

The Solicitor's Role in Balancing Efficient Educational Atmospheres with Student Free Speech Rights

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Looking back at the last 20 years, what lead to this?

🏫 Columbine High School -April 20, 1999

- 12 students, 1 teacher

🏫 Sandy Hook Elementary School -December 14, 2012

- 20 students, 6 teachers

🏫 Marjory Stoneman Douglas High School February 14, 2018

- 14 students, 3 teachers

National School Walk Out March 14, 2018

#Enough

17 Minutes at 10 a.m.

Reaction:

 Increased Police Presence

 Gymnasiums/Auditoriums

 Staging Point Outside

 Work with Student Class Officers

How to handle student walkouts

- 🚌 Is there a substantial disruption of school operations?
- 🚌 Examine School District policies on walkouts and unexcused absences
- 🚌 Do not punish participating students more severely

Free Speech Framework

Pure political speech:

- *Tinker v. Des Moines Independent Community School District*
 - <https://www.oyez.org/cases/1968/21>

Vulgar and lewd speech:

- *Bethel School District v. Fraser*
 - <https://www.oyez.org/cases/1985/84-1667>

School-sponsored speech:

- *Hazelwood School District v. Kuhlmeier*
 - <https://www.oyez.org/cases/1987/86-836>

Off-campus speech

- *Morse v. Frederick*, 551 U.S. 393 (2007)
 - <https://www.oyez.org/cases/2006/06-278>
- *A.N. v Upper Perkiomen School District (Pa. East. Dist. 2017)*

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)

The substantial disruption standard:

-  School officials must reasonably forecast that student expression will lead to a substantial disruption, or material interference, effecting the operation of the school.

Bethel School District v. Fraser, 478 U.S. 675 (1986)

Fraser balancing test:

-  freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior.
-  District may prohibit lewd, vulgar, or obscene speech



Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)

- 📌 School may exercise control that is reasonably related to a “legitimate educational purpose”

Morse v. Frederick, 551 U.S. 393 (2007)

- 📌 U.S. Supreme Court: State has a compelling interest in deterring drug use



A.N. v Upper Perkiomen School District (Pa East. Dist. 2017)

- 📌 Court held that off-campus speech was not protected
 - 📌 Reasonable belief that there would be substantial or material disruption in the school as a result of the posting of this video.

NSBA Suggestions

- 🚌 Logistics: identify the time, place, and location
- 🚌 Consider the possibility of an educational, curriculum-related assembly, debate, or other activity
- 🚌 Do not regulate content based on viewpoint
- 🚌 Educate students about what is acceptable and what consequences may arise from their actions
- 🚌 Educate faculty and staff on District's protest and walkout policies
- 🚌 Communicate with local police about safety and potential hazards
- 🚌 Ensure that staff is aware of their own obligations

Guidance from the ACLU of Pennsylvania

- 🚫 Permissible to give students the same punishment they would have received for leaving class without permissions (unexcused absence)
- 🚫 Cannot punish student participating in walkouts more severely than those who leave class for any other reason
- 🚫 Cannot punish student organizers more severely than other participants
- 🚫 Students should be permitted to carry signs unless they are disruptive or violates content-neutral rules
- 🚫 Schools may choose to allow students to walk out of class and gather elsewhere in the building
- 🚫 Schools may choose not to punish students who have parental permission to walkout

Scenario One

Students advocate political positions and encourage school walkouts or other school-based demonstrations on social media.

- 📚 **Law:** School's ability to address online speech will be dependent on disruption or a reasonable forecast of disruption.
- 📚 **Consider:** Whether district's policy clearly addresses speech via social media.

Scenario Two

Students do not show up for class on a specific preplanned day as a protest.

- 📚 **Law:** Truancy is addressed through state law and district policy, and mass preplanned absence could be considered disruptive. It is likely schools will treat these absences as unexcused.
- 📚 **Consider:** Clearly notifying the school community about how absences will be treated and apply the same rules to similar activities.

Scenario Three

Students plan to leave class at a specific time and leave campus, but may congregate on adjoining public sidewalks or other public, non-school property.

- 🚫 **Law:** Students leaving class is considered disruptive and schools may regulate this activity.
- 🚫 **Consider:** Working closely with local officials about safety concerns associated with students congregating on nearby property.

Scenario Four

Students walk out of class and walk in to the administrative office to voice a concern. The district is unaware of this plan ahead of time.

- 🚫 **Law:** Students interrupting class time is considered disruptive as is interruption of office operations. Schools may regulate this activity.
- 🚫 **Consider:** Addressing mass walk out/in activity by students in permanent board policy and clearly communicating that policy to staff.

Lacey Township School District Gun Policy

📧 On two occasions, counsel for the Association of New Jersey Rifle and Pistol Clubs sent letters to Lacey Township School District regarding violation of students' First Amendment rights

📧 **1st Incident:** Two high school students suspended after they posted pictures of themselves at a gun range with the caption “fun day at the range”

📧 Letter asserted the zero tolerance policy was unconstitutional.

📧 **2nd Incident:** Lacey Township High school forced a student to remove a bumper sticker with depicted a firearm.

📧 Letter requested an apology to the student affected and assurance that the school would not stifle students free speech in this manner going forward.



Bell v. Itawamba County School District

(5th Cir. 2014)

🚌 The Court held *Tinker*'s substantial disruption standard applies to this type of off campus speech.

🚌 The suspension was affirmed.

🚌 <https://caselaw.findlaw.com/us-5th-circuit/1686791.html>

Layshock v. Hermitage School District (3rd Cir. 2011)

🚌 Court held that District must establish a sufficient nexus between speech and a substantial disruption of the school environment

🚌 Discipline unconstitutional as there was no nexus.

🚌 <https://caselaw.findlaw.com/us-3rd-circuit/1570278.html>

R.L. v. Central York School District 183

F.Supp.3d 625 (2016)

- 📚 District Court upheld the suspension Even though speech was created on personal time outside of school
- 📚 Court applied *Tinker* because the speech was about violence and the subject matter made it especially likely to reach the school and cause an adverse reaction

📚 <https://www.leagle.com/decision/infdco20160504f32>

J.S. ex rel. Snyder v. Blue Mountain School District (3rd Cir. 2011)

- 📚 Court held that School District violated J.S.'s First Amendment rights
- 📚 Speech caused no substantial disruption in school and could not reasonably have led school officials to forecast substantial disruption in school.

📚 <https://caselaw.findlaw.com/us-3rd-circuit/1506476.html>

McKinney v. Huntsville School District et al (Ark. West. Dist. 2018)

- 📌 Parents are currently challenging the expulsion and allege K.P. was falsely accused of “criminal and terroristic conduct”
- 📌 Staff Attorney for the Arkansas School Board Association argues that the trench coat and gun together invoke images of the Columbine shooters
- 📌 ACLU of Arkansas argues K.P. has the right to post this photo
- 📌 <https://dockets.justia.com/docket/arkansas/arwdce/5:2018cv05067/53586>



LaVine v. Blaine School Dist., 257 F.3d 981 (9th Cir. 2001)

📖 The Court held “the school had a duty to prevent any potential violence on campus to James [Lavine] and other students.” and interestingly affirmed in part and denied in part the action. Court stated “negative documentation” in his file needed to be removed.

📖 <https://www.leagle.com/decision/20011238257f3d98111140>

Wynar v. Douglas County School Dist, 728 F.3d 1062 (9th Cir. 2013)

📖 The Court held:

Under *Tinker*, schools may restrict speech that “might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities” or that collides “with the rights of other students to be secure and to be let alone.” Such speech is “not immunized by the constitutional guarantee of freedom of speech.” It is an understatement that the specter of a school shooting qualifies under either prong of *Tinker*.

📖 <https://caselaw.findlaw.com/us-9th-circuit/1642928.html>

What is a true threat?

- 🗣️ A “true threat,” is a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another.
- 🗣️ Factors relevant to how a reasonable recipient would view the purported threat include:
 - 🗣️ (1) the reaction of those who heard the alleged threat;
 - 🗣️ (2) whether the threat was conditional;
 - 🗣️ (3) whether the person who made the alleged threat communicated it directly to the object of the threat;
 - 🗣️ (4) whether the speaker had a history of making threats against the person purportedly threatened; and
 - 🗣️ (5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence

True Threat Analysis

🗣️ Used to determine when speech that is “an expression of an intention to inflict evil, injury, or damage on another” does not receive First Amendment protection.”

🗣️ *Fogel v. Collins*, 531 F.3d 824, 830 (9th Cir. 2008) (quoting *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1075 (9th Cir.2002) (en banc)).

🗣️ Speech is examined in the “light of its entire factual context, including the surrounding events and reaction of the listeners.”

🗣️ *Fogel*, 531 F.3d at 831 (quoting *United States v. Orozco–Santillan*, 903 F.2d 1262, 1265 (9th Cir.1990)).

Application of “True Threat Analysis”

📖 10th grade student’s journal contained “hit list” as well as other violent writings.(NOTE: Identified who to kill and who to injure or severely injure)

📖 Diagnosed with depression, self esteem issues, and difficulty with interpersonal relationships

📖 No history of aggressive behavior, no intent to harm other students, and showed remorse.

📖 Student was suspended.

📖 Students were doing detailed research on Columbine shooting on school computer.

📖 Interviews showed students had signs of planning a shooting.

📖 One student determined to be a medium level of threat, the other high level.

📖 Students claim they were just interested in the topic

Terroristic Threat Policies

18 Pa.C.S.A. § 2706. Terroristic threats

- 🚒 (a) **Offense defined.**--A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:
 - 🚒 (1) commit any crime of violence with intent to terrorize another;
 - 🚒 (2) cause evacuation of a building, place of assembly or facility of public transportation; or
 - 🚒 (3) otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.
- 🚒 School policy in regard to terroristic threats and handbooks

Threat?

🚌 Q: Is the following a credible threat?

“Now I know why people bring guns to school.”

🚌 A: Depends. Consider context and ability to carry out threat.

Threat?

🚌 Q: May a School District discipline a student for inciting other students to protest?

🚌 A: Yes, if you can meet the *Tinker* standard such as School District can reasonably forecast the mass protest (e.g. walk out, sit in) would result in substantial disruption. (*Doniger v. Niehoff*, 2nd Circuit 2008, 2011)

Resources:



Call the office of Student Rights and Responsibilities

- Website: <https://www.philasd.org/studentrights/>
- Phone: 215-400-4830



Safe Schools Act

- <https://www.hrc.org/resources/safe-schools-improvement-act>



PDE Model Memorandum of Understanding for Police Involvement

- <https://tinyurl.com/yag9h25g>



ACLU's Summit on School Policing

- <https://www.aclupa.org/issues/studentyouthrights/police-and-schools>

Resources:

 ACLU-PA Guidance on Student Walk Out

<https://www.aclupa.org/news/2018/03/16/aclu-pas-guidance-student-walkouts>

 NSBA Coercion, Conscience and the First Amendment (January 2018)

<https://www.nsba.org/coercion-conscience-and-first-amendment>

 NSBA Navigating Student Walkouts and Mass Protests (February 2018)

<https://www.nsba.org/navigating-student-walkouts-and-mass-protests>



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