986); *Anderson v. Davis Polk & Wardwell, LLP*, 850 F. Supp. 2d 392. 404-405 (S.D.N.Y. 2012).
12. *Meritor*, 477 U.S. at 64-65.
13. CPLR 7515.
14. CPLR 5003(b) and Gen Oblig. L. § 5-336.
15. Lab. L. § 201-g.
16. *Id.*
17. Exec. L. § 296-d.
18. Pub. Off. L. § 17-a.
19. *Dear Colleague Letter*, U.S. Dep't of Educ. Office for Civil Rights, www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (last visited May 24, 2018).
20. *Dear Colleague Letter*, U.S. Dep't. of Educ. Office for Civil Rights , https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (last visited May 29, 2018); *see also Dear Colleague Letter,* U.S. Dep't. of Educ. Office for Civil Rights, ,https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf (last visited May 29, 2018).
21. *Q & A on Campus Sexual Misconduct,* U.S. Dep't. of Educ. Office for Civil Rights, https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (last visited May 29, 2018).
22. Roberta Smith, *In a Mattress, a Lever for Art and Political Protest*, N.Y. Times (Sept. 21, 2014), www.nytimes.com/2014/09/22/arts/design/in-a-mattress-a-fulcrum-of-art-and-political-protest.html; *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356 (S.D.N.Y. 2015).
23. Educ. L. §§ 6439-6449.
24. Violence Against Women Reauthorization Act of 2013, 113 P.L. 4, 127 Stat. 54 (2013); The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, 20 U.S.C. § 1092(f), 34 C.F.R. 668.46 (1990); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*.
25. Educ. Law § 6441.
26. *Id.* at § 6442.
27. *Id.* at § 6443.
28. *Id.* at § 6445.
29. *Id.* at § 6447.
30. *Id.* at § 6444 (5)(c)(ii).
31. *Id.* at § 6449.
32. N.Y.S. Office of Campus Safety, *Preliminary Report: A statewide Review of Compliance with Education Law Article 129-B* (Sept. 19, 2017), https://www.ny.gov/sites/ny.gov/files/atoms/files/EnoughisEnoughPreliminaryReport_September192017.pdf (last visited May 29, 2018).
33. Educ. Law § 6444.
34. Id.