

# When students mimic white supremacists

By the New York State  
Association of School Attorneys

The most recent data compiled by the Federal Bureau of Investigation showed a 5 percent annual increase in the number of hate crimes, which are defined by the FBI as “a traditional offense like murder, arson, or vandalism with an added element of bias.” Notably, almost 10 percent of 6,120 hate crimes in 2016 occurred at schools or universities.

The Anti-Defamation League recently published data showing an “alarming increase” in white supremacist propaganda on and near college campuses in 2017. White supremacist groups increased their use of flyers, stickers, banners and posters to spread their messages by more than 250 percent in 2017, according to the civil rights organization.

It is only a matter of time before white supremacist literature appears in our schools. What should be school officials’ response? The answer is highly dependent on the particular facts involved. Example scenarios set forth below focus on four commonplace student activities – drafting, posting, distributing and discussing flyers – and various legal standards that apply. Consult your school attorney should similar situations involving distribution of literature arise in your school district, as each district’s proper response depends on district policies as well as the law and precedent.

## Scenario #1: Posters seeking white football players

On a weekend, four high school students attend a meeting at one of the student’s homes with an adult affiliated with Identity Evropa, a group whose members participated in the “Unite the Right” rally in Charlottesville in May 2017. The group calls for an end to all immigration and promotes racial separation because, according to the group’s website, “ethnic diversity ... is an impediment to societal harmony.”

The speaker urges the students to engage in non-violent forms of activism including “flyering, flash demonstrations, banner drops and discussing Identitarian ideas with students.”

Later that weekend, the students create a flyer seeking “White boys” to try out for an “all-White” football team. The posters include the triangular symbol of Identity Evropa (copied from the Internet) and a slogan used by the group (“Keep Your Diversity We Want Identity”).

On Monday, the students place the flyers on windshields of cars in the school parking lot and post them in the school cafeteria.

**Question:** Can the school remove the flyers?

Probably. Schools are permitted to regulate the distribution of materials on school property to reasonable times and locations, as well as to limit any material that may substantially interfere with the order and discipline needed in the operation of the school and the educational process. (See the decision by the U.S. Court of Appeals for the Second Circuit in *Eisner v. Stamford Board of Education*, 1971.)

Certain forms of student expression are not protected by the First Amendment, according to the U.S. Supreme Court (see *Tinker v. Des Moines Independent Community School District*, 1969; *Hazelwood School District v. Kuhlmeier*, 1988 and *Bethel School District v. Fraser*, 1986). But the flyer does not advocate violence, destruction of property or acts of insubordination. Nor does the flyer use vulgar language or advocate drug use.

On the other hand, the flyer makes a specific reference to “White boys” and incorporates both a symbol and a slogan that many would find offensive and inconsistent with the mission and goals of the school district. School administrators could reasonably determine that the flyers may be perceived as promoting a hateful or discriminatory message,



Young men affiliated with Identity Evropa drop a banner in Tuscon, Ariz. on Sept. 5. The group calls ethnic diversity “an impediment to social harmony” and is classified as a hate group by the Southern Poverty Law Center.

Source: <https://twitter.com/IdentityEvropa>

particularly in light of the fact that the Southern Poverty Law Center classifies Identity Evropa as a “hate group.”

Before taking action to remove the flyers, school officials should review the district’s policies and regulations regarding student publications to ensure

there is language supporting such administrative action.

**Question:** Can the four students be disciplined for their actions?

Based on the district’s Code of Conduct and judicial precedents cited above, the distribution of the flyers could justify pursuing disciplinary action. In addition, the students may be subject to disciplinary action if it is reasonable for school officials to determine that the distribution and posting of the flyers created a threat of substantially interfering with the operation of the school.

## Scenario #2: Creating, posting and distributing flyers off-campus

Assume the same facts as in Scenario #1, except that the students distribute their flyers at the local pizzeria rather than the student parking lot and cafeteria.

**Question:** Can the school remove the flyers?

While the school would be unable to remove the flyers from private property, the pizzeria could, of course, remove them from its premises.

**Question:** Can the four students be disciplined for their actions?

The fact that the flyers were produced and distributed off school premises generally would prevent school officials from disciplining the students. (See the Second Circuit’s decision in *Thompson v. Board of Education*, 1979.)

However, the students could still be subject to disciplinary action if their flyers create a foreseeable risk of a material and substantial disruption within the school setting.

Also, school officials should determine whether the off-campus posting of flyers creates a hostile environment under the state Dignity for All Students Act (DASA), which prohibits harassment and bullying in the school context. Under DASA, prohibited conduct, including student speech in its various forms, includes conduct that:

- 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.
- Reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety.
- Reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student.
- 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.

## Scenario #3: A call to action

After tryouts, three African American students make the varsity football squad and are awarded high-profile positions. The group of four students, angered by this turn of events, meets and decides to make another flyer. This time, their flyer states: “No N\*\*\*\*\* should represent our community on the football team! Fellow White Americans – you know what we have to do to fix this. Be at team practice next Wednesday.” Adopting a frequently used Identity Evropa slogan, the flyer continues, “You will not replace us.”

**Question:** Can the four students be disciplined for their actions?

The answer is a resounding yes, regardless of where the flyer is distributed. The flyer includes statements that may “reasonably be understood as urging violent conduct” and will likely “materially and substantially disrupt” the operations of the school. (See the Second Circuit U.S. Court of Appeal’s ruling in *Wisniewski v. Board of Education of Weedsport CSD*, 2007.)

Actual disruption need not be shown, according to the Second Circuit’s decision in *Cuff v. Valley Central School District*, 2012. It is sufficient that it be reasonably foreseeable that a disruption would occur on school grounds. This would apply regardless of where the flyers were actually posted.

In addition, schools may regulate or prohibit student speech, including the distribution of literature, when the language is: (a) vulgar, lewd or indecent; (b) promotes illegal drug use; or (c) part of a school-sponsored forum or school-sanctioned event, and regulation or prohibition of the speech is “viewpoint neutral.” (See the U.S. Supreme Court’s decision in *Morse v. Frederick*, 2007.)

## Schools can establish review protocols for distributed literature

What can schools do to prepare for these types of incidents?

First, adopt, implement and enforce policies that create and maintain a school environment that is free of discrimination and harassment for all students. Such policies may include provisions in the Student Code of Conduct that regulate student speech and speech-related activities in school. For instance, schools may establish rules for the review of literature before it may be distributed on school property. However, such rules and procedures must have objective criteria regarding permissible literature. Generally, schools may prohibit only literature that can be reasonably anticipated to cause a substantial disruption of school operations.

Second, apply such policies in a neutral manner. Districts may not take action that appears to either endorse, or oppose, a particular viewpoint. Be sure to consult your school attorney should white supremacist literature appear in your schools.

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