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CHAPTER 4

Students' Rights

Schools, by their very nature, must encourage free inquiry and free expression of ideas. Such expression should include the personal opinions of students relevant to the subject matter being taught, school activities, services, policies, school personnel, and matters of broad social concern and interest. In expressing themselves on such issues, students have a responsibility to refrain from using defamatory, obscene, or inflammatory language and to conduct themselves in such a way as to allow others to exercise their First Amendment rights as well.

The courts have affirmed that students' free speech rights are protected by the Constitution—so long as they do not present a “clear and present danger” or threaten a “material disruption” of the education process, as noted in *Gitlow v. New York* (1925) and *Tinker v. Des Moines* (1969). In the event that students' activities *threaten the effective operation of the school*, principals are given clear authority to limit or ban students' activities.

School districts face a dilemma as they attempt to balance the issues of school safety, orderly operation of the school, and student rights. How restrictive must school officials become to fulfill their obligation to lead an orderly school and to protect students? Principals grapple with the issue in the same way our entire nation asks how much freedom must be limited in order to protect the citizenry from violence. It is a challenge for school administrators to find the appropriate balance between individual student civil liberties and the rules that keep a school orderly and safe. Unfortunately, there is no single intersection that balances student liberties and student safety that ensures the complete safeguarding of both.

There are also concerns that the responses to violence by educators, legislators, and others involved with public education may, in fact, make students less safe. There is obviously a natural response for parents and educators to err on the side of safety—but what if the action taken actually makes everyone less safe?

These questions are not necessarily new to educators, but they have become more pressing due to the severity of school violence. Imber and Van Geel (1993) state there is a “tension between the school's need to maintain an orderly environment and the student's right as a citizen and human being” (p. 151). The complexity of the issue has also increased. “Many of the most difficult questions in education law concern the conflict between individual rights of students and the corporate needs of the school” (p. 152).

School safety is not the only concern principals must consider when dealing with matters of student rights. Attempting to create a balance between allowing students to freely express themselves against the obligation to maintain an orderly environment is not easy. Schools must allow some degrees of freedom in order to prepare students to become productive citizens in our democracy; yet with a high degree of polarization that has taken place most recently outside of schools, there are greater challenges brought into the schools now than perhaps any other time.

SUGGESTED GUIDELINES FOR PRACTICE

There are essentially seven landmark SCOTUS cases that principals should understand as the foundational basis regarding student rights. Although many other court cases influence what principals can do in practice, these cases guide the majority of other decisions. In 2021, the case of *Mahanoy Area School District v. B.L.* was the first major Supreme Court case that centered on student speech, social media, and off-campus speech. The ruling had the potential to carve additional limitations to student speech rights, but in an 8–1 decision, the Court held in favor of the student. The case will be further discussed in Chapter 5.

Those listed here don't include cases related to religion or special education, which are discussed in other chapters.

Tinker v. Des Moines Independent Community School District (1969). School officials use the findings in this case to limit or restrict speech that either disrupted school, has the potential to disrupt school, or invades the rights of others.

Bethel v. Fraser (1986). When expression is not disruptive, but is deemed lewd or vulgar, school officials may limit or restrict student speech.

Hazelwood v. Kuhlmeier (1988). Schools may exercise control over school-sponsored speech as long as their action was reasonably related to a pedagogical concern. (Note: some states have affirmed student rights in this area regarding student publications.)

Morse v. Frederick (2007). School officials may prohibit schools from displays promoting illegal drug usage.

New Jersey v. T.L.O. (1985). Students retain Fourth Amendment protections, but school officials may conduct student searches based on reasonable suspicion. Such searches must be justifiable at inception and reasonable in scope.

Safford v. Redding (2009). Searching of students must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." The case involved the strip searching of a student.

Goss v. Lopez (1975). Students facing suspension must at a minimum receive some kind of notice and be afforded some kind of hearing.

SECTION A. SYMBOLIC EXPRESSION

In *West Virginia Board of Education v. Barnette (1943)*, the U.S. Supreme Court heard its first freedom of expression case that involved public schools. The case was brought against a West Virginia public school system by the parents of children who refused to participate in saluting the American flag because they were Jehovah's Witnesses. Although the parents objected to this requirement as a

Symbolic expression is nonverbal expression that conveys the personal ideas, feelings, attitudes, or opinions of an individual. People exhibit symbolic expression in a variety of forms, for example, physical gestures, clothing, hairstyle, buttons, jewelry, and tattoos. Symbolic expression contains an element of subjectivity, and in determining whether or not a form of expression is, in fact, symbolic, some consideration must be given to the intention of the persons who are expressing themselves.

violation of their religious beliefs, the Supreme Court decided this case on free speech grounds. The Court ruled that “the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas . . . a short cut from mind to mind.” Therefore, the students could not be required to salute the American flag.

During most of the twentieth century, students were routinely disciplined for engaging in forms of expression that displeased school authorities. A major turning point in the courts’ interpretation of the First Amendment occurred in the landmark case of *Tinker v. Des Moines* (1969). In that case, the U.S. Supreme Court declared that students are “persons” under the Constitution who must be accorded all its rights and protections, especially the right to freedom of expression, and that the school board’s subjective fear of some disruption was not enough to override students’ right to express their political beliefs. The Supreme Court further noted that students possess fundamental rights that schools must respect. However, a controlling principle of *Tinker* was that conduct by a student, in class or out, that for any reason disrupts class work or involves substantial disorder or invasion of the rights of others is not protected by the constitutional guarantee of freedom of speech.

Policy in the area of student expression is difficult to develop and even more difficult to defend. Assuming that rules and regulations regarding student expression have been developed and are maintained as official policy by local boards of education, individual schools may build on these policies and regulations to set standards. Such standards generally will be upheld as long as the rules are in accord with board policy and are reasonable and specific. School officials may restrict freedom of expression if there is evidence of material and substantial disruption, violation of school rules, destruction of school property, or disregard for authority. The key questions to determine whether the rules are reasonable and specific are the following:

- Does the expression targeted cause a health, safety, or disruptive hazard?
- Are the rules based on objective needs?
- Will the rules constitute an arbitrary infringement of constitutionally protected rights? (Unsubstantiated fear and apprehension of disturbance are *not* sufficient grounds to restrict the right to freedom of expression and should not be the basis for the development of standards.)

Items Students Wear

Students’ rights to wear insignia, buttons, jewelry, armbands, and other symbols of political or controversial significance are firmly protected by the Constitution

and the courts. Like other student rights, this right may be forfeited when wearing such symbols causes a material disruption of the education process. A federal appeals court, in *Gusick v. Drebus* (1971), held that school authorities may establish policies regulating these activities when the rule is not arbitrary and is applied, without exception, to all insignia and not just one type of insignia. When students' insignia is unlikely to cause material disruption of the education process, courts have generally ruled that students cannot be deprived of their basic right to express themselves (see, e.g., *Burnside v. Byars*, 1966).

In what may seem like a minor problem compared to others, schools have faced challenges with the popularity of “I ♥ Boobies” bracelets and attire worn in support of breast cancer awareness, as well as similar attire supporting other causes. Courts have not been in agreement on such bans. In 2013, a federal district court upheld a ban in *J. A. v. Fort Wayne Community Schools* stating that breast cancer awareness does not eliminate the “vulgar meaning behind the I ♥ Boobies” message and also expressed the reluctance to have the court interfere with a school decision. However, the Third Circuit prohibited a ban in *B. H. v. Easton Area School District* in part because the school district did not consider the bracelet message lewd but instead considered them a disruption, even after having waited months to reach that conclusion. The age and grade level of students involved in these and similar circumstances are additional considerations that may change the context of how administrators and courts weigh their options.

Cases involving messages on clothing have long been issues for schools. “T-shirt” cases can run the gamut on free expression issues. T-shirt challenges related to controversial issues such as abortion, LGBTQ+ rights, the Confederate flag, and racial issues are frequent occurrences, and current local and school climate often determines whether or not a particular shirt is prohibited. Restrictions are more likely to be upheld where a history exists of increased conflict or violence. Given national attention to racial and other issues, it's to be determined if such consideration becomes wider in scope.

Hardwick ex rel. Hardwick v. Heyward (2013) is an example of a federal appellate court decision that considered whether a high school student has a First Amendment right to display a Confederate flag on the student's clothing while at school. In *Hardwick*, applying the *Tinker* “substantial disruption” test, the court ruled that there was ample evidence that the Confederate flag image could excite racial tensions at the school and create a substantial disruption of the school environment. Hardwick wore several different shirts over a period of years, including “Southern Chick” and “Honorary Member of the FBI: Federal Bigot Institutions.”

According to the court record, at times she followed school officials' requests to change her shirt, and at other times she served in-school suspension for refusing to change. Most of the shirts depicted a Confederate flag. She also wore a shirt displaying the American flag with the words “Old Glory” and “Flew over legalized slavery for 90 years.” Her parents finally requested that she be allowed to wear the shirts because of her heritage and religious beliefs. When the school district refused to relent, the parents sued. After she lost twice on different points in the trial court, in March 2013, the Fourth Circuit ruled against her, relying on *Tinker*.

This case differs in some respect to many cases because the court ruled that school officials could reasonably forecast a disruption due to the shirts, rather than agreeing that there was, in fact, a disruption. Hardwick argued that there was no disruption in the three years she wore the shirts, but the court rejected her position.

Other controversial issues have resulted in “T-Shirt” cases. When a student wore a shirt that said “Be Happy, Not Gay” in counterprotest to a gay rights “Day of Silence,” school officials reached too far in their attempt to prohibit the shirt. In *Zamecnik v. Indian Prairie School District No. 204* (2011), the court held that a school that permits the advocacy of the rights of homosexual students cannot silence the views of students who hold a different view. This is a tricky area for educators because during the expression of an opposing view, a line can be crossed at which the expression may be demeaning, derogatory, or even “fighting words.” Crossing that line is subject to interpretation and often triggers other legal arguments concerning freedom of speech and/or expression.

Such issues involve issues that go beyond the freedom of expression, because such freedom may actually be a form of harassment to other students or adults. This issue will be more fully addressed in Chapter 7 on sexual harassment.

Additional Dress Codes and Hairstyles

Many schools have grooming policies intended to improve school discipline and bring order to the classroom environment. Among the items prohibited by various school dress codes have been articles of clothing associated with gang activities, shorts, tight or immodest clothing, undergarments worn outside of clothes, sweat pants and jogging suits, torn clothing, baggy pants, night clothes, muscle shirts, halter tops, open-back blouses, and fur coats. Although some of these items of dress have been banned as a matter of taste, others have been outlawed to protect the students from becoming the victims of theft or violence. Mandatory school uniforms have also been upheld as constitutional, as in *Canady v. Bossier Parish School Board* in 2001.

Dress code and hairstyle policies have come under scrutiny due to concerns about racial and gender bias, with schools banning hairstyles predominantly worn by students of color, or having policies clearly directed at female students because their clothing items are described as “distractions.” Supporters of these students question the origins of the policies, challenging the basis of the rationale that Black hairstyles are somehow disruptive or unhygienic or that female student attire should be regulated because they are deemed a “distraction” instead of placing the focus on those who may be “distracted.” Principals should strongly consider the validity of their dress code policies regarding the potential of such racial and gender bias.

The issue rests between the balance of the interest of the school to mandate a dress code to keep “decorum” with any fundamental interest the student has to personal appearance, free expression, a right to privacy, and equal protection. The courts have not always agreed regarding the authority schools have to control students’ appearance. A federal court of appeals, in *Richards v. Thurston* (1970), ruled against a school dress policy, deeming that it was not a justifiable part of the education process. The next year, another federal court, in *Smith v. Tammany*

Parish School Board (1971), upheld the right of elementary and secondary schools to promulgate dress codes. The majority of decisions, including *Karr v. Schmidt* (1972), have recognized a constitutional protection for students to regulate their own appearance within the bounds and standards of common decency and modesty. Students have a constitutional right to wear clothing of their own choice, as long as their clothing is neat and clean and does not cause a material disruption of the education process. To be constitutional, a dress code must be reasonably related to the school's responsibility or its curriculum. The courts have tended to distinguish hairstyles from clothing and have indicated that restrictions on hairstyles are more serious invasions of individual freedom than are clothing regulations. However, courts do give schools wide discretion to regulate appearance in the interests of health, safety, order, or discipline.

There may be increased awareness of Title IX implications with dress codes. In *Hayden v. Greensburg Community School Corporation* in 2014, a hairstyle policy that applied to a boys basketball team, but not the girls team, was struck down by the court. The court held that the policy to maintain a "clean cut" image was gender discrimination.

Physical Acts of Protest and the Right to Freedom of Assembly

Most people are familiar with a variety of physical gestures used by groups or individuals to express an idea, concept, opinion, or contempt. Although most would agree that obscene, disrespectful, or obviously annoying gestures should be banned from schools, policy should be based on the degree to which such gestures impinge on the rights of others and their likelihood of creating substantial disruption.

Students' freedom-of-assembly rights are protected by the First Amendment; however, the *Tinker* decision made it clear that students' First Amendment rights are protected only so long as they do not substantially disrupt the education process. Schools are well within the scope of their authority to adopt rules that restrict student gatherings to nondisruptive times, places, and behaviors.

A school that allows students to gather, even peacefully, whenever they wish may not function efficiently or effectively. On the other hand, a school that does not allow adequate time for students to meet and discuss relevant issues, or that denies use of school facilities for such assemblies outside regular school hours, clearly discourages one of the most fundamental perquisites and options of good citizenship.

The key to distinguishing between the use and abuse of the students' right to assemble peacefully, then, lies in balancing the fundamental nature, necessity, and usefulness of the freedom itself with the duty to carry out the education process effectively.

In the wake of national protests surrounding civil rights issues, including students "taking a knee" before school events, principals must recognize that such protests, absent some actual substantial disruption of school, are likely to be upheld as permissible should principals attempt to restrict the speech. The "taking of a knee" is controversial and provoking to many people, but principals should be wary of the use of prior restraint when attempting to restrict such

speech. Merely because someone may be offended or does not like the speech in question is not a valid reason to prevent the speech, and such action may not be enforceable. The concept of the “heckler’s veto” is discussed later in the chapter.

Likewise, student activism raising awareness of school violence led to a National Walkout Day in 2018. Many school districts offered proactive guidance on how the day would be handled in their school districts, informing parents of procedures that would be in place to excuse their students should they wish to participate in the walkout. Many school districts took those measures not in support of the walkout, but to avoid a potential clash with First Amendment concerns. Perhaps instructive for any such events in the future comes from a settlement made by a Kansas school district, which apologized to several students who participated in the walkout and were removed from a stage during student speeches. The district had originally agreed that although they would not sponsor the walkout, they would not punish students for participation, but at one school, administrators began to silence student speakers if they mentioned gun violence. One student was sent home for her speech, and the protest was stopped. After facing litigation, the district agreed to apologize to the students, provide First Amendment training for administrators and teachers, and adopt policies to prevent such action in the future (ACLU, 2019).

School Mascots

With the changing awareness of the importance of symbols in communicating values, a number of school districts have found their mascots the targets of community attacks. For example, in *Crosby v. Holsinger* (1988), the principal of a Virginia high school decided to discontinue the use of a cartoon figure named Johnny Reb as the school’s mascot because of complaints that it offended Black students. A group of students protested the principal’s decision as a violation of their First Amendment rights. Although the lower court ruled in favor of the students who wished to retain Johnny Reb as their mascot, a federal appeals court ruled in favor of the principal. The appeals court recognized that school officials need not sponsor or promote all student speech and that because a school mascot may be interpreted as bearing the school’s stamp of approval, the principal was justified in mandating a change that would not offend a segment of the student population.

A decades-long effort to eliminate Native American mascots, branding, and imagery has recently gained momentum and relates to student rights because these mascots and imagery in schools intersect and clash with school antibullying policies and the rights of students to be free from the hostile learning environment such imagery creates. For over fifteen years, the American Psychological Association (APA) has recommended removing Native American mascots, symbols, and imagery from schools (APA, 2005).

Efforts should not be limited to changing names considered by some to be the most offensive, as research has demonstrated negative effects on all students even when imagery and branding is intended to be honorable and positive (KANAE, 2021). Perhaps the issue is becoming more into focus, as leadership and mascot literature in research have not been fully in concert in the past (RedCorn, 2017). Principal awareness should be raised regarding this issue, acknowledging that their own school and district mission statements and policies promoting “inclusion”

or “culturally responsible curriculum” are at odds with what the research has shown with the negative effects of such imagery. Native American mascots are harmful for all students, not just Native American students (Kim-Prieto, Goldstein, Okazaki & Kirshner, 2010).

Some school districts that have moved from Native American imagery have considered the issue from an antidiscrimination policy approach, which is a proactive approach to avoid potential litigation alleging bullying and harassment or equal protection claims (RedCorn, 2021). The issue meets bullying and harassment policies as well as social–emotional learning head on. As with other issues that intersect with school and society as a whole, principals should consider how the continuance of Native American mascots violates the core values of the school and community.

Gang-Related Regalia and Behaviors, Cults, and Satanism

Many communities have to contend with gang activity that can cause substantial interference with school programs and activities. Because students announce their membership in a gang by wearing certain colors or emblems, students in some communities in which gang activity is a serious problem have responded by wearing only neutral colors. Many school administrators have revised their student dress code policies to prohibit the wearing of gang colors or emblems. In doing so, these administrators have re-raised the legal questions regarding whether students have the right to choose their own dress styles and whether schools can limit that right. Those school districts that have adopted rules prohibiting the wearing of gang symbols and jewelry believe that the presence of gangs and gang activities threatens a substantial disruption of the schools’ programs.

In a suit challenging the constitutionality of an antigang policy, a high school student claimed that the policy violated his right of free speech under the First Amendment and his right to equal protection under the Fourteenth Amendment. The court, in *Olsen v. Board of Education of School District 228, Cook County, Illinois* (1987), affirmed the district’s right to enforce the dress code, saying that school boards have the responsibility to teach not only academic subjects but also the role of young men and women in a democratic society. It went on to say that students are expected to learn that, in our society, individual rights must be balanced with the rights of others. The court’s decision indicated that the First Amendment does not necessarily protect an individual’s appearance from all regulation. When gang activities endanger the education process and safety of students, schools have the right to regulate students’ dress and actions during school hours and on school grounds.

Regulations in the areas of gangs and other groups must be specific. Courts have found some districts’ policies unconstitutionally vague. One court, in *Stephenson v. Davenport* (1997), held that the absence of important definitions for terms including *gang* provided administrators with too much discretion in determining how to *define* a symbol. As a result, the school district’s rules did not adequately define those terms that would alert students and others to prohibited symbols.

SECTION B. ORAL AND WRITTEN EXPRESSION

*Students' rights to exercise freedom of expression in the school environment have undergone several major transformations. Court decisions upholding schools' rights to set certain limits on student speech reflect a changing interpretation of the First Amendment. Historically, there has been disagreement over the way this amendment should be applied. Some believe that the First Amendment was written primarily to protect citizens from being punished for political dissent. Others take the broader view that the First Amendment extends protection to all expression except overt, antisocial, physical behavior. Oliver Wendell Holmes's "clear and present danger" doctrine, as declared in *Gitlow v. New York* (1925), states that speech loses its First Amendment protection when it conflicts with other important social interests. Even proponents of a "full protection" theory of freedom of speech set limits on speech. For example, obscene telephone calls, threatening gestures, disruptive heckling, and sit-ins have been classified as "actions" rather than protected expression.*

Oral Communication

The Supreme Court has relied primarily on two tests to determine whether schools may control freedom of speech or expression. The first is the "clear and present danger" doctrine handed down through *Gitlow*. The second is the "material and substantial disruption" doctrine that derives from the *Tinker* decision. More recent courts have expanded the rationale for schools to limit students' freedom of speech when obscenity is involved.

In a landmark SCOTUS case, a student was suspended for delivering a speech nominating another student for elective office and including a graphic sexual metaphor. Two teachers had warned the student not to deliver the speech, but he proceeded to do so anyway. The student brought suit on First and Fourteenth Amendment grounds. The Court, in *Bethel School District No. 403 v. Fraser* (1985), said that although students have the right to advocate unpopular and controversial rules in school, that right must be balanced against the school's interest in teaching socially appropriate behavior. The Court observed that such standards would be difficult to enforce in a school that tolerated the "lewd, indecent, and offensive" speech and conduct that the student in this case exhibited.

Written Communication

Student Writing in Journalism Classes and Productions

Student journalists have the same rights and responsibilities as any other journalists. There are limits on what adult journalists can write and identified consequences for such actions as copyright infringement and plagiarism, false advertising and the advertising of illegal products, inflammatory literature, obscenity, libel, invasion of privacy, fraud, and threats. Unlike regular newspapers and magazines, school newspapers are considered to be nonpublic forums and are thus subject to reasonable censorship by school officials.

Just as the right of students to express themselves orally has undergone recent modification, their right to freedom of written expression has also been modified, most notably in the landmark case of *Hazelwood School District v. Kuhlmeier* (1988). The *Hazelwood* case involved a principal who deleted two full pages from the student newspaper produced in the journalism class. In his view, the deleted pages contained two “objectionable” articles that he characterized as “inappropriate, personal, sensitive, and unsuitable.” The U.S. Supreme Court held that the First Amendment does not prevent school administrators from exercising editorial control over the style and content of school-sponsored student newspapers. The Court reasoned that high school papers published by journalism classes do not qualify as “a public forum” open to indiscriminate use but one “reserved . . . for its intended purpose as a supervised learning experience for journalism students.” School officials, therefore, retain the right to impose reasonable restrictions on student speech in those papers, and the principal, in this case, did not violate students’ speech rights.

The “public forum doctrine” was designed to balance the right of an individual to speak in public places with the government’s right to preserve those places for their intended purposes. Although there is considerable doctrinal conflict in recent public forum cases, the *Hazelwood* court placed school-sponsored activities in the middle ground of a “limited public forum.” Although speech cannot be regulated in a public forum, it can be regulated in a nonpublic forum, and school-sponsored speech may be regulated if there is a compelling reason.

The Court also drew a “two-tiered scheme of protection of student expression; one for personal speech, and the other for education-related speech.” According to the *Hazelwood* decision, personal speech of the type discussed in *Tinker* is still protected by a strict scrutiny under the material and substantial disruption standard. However, speech that is curriculum related, whether in a class, an assembly, a newspaper, or a play, may be regulated. Such speech is protected only by a much less stringent standard of reasonableness.

Some states have affirmed student press rights in light of *Hazelwood*, which for some principals may actually be welcomed. Being legally permissible is not the same as being an advisable, necessary, or mandated practice. Certainly there may be valid reasons for school administrators to intervene at times when certain topics may become highly disruptive to the school environment. Principals should ask themselves if they truly want to add the responsibility of newspaper editor to their list of duties. It is a slippery slope once a principal decides to be the content editor because such action will ultimately raise questions of why one story was included while another was not; why one sports team received a longer story than another sports team; or whether the school newspaper was expressing the viewpoint only from the perspective of the principal. Such decisions are better left to the instructor or sponsor of the student publication.

In states that have not guaranteed additional protections for student publications, the involvement of school administrators as publication gatekeepers may create unintended consequences that put into question the action taken. A school principal in Texas censored articles, imposed a highly restrictive prior review policy, banned student editorials, and justified the decision by stating that the school newspaper reflected badly on the school (Dieterich & Greschler, 2018). In addition, the contract of the highly recognized advisor was not renewed. After a year of negative national backlash, the principal reversed the policy and would

no longer require students to submit their stories prior to publishing. Student journalists from the school felt that in the end the policy was changed before the negative publicity became even worse.

In Nebraska, a high school journalist published an article in the local newspaper after the school principal would not allow a story to be published in the school newspaper. The story involved student reactions to the theft of a Confederate flag displayed on a truck in the school parking lot (Schatz, 2021). The principal would not permit the story to be published due to what he called “inaccuracies,” but the student was steadfast in defending her reporting. After multiple revisions and attempts to gain approval, the student decided instead to have the article published outside of school.

In what some viewed as ironic, the initial efforts to ban displays of the Confederate flag were viewed as censorship by the administration. Instructive from this incident is how quickly free speech issues can become seemingly inconsistently regulated; how is the removal of Confederate flags from school grounds deemed a form of censorship, while it is not considered censorship to ban the publication of a school newspaper article about Confederate flags?

Many schools permit students to solicit advertisements to be placed in school-sponsored publications. Problems can arise when school authorities determine that the content of an advertisement is inappropriate for a school paper. A federal court, in *Williams v. Spencer* (1980), found that protecting students from unhealthful activities was a valid reason to justify the deletion of a paid advertisement for drug paraphernalia in a student newspaper. The court affirmed the right of the school to prevent any conduct on school grounds that endangers the health and safety of students and upheld the prior restraint of material that encouraged actions that might endanger students’ health or safety. Based on this decision, schools may restrict advertisements that promote unhealthy or dangerous products or activities.

Schools have also been concerned about advertisements that promote controversial points of view. In *San Diego Community Against Registration and the Draft v. Governing Board of Grossmont Union High School District* (1986), the court ruled that a school board cannot, without a compelling interest, exclude speech simply because the board disagrees with the content. Specifically, the school board cannot allow the presentation of one side of an issue but prohibit the presentation of another viewpoint. Because a school newspaper is clearly identified as part of the curriculum rather than a public forum, the school has greater latitude in regulating advertisements.

Courts that have supported schools’ rights to regulate student newspapers have made a distinction between off-campus and on-campus publications. Courts have generally held that school authority is limited to school grounds, and school officials do not have the power to discipline students for distributing underground newspapers off-campus (see, e.g., *Thomas v. Board of Education*, 1979).

However, some of the rules that apply to sponsored publications also apply to unofficial student publications. Unofficial publications must not interfere with the normal operation of the school and must not be obscene or libelous. Although students have the right to express themselves, schools retain the right to regulate the distribution of materials to protect the welfare of other students.

Freedom of Expression and the Concept of the “Heckler’s Veto”

Prior restraint is generally defined as official government obstruction of speech prior to its utterance. As agents of the state, school districts or their agents may not exercise prior restraint unless the content of the publication or speech

- Would result in substantial disruption of the education process
- Is judged to be obscene or pornographic
- Libels school officials or others
- Invades the privacy of others

Courts have ruled that a school board is not required to wait until the distribution of a publication takes place to determine whether any of these criteria have been met. Schools have the right to establish rules on prior review procedures as well as standards regulating the times, places, and manner of distribution of student publications. If a school chooses to establish rules that govern the distribution of student publications, these rules must be reasonable and relate directly to the prevention of disruption or disorder.

The concept known as the “heckler’s veto” should be recognized by school authorities as they take actions against students when there are free speech issues. The heckler’s veto takes away the rights of the speaker and gives greater power to anyone who may be offended by the speech. This is an important concept when administrators attempt to determine whether student speech or actions have caused or have the potential to cause a disruption of the school. Is the potential or actual disruption the fault of the speaker or those who are creating the disruption? Student speech cannot be suppressed for the sole reason that someone may be offended or create an outburst in response to the speech.

As principals try to sort out incidents in their schools, they must consider both sides of a controversy and decide whether the heckler’s veto is relevant to the circumstances. Although the courts recognize the difficulty for school authorities as they try to maintain school climate, protected student speech under the *Tinker* standard remains protected unless there is an actual disruption or there are specific facts to reasonably conclude that there would be disruption. Such was the case in *West v. Derby Unified School District No. 260* (2000), in which the court ruled that given the school’s history of racially charged fights, a student could be punished for drawing the Confederate flag during class.

Speech cannot be suppressed by being labeled disruptive simply because it attracts attention or invites disagreement. In *Barber v. Dearborn Public Schools* (2003), there was some concern that Barber’s shirt calling President George W. Bush an “International Terrorist” would offend Iraqi students, but no evidence to that effect was presented. In *K. D. ex rel. Dibble v. Fillmore Central School District* (2005), school officials were told they could not ban a shirt that said “Abortion Is Homicide” until “such time, if ever” they could demonstrate that the shirt caused a disruption.

School officials must be sensitive to the arguments surrounding the heckler’s veto concept. For school authorities concerned with potential or actual disruption, in order to side on speech protection, one court offered,

The “heckler’s veto” rule does not limit Defendants’ authority to maintain order and discipline on school premises or to protect . . . students and faculty. *Tinker* [is] designed to prevent Defendants from punishing students who express unpopular views instead of punishing the students who react to those views in a disruptive manner. (*Boyd County High School Gay Straight Alliance v. Board of Education*, 2003)

Similarly, in a vigorous dissent in *Harper v. Poway Unified School District* (2006), Ninth Circuit Judge Alex Kozinski wrote, “I must also mention the incongruity of prohibiting speech because others respond to it with violence. . . . Maybe the right response is to expel students who attack other students on school premises.” Further, he stated, “Any speech code that has at its heart avoiding offense to others gives anyone with a thin skin a heckler’s veto—something the Supreme Court has not approved in the past.”

SECTION C. PRIVACY, SEARCH, AND SEIZURE

Principals must be as equally aware of the importance of student rights related to privacy, search, and seizure as they are to those related to student expression. As complex as speech issues can be, principals may find that those related to search and seizure create even greater dilemmas, especially due to the fact that the searching of students may yield contraband that requires the involvement of law enforcement.

Because of school safety concerns, principals are frequently confronted with decisions related to searching for weapons and drugs. Principals may also find themselves needing to search for other reasons not related to school safety, and all searches have their own circumstances that bring layers of complexities to consider such as the age and gender of the student and whether the search involves the possessions of the student or the student themselves. Principals frequently must make immediate judgments because the gravity of the situation could result in serious harm to the student or others. But principals may also be responsible for conducting suspicionless or random searches mandated by local policy.

Principals must also recognize that not only is the Fourth Amendment concerned just with search rights but it also involves the concept of *seizure*—and detaining or restraining students must also be done in a manner that does not run afoul of that right. These rights are considered within the general idea of a student’s right to privacy, which is balanced against the legitimate needs of the school to provide a safe and orderly environment.

The *in loco parentis* concept—namely, that school officials act in place of the parents and not as agents of the state—is used as the basis for some court rulings regarding search and seizure. However, in some more recent cases, courts have rejected the *in loco parentis* argument as being out of touch with contemporary reality, affirming that schools act as representatives of the state and not as surrogate parents.

Principals acting with malice toward a student or in ignorance or disregard of the law may be held liable for violating a student’s constitutional rights. Absent these conditions, the principal has general immunity.

Students may willingly waive their rights of privacy under the Fourth Amendment. However, this waiver must be given free of even the slightest coercion. Principals are not protected from liability because students give permission for any kind of search. Courts have determined that students cannot freely give consent to a search because they are expected to cooperate in a school setting.

In an emergency situation, when school authorities are faced with a situation that demands immediate action to prevent injury or substantial property damage, the requirements of the Fourth Amendment are relaxed.

Proper or Improper Search and Seizure

The Fourth Amendment to the Constitution guarantees the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures without probable cause. In *Mapp v. Ohio* (1961), the U.S. Supreme Court ruled that the Fourth Amendment protects citizens from the actions of state as well as federal governments.

The U.S. Supreme Court ruled, in the case of *New Jersey v. T.L.O.* (1985), that the Fourth Amendment applies to school searches and seizures. In this case, although the student herself lost her individual case, the *T.L.O.* decision affirmed that students have Fourth Amendment protections at school. Although this decision left some questions unanswered, it did give educators some guidance, and that guidance is required, not merely suggested.

Prior to conducting any search, principals must adhere to the two-part legal standard required by *T.L.O.*, asking themselves if the search is both (1) *justified at its inception* and (2) *permissible (reasonable) in scope*. In practice, this means principals must determine whether they have a legitimate (reasonable) reason to initiate a search (inception), and then they must determine how intrusive their search will be (scope).

Therefore, whenever a principal or other government actor (school official) decides to search a student, the person conducting that search—or asking that the search be conducted—must mentally ask themselves “Why am I doing this search? . . . Is this justified? . . . Do I have a valid reason to do this search?” If the answer is “no,” then a search should not be conducted.

If the answer is “yes,” then the next questions to be asked could include “How far am I going to take this search? . . . Am I going to need to pat down (touch) the student? . . . Am I going to ask the student to remove a clothing item? . . . Am I going to reach inside a bookbag the student won’t empty?”

Expanded further, answering the following questions prior to conducting a search helps school officials in particular situations determine whether a search is justified at its inception and reasonable in its scope:

1. *Is there reasonable suspicion that a student has violated a law or school policy?* Before conducting a search of a student’s person or property, including school lockers, a school official must have a reasonable suspicion that a student has violated a law or school policy and, in conducting the search, the school official must use methods that are reasonable in scope. The search must be reasonably related to the objectives of the search and

not excessively intrusive in light of the age and gender of the student and the nature of the infraction. Considerations of student age, gender, and emotional condition are directly applicable as inhibitions to searches that must be justified by reasonableness.

2. *Was the source of information suggesting the need for a search reliable and credible?* A school official's good judgment applies to the determination of whether the information recommending the need for a search came from a reliable source. The courts have generally agreed that school officials may reasonably rely on information by school personnel or by a number of students, but information from a single student or from an anonymous source should be weighed more carefully before any action is taken.
3. *Does the school official's experience or knowledge of the student's history provide reasonable suspicion to justify a search?* Reasonable suspicion would be based on the details of the information and whether those details are credible in the current overall situation. Reasonable suspicion may be based on the school official's knowledge of the student's history or on the official's experience.
4. *Is the intended search method reasonable in relation to the objectives of the search and the nature of the suspected infraction?* Once the school official has met the standards of reasonable suspicion, reasonable scope is considered. The place or person identified through reasonable suspicion has a direct bearing on the scope of the search.
5. *Is the intended search method not excessively intrusive, given the nature of the suspected infraction?* The closer the searcher comes to the person, the higher the intrusiveness and, as a result, the stronger that reasonable suspicion must be to justify a search. The highest degree of intrusiveness would be the strip search of a person. The lowest degree of intrusiveness would be the search of an inanimate object such as a locker.

A school official's reasonable suspicion that a search will reveal evidence that a student has violated or is violating a law or school policy is a less rigorous test than the probable cause required for a police officer to obtain a search warrant. In an education setting, a school official may rely on their good judgment and common sense to determine whether there is sufficient probability of an infraction to justify a search. Furthermore, the level of suspicion may vary depending on the circumstances of the particular situation. In emergency situations that are potentially dangerous or where the element of time is critical, less suspicion is necessary to justify a search (e.g., the suspected presence of a weapon or explosive device or of drugs that might be quickly disposed of).

School Employee Versus School Police Searches

Although both public school employees and law enforcement officers are considered government actors and therefore are required to follow the Fourth Amendment protections, school administrators follow the lesser standards of "reasonable suspicion" rather than the "probable cause" standards required of law enforcement. Courts will still scrutinize the conditions surrounding any search. To determine whether a search is reasonable, the courts consider the magnitude of the suspected offense and the extent of the intrusiveness to the student's privacy. To

establish reasonable suspicion, a school administrator must have some evidence regarding a specific suspicion that would lead a reasonable person (experienced school administrator) to believe that something is hidden in violation of school policy. In addition, the Fourth Amendment clearly states that the issuance of a warrant must “describe the place to be searched and the persons or things to be seized.” Even though school administrators may conduct a warrantless search, they must be guided by a degree of specificity, for example, What is the suspected offense? Do I have definitive knowledge of where the suspected contraband is located? Do I know who the subjects in question are?

The most common searches principals conduct are personal searches of an individual student, the possessions or property of an individual student, or the property of the school district assigned to an individual student. Becoming more common are searches of electronic devices such as cell phones, tablets, and computers. In addition, some school district policies or special circumstances call for searches that do not have individualized suspicion, such as locker sweeps or sobriety checks before entry to an activity. Drug testing of students involved in sports or other extracurricular activities has long been routine in many school districts across the nation.

In 2017, a court held that the search of a student after he arrived thirty minutes late to school did not meet the requirements under *T.L.O.* The fact that all late-arriving students were uniformly subjected to suspicionless searches was not persuasive to the court. Student tardiness, standing alone, does not establish the requisite reasonable suspicion required to conduct a search (*State v. Williams.*, 521 S.W.3d 689 Mo. Ct. App. 2017).

Searches Based on Individual Suspicion

Nearly every principal may frequently be faced with a decision to conduct some type of search based on individual suspicion—from actual knowledge they have themselves having witnessed some action by a student; through information gained from other sources; or by the circumstances related to some type of incident involving the student. Among the most common of these searches are the following:

Pocket and pat-down searches. When a school employee actually touches a student’s clothing while engaged in a search, the search becomes more invasive. The risks of this type of search increase if it is conducted by a person of the opposite gender. Courts have warned that because this type of search may inflict indignity and create strong resentment, it should not be undertaken lightly. Even though the search of a student may be justified at its inception, principals should strongly consider and evaluate the scope of search of any student.

Strip searches. The most controversial search of students is the strip search. There have been situations in which school officials have ordered students to remove their clothes down to or including the undergarments in a search for stolen money, illegal drugs, or weapons. Although *T.L.O.* did not directly address strip searches of students, the two-part legal standard from the case was used in a U.S. Supreme Court case in 2009 involving the strip search of a thirteen-year-old female student. In *Safford Unified School District #1 v. Redding* (2009), the

Court held that a strip search of a student requires three distinct elements of justification:

1. A significant and immediate danger to students
2. Individualized suspicion based on reliable, specific evidence
3. Reason to believe the strip search will yield the contraband

Even though in most strip search cases, the boys and girls were placed in separate rooms and searched by school personnel of the same gender, the courts have generally condemned strip searches in the public schools as impermissible and, since *Safford*, school officials have been put on notice as to the denial of immunity under Section 1983.

In 2018, a Fifth Circuit opinion held that the strip searching of twenty-two pre-teen girls in an attempt to find missing money was a violation of their Fourth Amendment rights and that the school district acted with deliberate indifference by failing to train administrators regarding the constraints of strip-searching students (*Littell v. Houston Independent Sch. Dist.*).

A body cavity search is the most intrusive type of search and should *not* be conducted by school employees. Such a standard has even applied to school medical personnel. A school nurse was denied qualified immunity for conducting an examination of the genitals of an elementary student after learning the child possibly had a urinary tract infection. The court agreed with the parents that the examination was an unreasonable search and not within the purview of the nurse's duties (*Herring v. Sliwowski*, 2012).

Some states have recently passed legislation requiring some type of "genital inspection" to "verify gender" of students, specifically transgender students, when their participation is questioned for athletic participation. Challenges to these recent laws will surely be made in the courts based on the privacy issues involved.

Student-owned devices such as cell phones. When a principal is considering conducting a search that involves a student-owned device, most typically a cell phone, a distinction to keep in mind is that there is a difference between searching *for a device* and searching *the contents of a device*. Searching *for* a student bookbag and then searching *the contents* of a bookbag is not entirely analogous to the searches related to cell phones or other devices.

Confiscation of student cell phones and other devices fall under the Fourth Amendment, and the standards of *T.L.O.* apply when considering the taking of a device from a student. As with any search of a student, the decision to search for an electronic device must be justifiable at its inception and reasonable in scope. The search for electronic devices conducted by school police would require the higher standard of probable cause. Except in cases of imminent danger, strip-searching a student for an electronic device would be prohibited.

The decision to search the *contents* of a student-owned device also falls under the standards of *T.L.O.*, however; the additional scrutiny in deciding to initiate the search as well as the scope of the search must be undertaken. The justification to search the contents of a cell phone must be based on a reasonable suspicion that the

search would yield necessary information related to whatever is being investigated. A student arriving tardy to class or causing a disruption of some type in class is not a proper justification to initiate a search of the contents of a student-owned device. Although there may be circumstances where searching the contents of a device is justifiable when there is a possible imminent danger to others, it should be remembered that a cell phone in and of itself causes no imminent danger.

Principals should not search the contents of a confiscated cell phone in an attempt to catch violations by other students. A federal court in *Klump v. Nazareth Area School District* (2006) ruled against a school administrator who searched the phone of a student who was caught in violation of school policy that prohibited the display or use of a cell phone during school hours. The administrator searched messages and the directory in the phone and contacted several students in order to determine if other students were also in violation of the policy. The court determined that the confiscation of the cell phone was justified, but the search of the phone was not reasonable in scope because the administrator had no reason at the outset to suspect the student had violated any other policy.

Although this area of law is still emerging, demanding social media usernames and passwords to student accounts and searching the contents of students' devices without their knowledge or permission is likely to be prohibited, as found in *R. S. v. Minnewaska Area School District No. 2149* (2012).

In 2014, the U.S. Supreme Court in *Riley v. California* was emphatic in their decision that police could not conduct warrantless searches of the contents of cell phones of criminal suspects in their custody. Although the case was not related to an educational setting, the unanimous decision of the Court may be an indication of how the Court might apply such searches in an educational setting. The Court concluded that cell phone and other devices were such a major aspect of life that their contents should be considered different from searching occasional items. Therefore, returning to the comparison between bookbags and cell phones, there is a clear recognition that cell phones are more personal in nature and not tantamount to a container. For that reason, principals must very carefully weigh their justifications when deciding to search the contents of a cell phone.

There may be some circumstances in which the search of an electronic device is reasonable based on information provided by a student, for example, in cases of potential imminent violence, threats, or other circumstances that may cause harm to individuals.

In a case that illustrates numerous student search guidelines, a Virginia court in 2014 upheld a pat-down search of a student but ruled that searching the contents of his cell phone constituted an illegal search (*Gallimore v. Henrico County Sch. Bd.*). After receiving a tip from parents that a student was seen smoking marijuana on a bus, the student was searched by a group of administrators. His pockets, shoes, and backpack were searched, uncovering food wrappers and a Vaseline jar. Another administrator searched the contents of his cell phone. The court held that under *T.L.O.*, the search of the student and his backpack was justified at its inception, based on their knowledge of the student, the parental tip, and the fact that marijuana could have been hidden in those places. However, searching the contents of the cell phone exceeded the scope of a reasonable search initiated to find drugs, because the cell phone could not have contained the drugs.

The judge stated that “common sense” dictated that the administrator could not claim to be looking for marijuana by searching the contents of the cell phone.

In a more recent decision, the Eleventh Circuit affirmed a lower court decision that held that the search of a student cell phone contents did not violate clearly established law. In *Jackson v. McCurry*, the court determined that even if the search of messages on a student cell phone was an improper search, the administrator would have qualified immunity because such search guidelines are not clearly established law. The phone was searched after a student had been accused of making threats and harassing another student. The administrator asked the student to unlock the phone, and once she did, he searched numerous messages from different individuals. This was justified as reasonable in scope because the messages were under emojis rather than identifiable names. The search did not result in finding any offending messages and the phone was returned to the student.

The parent of the student claimed the search was illegal, but the court held that the search was justified at its inception because of the allegations involved, and that the scope of the search was allowed because the contacts included emojis and nicknames, and expanding the search was reasonably related to the objectives of the search. The court distinguished the case from *Riley* by holding that the case did not involve search warrants, and that other student cell phone search cases where the search was held as impermissible were also distinguishable due to the elements of the cases.

School district-owned devices. There is typically no expectation of privacy when students are using district technology, and students typically agree to an acceptable use policy each time they sign on to district-owned devices either distributed to students to use off-premises or devices accessed on campus.

Locker searches. There is some question about whether a search of a student’s locker falls within the protection of the Fourth Amendment. The Fourth Amendment protects only a person’s reasonable expectation of privacy. Therefore, some courts have ruled that because students know when they are issued a locker that the school administrator keeps a duplicate key or a copy of the combination, their expectation of privacy in the locker is so diminished that it is virtually nonexistent. Courts have noted that students have use of the lockers, but the lockers remain the exclusive property of the school. School authorities, therefore, have both the right and duty to inspect a locker when they believe that something of an illegal nature may be stored in it or simply to remove school property at the end of the school year. Therefore, locker searches may be conducted with a fairly low degree of suspicion.

Before police or other law enforcement officials may search students’ lockers, they must have a search warrant. They must demonstrate “probable cause” as the basis to justify the issuance of a search warrant. This also holds true when a law enforcement official requests that school personnel do the actual searching. By acting with the police, the school official becomes an “arm of the state” and subject to due process requirements and illegal search and seizures sections of the U.S. Constitution; therefore, a search warrant is necessary. Evidence seized without a warrant will not be admissible in court.

Whether uniformed or plain clothed, school security personnel are generally considered by the courts to be law enforcement officers. As such, they must apply

the higher standard of “probable cause” (as opposed to “reasonable suspicion”) in conducting searches.

Student vehicles. The search of a student’s car, even when the car is on school grounds, is highly controversial. Because a car is privately owned, the search of a car is a greater invasion of privacy than the search of a locker. However, because the car is parked on school property, in public view, the expectation of privacy is reduced. Courts have, however, identified degrees of privacy. For example, objects in open view are less protected than objects in the trunk or glove compartment. Generally, principals will want to avoid searching a student’s car unless there is clear reason to believe that there is imminent danger either to the student or to others, should the student come into possession of the items.

Searches Without Individualized Suspicion

Some school districts conduct searches of students when there is no individualized suspicion of wrongdoing or policy violation, but conduct such searches as preventive or deterrent measures.

Metal detectors. In an effort to reduce the number of guns, knives, and metal weapons carried into schools, some school districts use metal detectors. School districts that use these devices argue that they are one of the less intrusive search techniques for searching for dangerous items, and the compelling need for school safety overrides the privacy concerns expressed by opponents of such searches. The use of metal detectors also raises the additional issue of whether or not faculty and staff will be subjected to the same search.

While not related to the legality of such searches, principals are cautioned that the use of metal detectors is not foolproof, and their use should not be relied upon as the sole means to prevent school violence.

Searches before activities. In their effort to prevent drug and alcohol use at proms or other activities, many school districts attempt to search all students prior to entry to activities. While principals are cautioned regarding these types of searches, a more defined clear line exists when the search may include pat downs or other touching of students without individualized suspicion. In New Mexico, suspicionless pat downs of prom attendees were prohibited from taking place after students brought suit (*Herrera v. Santa Fe Public Schools*, 2013).

Surreptitious video surveillance. The use of video surveillance conducted without the knowledge of those being observed is not recommended and has been struck down by courts. In an effort to improve school security, a Tennessee middle school installed video cameras throughout their building, including locker rooms. The locker room cameras were unnoticed for over six months and captured images and video of students from their school and competing schools changing clothes. In *Brannum v. Overton County School Bd.* (2008), the Sixth Circuit ruled that the scope of the search was not reasonable, and the use of secret surveillance significantly invaded the students’ reasonable expectation of privacy.

Dog sniff searches. A U.S. Supreme Court case has placed some question regarding the use of trained dogs used during law enforcement searches. In *Florida v. Jarines* (2013), the Court ruled that a trained dog taken by police without a warrant to the porch of a house that subsequently sniffed drugs amounted to an illegal search.

Because the case was decided on property rights rather than privacy rights, the application of the case to schools is not yet clear.

The Eighth Circuit Court of Appeals held in *Burlison v. Springfield Public Schools* (2013) that a random lockdown policy in Springfield, Missouri, was a reasonable procedure to maintain safety and security at school. As part of the policy, students are prohibited from leaving the classroom until directed by law enforcement, after which their belongings left behind are searched by drug-sniffing dogs. The case was appealed to the U.S. Supreme Court, but the Court chose not to hear the case.

In previous cases, the courts have been split on the legality of using dogs in a dragnet search of students. In the case of *Horton v. Goose Creek* (1982), the court held that because the canine actually touched the students while sniffing, the students' Fourth Amendment right to be free from unreasonable searches was violated. The court also found that the school district failed to establish an individualized suspicion of the students searched.

In *Doe v. Renfrow* (1979), the court held that the use of dogs to sniff out drugs was not a search within the meaning of the Fourth Amendment and, therefore, not a violation of the Fourth Amendment. This court's opinion seems to suggest that if a school district clearly establishes an individualized suspicion of certain students, then a use of dogs might be appropriate.

When school authorities find the use of dog sniffs necessary to combat a drug problem, it is suggested that they coordinate the proposed search with law enforcement officials who have search warrants. In addition, the use of dogs should be subject specific rather than a dragnet of all students and should be done in private.

Drug Testing of All Students

The Carlstadt-East Rutherford, N.J., School District was the first in the United States to adopt a policy under which all the students at a high school would be required to submit to a chemical test for the identification of illicit drugs. The test was part of a more comprehensive physical examination required of all students. A state superior court judge ruled the proposed program unconstitutional. In *Odenheim v. Carlstadt-East Rutherford School District* (1985), the court ruled that drug testing was an unreasonable search, and the school's interest in discovering student drug use did not justify the interference with student privacy that the testing program involved. The court also held that the school district's program violated the students' right to due process because of the possibility that the results of the test could lead to suspension or expulsion from school without following the usual rules for such actions.

Drug Testing of Students Involved in Extracurricular Activities

In the fall of 1998, the U.S. Supreme Court refused to hear *Todd v. Rush County Schools*, a case in which a lower court had held that it was constitutional for the district to test all students involved in extracurricular activities for drugs. Consequently, some school districts have adopted policies that require all students who wish to participate in extracurricular activities to agree to submit to a drug test. In 1999, the Court refused to hear the *Anderson Community Schools v. Willis*

by *Willis* case in which a high school's policy required all students who were suspended for fighting to be tested for drugs.

A 2002 U.S. Supreme Court decision illustrates the trend of the Court to place school safety over the Fourth Amendment protection of students. In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, a group of Oklahoma high school students and their parents challenged a district's policy that required all middle and high school students to consent to urinalysis testing for drugs in order to participate in any extracurricular activity. They argued that this policy resulted in an unconstitutional suspicionless search in violation of the Fourth Amendment. The Court held that the policy was a reasonable means of furthering the school district's important interest in preventing and deterring drug use among its students and therefore did not violate the Fourth Amendment. The Court reasoned that there is a limited expectation of privacy in extracurricular activities generally, and that drug testing and the use of the results were minimally intrusive.

Drug Testing of Athletes

Schools that test student athletes for drugs argue that the tests are preventative, not punitive. Most drug-testing procedures are similar in that they make participation in athletic programs conditional on consent to drug testing at the beginning of each season. Typically, a district randomly selects athletes for testing each week throughout the athletic season. Selection is made from the entire athletic team regardless of whether the student has already been tested that season. Once selected, students who refuse to be tested are treated as if they had tested positive for drugs.

In 1995, the U.S. Supreme Court considered the constitutionality of a school's program of mandatory drug testing for athletes. In *Vernonia School District 47J v. Acton*, the Court held that the Fourth Amendment permits school districts to randomly search high school athletes without cause through drug testing. The Court held that the standard for the search was reasonable and that future balancing tests include the reduced privacy expectations for athletes, appropriate safeguards for testing, and the compelling governmental interest demonstrated by the school to combat drug use and abuse.

Seizure of Property

Seizing property that belongs to students is covered by the Fourth Amendment. Recently the trend has been toward an increase in cases involving illegal seizures, some of which center on students with disabilities. There have also been challenges to random lockdowns of classrooms and challenges when school authorities have physically restrained students using force or devices such as handcuffs (*E. C. v. County of Suffolk*, 2013) or specially designed desks (*Ebonie S. v. Pueblo School District 60*, 2012).

Restraint of Students

The restraint of students also falls under the Fourth Amendment, and principals are under strong advisement to adhere to all statutes, policies, and regulations regarding student restraint and to ensure that their staff is properly trained in restraining

techniques when the decision is made to restrain a student. Detaining students is also a seizure, but does not have the same physical implications of student restraint.

In a 2017 case, a court allowed a case to proceed to trial against a school district where an employee allegedly dragged a first-grade autistic student across the classroom floor after de-escalation attempts failed to calm the student. The student suffered carpet burns as a result of the dragging by his ankles, which the court concluded was precisely done to restrain his freedom of movement (*K.G. v. Sergeant Bluff-Luton Community Sch. Dist. et al.*).

Putting hands on a student to restrict their movement is frequently challenged. Summary judgment for a teacher was denied in a case where a teacher was alleged to have forcibly grabbed the wrist of a student to prevent him from using a drinking fountain (*Young v. Mariscal*, 2017). In another case, an elementary student refused to sit at a table with a student who had previously bullied him and argued with a staff member. When the student tried to leave, the staff member blocked the student, bumped his chest, and knocked the student backwards. The student was then grabbed by the wrist, dragged to the table, and “slammed” onto the chair. A court allowed a Fourth Amendment claim to move to discovery in the case (*Jaythan E. v. Board of Education of Sykuta Elementary School et al.*, 2016).

SECTION D. GENDER IDENTITY

In light of recent efforts by legislatures that challenge the rights of transgender students, such rights should be highlighted. There are ongoing cases where teachers refused to use preferred pronouns of students, with teachers asserting such use violates their personal or religious beliefs. Still being weighed by the courts, a teacher filed suit in Indiana alleging discrimination and forceful resignation because his sincerely held religious beliefs prevented him from following a school policy that required him to address students by their preferred pronouns (*Kluge v. Brownsburg Cmty. Sch. Corp.*, 2020). In a similar case in Virginia, the courts have yet to rule on a case where a teacher was fired for refusing to call students their preferred name (*Vlaming v. West Point Sch. Bd.*, 2020).

For the purpose of this text, principals are reminded that such rights often clash, but framing that issue in a different light may help inform practice. Is any name absolutely gender specific or “belong” to a specific gender? Is the name of a student the criterion used to judge or determine the gender of a student, or are other criteria used? The question of which rights take precedence will likely take time to work through the legal system.

Several courts have made decisions regarding the use of restrooms by transgender students, with some noting that schools cannot punish a student for their nongender conformity. (See *Grimm v. Gloucester Cty. Sch. Bd.*, 2019; *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2019; *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd of Educ.*, 2017).

In 2020, the U.S. Supreme Court declined to hear a lawsuit aimed at barring transgender students from bathrooms and locker rooms that matched their gender identity (*Parents for Privacy v. Barr*, 2020). In 2021, the Court declined to review the appeal from Virginia in the Gavin Grimm case, which signaled a victory for the student in the case. These outcomes indicate an unwillingness by the Court to side with restrictions related to limitations of transgender rights.

Principals must be mindful that transgender students have the same rights as other students including protection against bullying and harassment; the right to same educational opportunities; and the right to present themselves according to their gender identity. A school cannot force a student to identify as the gender the school chooses. Their rights, as with all other students, are protected through Title IX, which bans sex discrimination in schools; through the Equal Access Act, which requires student organizations such as a Gay-Straight Alliance to be treated equally; and through FERPA, which protects their transgender status in terms of privacy. Protecting the privacy of the student is paramount, and it is up to the student, and not the school, to inform or not inform others about the gender identity of any student.

In the most recent developments in 2021, the U.S. Department of Education issued a “Notice of Interpretation” stating that the Office for Civil Rights (OCR) will enforce the Title IX prohibition on discrimination on the basis of sex to include discrimination based on sexual orientation and discrimination based on gender identity. This interpretation is based on the 2020 SCOTUS decision in *Bostock v. Clayton County* that held that discrimination against a person based on their sexual orientation or gender identity is discrimination on the basis of sex, which is prohibited under Title VI of the Civil Rights Act of 1964 (U.S. Department of Education, 2021a).

SUGGESTED GUIDELINES FOR PRACTICE

Finding the proper balance between maintaining a safe and orderly school while safeguarding the rights of students is not a simple task, and often there are no existing bright lines to help resolve those dilemmas. In general, however, some of the following suggestions may be good rules for practice.

Take precautions to ensure that efforts to avoid controversy or disruption do not result in silencing or muzzling sides of issues. A school climate in which ideas are suppressed may result in undesirable outcomes.

However, you must also ensure that while allowing more freedom of expression, other students are not targets of harassment or other victimization. Educators have not only a moral but a legal obligation to respond to as well as prevent such harassment.

Student expression cannot be banned merely because it may conflict with the personal views of school officials. As long as the actions of school

officials are not coercive or threatening, educators can advise students about such issues, but to summarily suppress student viewpoint expression that would fall under *Tinker*, *Fraser*, *Hazelwood*, or *Morse* guidelines would be prohibited.

When making decisions regarding student expression that is disruptive, school officials must be able to establish proof of an imminent or substantial disruption. Student expression that has taken place for an extended period of time that did not cause actual disruption but has instead merely tested the patience of the administration cannot later be justified as “disruptive.” Similarly, principals should make certain that it’s not their response to the expression and their actions that are the actual disruption of the school.

Preparation for the potential of peaceful student protest as well as potentially disruptive unauthorized protest is a proactive step that helps to minimize the likelihood of making mistakes when responding

(Continued)

to such protests. Even when schools don't formally "sponsor" or "endorse" peaceful student protests, providing avenues to do so may help prevent the potential for disruptive student protest.

Ensure that any acts by school officials to censor student expression are reasonable in light of the context in which the communication is expressed. There are differences between the classroom, clubs, assemblies, or other ceremonies. An invited graduation speaker may not be considered in the same light as a student speaking to a large assembly of students in the cafeteria during lunchtime.

Involve multiple parties in the development of school dress codes, including students, faculty, and staff. Paying careful attention to avoid dress codes that are overly focused on "female" attire helps to limit potential discriminatory practices. Reasonable dress codes generally supported by the courts are those that focus on health, safety, order, and decency, rather than those that focus solely on style, fashion, and personal taste.

Always consider if a student search is even justified to be undertaken in light of the circumstances and then always seriously consider how far you are willing to proceed in your search. If you have no justifiable reason to conduct a student search of any kind, to proceed with the search could be found to be an unreasonable search. Even fully justifiable searches could be prohibited if the scope of the search goes beyond what is reasonable in light of the circumstances.

Absent sufficient reason to search the contents of a student-owned device such as a cell phone, such a search would be ill-advised. Mere possession of a cell phone is not generally, in and of itself, a reasonable cause to search the contents of the device. School handbook policies should clearly state that the school may conduct a search of a device if there is reasonable suspicion that a search of the device will reveal a school policy violation.

Strip searching of students should not be undertaken; in the rare instance when such a search may be considered, it should only be conducted if there is reason to believe the search would protect the health and safety of the student or others. This language indicates that a strip search might be supported when searching for weapons, but not supported for searching for material items such as missing money.

Principals should always turn over to law enforcement any device where there is suspicion that pornographic images of minors may be involved. Should a principal discover such evidence, under no circumstances should the principal copy, share, store, or distribute such images, as doing so may be in violation of child pornography laws regardless of the motive of the principal.

There should be written policy and guidelines regarding student publications that are school sponsored and nonschool sponsored. Make sure such policies adhere to school board policy. Such policy should include the procedures that are to be followed in the event any prior review is deemed necessary.

Principals should be wary of becoming "editors" of school publications. Entrusting those responsibilities to qualified staff members is the best practice. Principals don't have the time to add such responsibilities to their job description, and doing so opens them up to criticism of their editorial decisions.

All school officials must recognize that all students, regardless of their sexual orientation or gender identity, enjoy the same rights as other students, which include the right to be free from harassment and discrimination. Although states have taken measures to restrict transgender students from restroom and locker room access, the courts have trended toward nullifying those restrictions. Although the courts will likely be asked to weigh in on transgender student athlete bans, in 2021 the OCR has indicated they will consider discrimination a violation of Title IX.

ADDITIONAL CASES OF INTEREST TO EDUCATORS

FREEDOM OF EXPRESSION

Blackwell v. Issaquena County Board of Education (363 F.2d 749, 5th Cir. 1966). In a case that today provides context for discussion, this case predates *Tinker* and involved Black students in Mississippi in 1965 who were suspended for wearing “freedom” buttons and others in support of the Student Nonviolent Coordinating Committee (SNCC). The school claimed the buttons caused disruption in the school, and the federal courts upheld their action by saying the interest of the school to prevent interference with school policies trumped the student speech rights.

Alabama and Coushatta Tribes v. Big Sandy School District (817 F.Supp. 1319 Tex. 1993). A school policy regarding the length of hair male students could wear was challenged by Native American students, who testified that their hair length was guided by their religious beliefs. The court was persuaded that the school interest in dress codes is not so compelling to overcome religious practice and belief.

Chandler v. McMinnville School District (U.S. Ct. of App., 9th Cir. 1992, 978 F.2d 524). Students filed suit after the school district prohibited the wearing of buttons in school supporting their striking teachers. The buttons were in protest of hiring replacement teachers and referred to them as “scabs.” An appeals court sided with the students, noting that the buttons should have been analyzed using a *Tinker* analysis because *Fraser* and *Hazelwood* precedents did not apply.

Palmer ex rel. Palmer v. Waxahachie Independent School (79 F.3d 502, 5th Cir. 2009). The U.S. Supreme Court declined to review a case involving a student who challenged school policy banning printed messages on t-shirts. Among the shirts the student wore was a shirt that said “Free Speech” on one side and the text of the First Amendment on the other. School officials may restrict speech that is considered content neutral. Although the student lost the case, the school district later relaxed the restrictions in its policy.

BWA v. Farmington R-7 School District (554 F.3d 734, 8th Cir. 2009). A court upheld a ban on Confederate flag clothing, citing a history of racially based discrimination and violence at the school.

Defoe ex rel. Defoe v. Spiva (625 F.3d 324, 6th Cir. 2010). Justified a ban on displaying Confederate flags at school.

Scott v. School Board of Alachua County (324 F.3d 1246, 11th Cir. 2003). Upheld decision to prohibit students from displaying a Confederate flag at school.

Bystrom v. Fridley High School Independent School District No. 14 (822 F.2d 747, 8th Cir. 1987). Underground newspapers can be controlled by school.

Rivera v. East Otero School District R-1 (721 F.Supp 1189, D.Colo. 1998). Students were determined to have a right to engage in political and religious speech in their distribution of an independent newspaper that advocated Christian principles for living.

Hedges v. Wauconda Community Unit Sch. Dist. No. 18, 1991 U.S. Dist. LEXIS 14873 (N.D. Ill. 1991). A court upheld a school policy that prohibited distribution of materials that were not primarily prepared by students. Allowing distribution of student self-expression enhances the educational mission, but to permit outside groups access to students uses the school as a convenient target audience.

DRESS CODE

Hines v. Caston Sch. Corp., 651 N.E.2d 330 (Ind. App. 1995). A court held that a policy banning males from wearing earrings served a valid educational purpose.

Littlefield v. Forney Independent Sch. Dist., 268 F.3d 275 (5th Cir. 2001). Mandatory school uniform policies do not violate free speech rights even though the policy may limit expression. Such policies enhance the school district interest in the educational process.

Canady v. Bossier Parish School Board., 240 F.3d 437 (5th Cir. 2001); *Littlefield v. Forney Independent School District.*, 268 F.3d 275 (5th Cir. 2001). These decisions upheld school district school uniform policies.

FOURTH AMENDMENT

Beard v. Whitmore Lake School District, 402 F.3d 598 (6th Cir. 2005). The strip search of twenty-five students—in an attempt to find missing money—lacked individualized suspicion, and a search undertaken to find money serves a less weighty government interest than one undertaken for items that pose a threat to student safety.

Camreta v. Greene, 131 S.Ct. 2020 (2011). Although the U.S. Supreme Court discarded a Ninth Circuit Court of Appeals ruling on technical grounds, it did not rule on the merits of the case as to whether authorities needed a search warrant to interview students at school regarding sexual abuse allegations. The question concerns whether police or social worker interviews absent a warrant, parental consent, or a court order constitute a “seizure” under the Fourth Amendment.

Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316 (U.S. Ct. of Appeals, Seventh Cir., 1993). In an exception to many strip search decisions, a court held that the strip search of a student believed to be in possession of drugs due to a noticeable bulge in his pants was not illegal. The court noted that as the intrusiveness of a search intensifies, so does the standard for reasonableness of the search. Therefore, a less intrusive search may be based on justifiable grounds that could be insufficient for a strip search.

DesRoches v. Caprio and School Board of Norfolk, 156 F.3d 571, 129 Educ. L. Rep. 628 (U.S. Ct. of Appeals, Fourth Cir., 1998). The school had reasonable suspicion to search student’s backpack for stolen tennis shoes.

Hough v. Shakopee Public Schools, 608 F. Supp. 2d 1087 (D. Minn. 2009). Daily searches of students and belongings, including student pat downs, were considered overly intrusive and prohibited under the Fourth Amendment.

In the Matter of T. A. S., 713 S.E. 2d 211 (N.C. Ct. App. 2011). Daily searches of students at an alternative school were allowed, but strip-searching without individualized suspicion was prohibited.

Isiah B. v. State of Wisconsin, 176 Wis. 2d 639, 500 N. W. 2d 637 (S.C. of Wisc., 1993). A student does not have a reasonable expectation of privacy when storing personal items in a school locker.

Oliver v. McClung, 919 F.Supp. 1206 (N.D. Ind. 1995). A strip search for money was found not reasonable, but the same search for drugs or weapons may have been reasonable.

R. S. v. Minnewaska Area School District No. 2149, 894 F. Supp. 2d 1128 (D. Minn., 2012). Although this case could continue through the judicial system, principals should take notice of the issues. Because of incidents in the school, administrators demanded Facebook and e-mail user names and passwords from a middle school student. School officials searched the accounts of a middle school student without permission, and the court deemed this to be a violation of privacy and a prohibited search.

State v. Polk, 78 N.E.3d 834 (Ohio 2017). The Ohio Supreme Court reversed a lower court decision and upheld the search of an unattended bookbag. School employees searched the bag to determine who owned the bag and to ensure the contents of the bag were not dangerous.

State of Louisiana in the interest of K. L., 217 S.3d 628 (La. Ct. App. 2017). The court held that reaching into the pocket of a student by a staff member after he observed a drug transaction constituted a legal search. The student was evasive when asked to empty his pockets, and because the staff member observed the hand-to-hand transaction, the search was not a random, suspicionless drug search.

Mendoza v. Klein, No. H-09-3895, slip op. at 2 (S.D. Tex. Mar. 15, 2011). A teacher confiscated the cell phone of an eighth-grade student after she was observed looking at her phone surrounded by friends. Because the teacher suspected inappropriate behavior based on the reactions of the students, she decided to search through text messages and photos on the device and discovered nude photographs of the student. The student was suspended and assigned to a disciplinary program. A court held that the teacher was justified in checking the contents of the phone to see if she violated policy, but denied summary judgment for the school district, holding that a jury might conclude that opening the texts was not reasonable in light of the original justification to search the phone.

G. C. v. Owensboro Public Schools, 711 F.3d 623 (6th Cir. 2013). A court held that the school had insufficient reasons to search the contents of the cell phone of a student even though in the past the student had expressed suicidal thoughts and admitted to smoking marijuana. The court ruled they had no reason to search the phone to attempt to determine if he had violated other school rules.

J. W. v. DeSoto County School District, Civil Action No. 2: 09-CV-155-MS (N.D. Miss. Mar. 18, 2010). School officials confiscated a student's cell phone after he was observed looking at text messages in class. Several school officials searched through private and personal pictures stored on the phone and, after claiming they were gang related and indecent, turned the phone over to law enforcement. The student was suspended and expelled. The photos primarily depicted the student dancing in the bathroom of his home. The district court ruled in favor of the school, noting that because the student was caught violating

school policy by using the phone, there was a diminished expectation of privacy that resulted. Qualified immunity was granted.

Jones v. Latexo Ind. Sch. Dist., 499 F.Supp 223 (E.D. Tex. 1980). A court held random drug dog sniffing of students' person as impermissible. The court held that such searches were too intrusive and unreasonable. Similarly, because students did not have access to their vehicles during the day, the interest of the school to conduct dog sniff searches of student vehicles was also unreasonable.

Robertson v. Anderson Mill Elementary School, No. 19-2157 (4th Cir. 2021). The Fourth Circuit held, under standards in *Hazelwood v. Kuhlmeier*, that a fourth-grade student's rights were not infringed when her essay regarding the topic of LGBTQ+ equality was not included in the class essay booklet after the school judged the essay as age inappropriate.