

First Amendment In Schools

Arkansas School Boards Association
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First Amendment Issues

- Protected student speech/ conduct
- Can a student refuse to stand during the Pledge of Allegiance?
- Can a band member chose not to participate in the playing of the National Anthem?
- Can a student refuse to memorize the Pledge of Allegiance as a class assignment?
- Can a student lead a prayer at graduation?
- Can the school board pray before a meeting?
- Can a teacher lead a Bible study after school?
- Can *O Holy Night* be sung at a school musical?

School vs. Public

- The Court has recognized that students do not shed their constitutional rights when they enter school.
- However, the Court has traditionally recognized that the educational mission of the school cannot be disrupted by the exercise of free speech.
- Speech rights at school differ from outside the school environment.

Student Conduct and First Amendment

- An 18 year old high school student in Mississippi published a rap song on Facebook and YouTube. The rap included the N-word, the B-word, the S-word, the P-word, the MF-word, and the F-word. The rap further was defamatory to identifiable people, accusing two coaches of sexual misconduct with students, comments on the size of the breasts of the one of the coach's wives and suggesting that one of the coaches will "get a pistol down your mouth/Pow."
- No school resources used to create the song.
- The song was widely distributed to students and staff.
- The school expelled the student and the student sued alleging violation of his First Amendment rights.
- You are the Court, how do you rule?

Student Conduct and First Amendment

- **Expulsion upheld**

- The court recognized the digital world and social media did not exist presents new challenges for school administrators.
- The court noted the large increase in school violence and that the student's intent, while the rap was produced and recorded off campus, was intentionally directed at the school community.
- The court recognized that the cornerstone of public education is the teacher and coach, and any act which threatens, harasses, or intimidates the educator impedes if not destroys the ability to educate.
- A “student's threatening, harassing, and intimidating, a teacher inherently portends a *substantial disruption*.”

Bell v. Itawamba Cnty. Sch. Bd., 782 F.3d 712 (5th Cir. Miss. 2015)

Tinker v. Des Moines, 393 U.S. 503 (1969)

- In 1968, three public school students came to class wearing black armbands, including Mary Tinker.



- *Fearing a disruption**, the principals of the schools suspended them.
- The US Supreme Court held in a 7-2 decision that the wearing of the armbands was protected by the First Amendment.

**You need more than a fear of disruption, “would it foreseeably create a risk of substantial disruption”*

Tinker v. Des Moines, 393 U.S. 503 (1969)



Tinker v. Des Moines, 393 U.S. 503 (1969)

- “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
- “The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.”
- [The students] may express his opinions, even on controversial subjects..., if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.

Tinker Quiz

- A District adopts a new dress code policy. It allows jewelry, as long as the jewelry does not overlay any part of the uniform (i.e. low hanging necklace).
- Students are allowed to wear jewelry or other bracelets with insignia.
- One day, students where black wristbands in unified protest against the dress code policy; they are expelled.
 - How does the Court rule??

Tinker Quiz

- *LOWRY v. WATSON CHAPEL SCHOOL DIST.*, 508 F.Supp.2d 713 (2007)
 - Students won on their First Amendment claims, were awarded \$1.00 in money damages, but the school was ordered to pay \$45,601.54 in cost and attorneys' fees.
 - Is the conduct, in itself, disruptive or disorderly?

Pledge of Allegiance

- “Mini- Kaepernick Sit Out the Pledge of Allegiance—
but Not All Teachers Know The Law.” — *The
Daily Beast* Sept. 07, 2016



Pledge of Allegiance



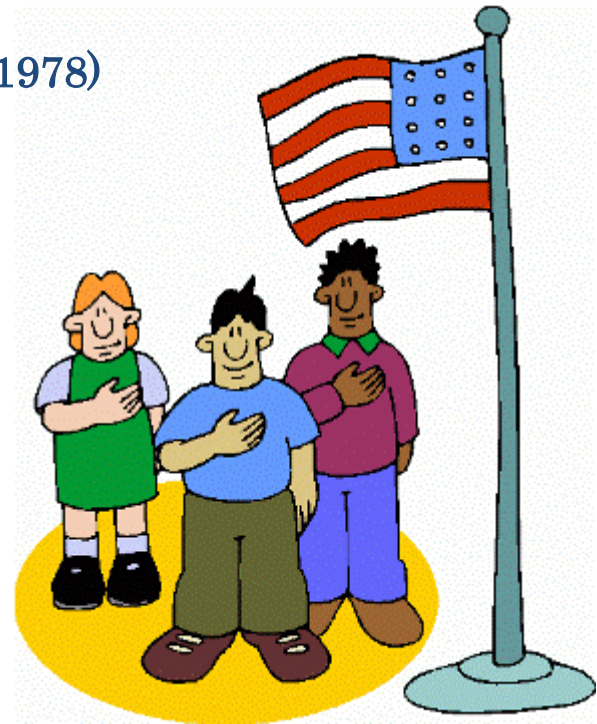
School in Naples, Florida September
2016

Pledge of Allegiance

- Students cannot be required to recite the Pledge or salute the flag.
- *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (U.S. 1943)
 - Students were Jehovah's Witnesses, forced to stand, salute and recite the Pledge of Allegiance. They would not comply because of religious objections and were expelled. They sued.
- Compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind
- The government cannot coerce nationalism or consent
- Court did not address standing for the flag, just saluting and reciting

Pledge of Allegiance

- Can students be required to stand?
- Students have a constitutional right to remain seated
 - *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1274, 1278 (11th Cir. 2004)
 - *Lipp v. Morris*, 579 F.2d 834, 836 (3d Cir. 1978)



Pledge of Allegiance

Arkansas Law Requires daily recitation of the Pledge of Allegiance

No student shall be compelled to recite the Pledge of Allegiance if the student or the student's parent or legal guardian objects to the student's participating in the exercise on religious, philosophical, or other grounds.

Students who are exempt from reciting the Pledge of Allegiance shall be required to remain quietly standing or sitting at their desks while others recite the Pledge of Allegiance;

Teachers or other school staff who have religious, philosophical, or other grounds for objecting are exempt from leading or participating in the exercise.

A.C.A. § 6-16-108

Pledge of Allegiance

- In 2006 Florida student required to stand for Pledge awarded \$32, 500.
- *Frazier v. Alexandre*, 434 F. Supp. 2d 1350 (S.D. Fla. 2006)
 - 11th grade student, Frazier, refused to stand for pledge in math class, teacher was Mrs. Alexandre, the defendant. Alexandre demanded the student stand, when he refused...
 - T: "oh you wanna bet? See your desk? Now look at mine. Big desk, little desk. You obviously don't know your place in this classroom."
 - S: "I thought this was a classroom. Why must you insist on taking this so far?"
 - T: "I will take this as far as I need to. I will fight this to the top."
 - S: "I'm sorry, I do not stand for the flag."
 - T: "You clearly have no respect! You are so ungrateful and so un-American. Do you know what's out there fighting our war? That flag you refuse to show respect to. No! You're out of here. I'm so sick of you!"

Pledge of Allegiance as a Class Assignment

- A Texas high school student sued her school district alleging that being required to memorize and recite in Spanish the Mexican pledge of allegiance violated her right to be free from compelled speech. All students in the class were given the assignment as part of Mexican Independence Day.
- Facts:
 - Part of a Spanish class assignment, meant to foster awareness of “the culture and heritage of neighboring countries...”
 - One time requirement
 - Students were required to stand and salute as part of the assignment
 - Student at issue was ultimately given an alternative assignment, but received a considerably lower grade
- How did the Court Rule?

Pledge of Allegiance as a Class Assignment

- School District Won- Assignment Did Not Violate Establishment Clause of the Constitution

Brinsdon v. McAllen Indep. Sch. Dist., 832 F.3d 519 (5th Cir. Tex. 2016)

- Purpose was not to “foster Mexican nationalism”
- Purely “cultural and educational exercise”
- “Assignment was a singular event; it was not repeated on a daily basis”

- Would this be the same if it were the US Pledge of Allegiance?

School Bands and First Amendment



- You are the administration...what's your decision?

School Bands and First Amendment

- Participation in the band is not compulsory
- Playing the anthem is essential to performance
- Performance is part of the grade
- Disruptive to the performance



School Prayer

- Mandatory Moments of Silence
- Student- Led Prayer at Events
- Graduation Prayer



School Prayer

- **Arkansas Law**
- Period of silence.
- (a) A public school in this state shall observe a one (1) minute period of silence at the beginning of school each school day.
- (b) During the period of silence a student may, without interfering with or distracting another student:
 - (1) Reflect;
 - (2) Pray; or
 - (3) Engage in a silent activity.
- (c) A teacher or school employee in charge of a public school classroom shall ensure that all students remain silent and do not interfere with or distract another student during the period of silence.

- A.C.A. § 6-10-115

School Prayer

Is the “Period of Silence” law Constitutional?

- Must meet 1 of the 3 criteria (**Lemon Test**)
 1. Have a non-religious purpose
 2. Primary purpose can neither advance nor prohibit religion
 3. Avoid excessive entanglement of religion
 - *Lemon v. Kurtzman*, 403 U.S. 602 (1971)



School Prayer

Lemon Test

- What if the Arkansas “Period of Silence” law stated:

A public school in this state shall observe a one (1) minute period of silence at the beginning of school each school day for the purpose of “meditation or voluntary prayer.”

- No, clear intent is to promote prayer. A genuinely neutral moment of silence is appropriate, but must have a secular purpose.
 - *Wallace v. Jaffree*, 472 U.S. 38 (1995)

School Prayer

Lemon Test

- Can the high school principal allow different students to give non-denominational prayers over the school intercom as part of “cultural awareness of world religions” during the month of December?
 - No, it clearly advances religion, regardless of the fact it is non-denominational.
 - *Engel v. Vitale*, 370 U.S. 421 (1962)
 - Schools can teach religion as part of curriculum, but school-led prayer is not appropriate to meet that goal.

School Prayer and Graduation

Can clergy to lead prayer at graduation?

- A. Yes, if attendance is optional, the student is not penalized for non-attendance, and the District does not pre-approve the prayer.
- B. Yes, as long as the student body selects the speaker, the District has no control over the selection, and objecting students are not forced to bow or stand.
- C. No. Whether attendance is mandatory doesn't matter, students are pressured to attend, and regardless of who chooses the clergy, it has the appearance of District influence.

School Prayer and Graduation

Can clergy to lead prayer at graduation?

- C. No. Whether attendance is mandatory doesn't matter, students are pressured to attend, and regardless of who chooses the clergy, it has the appearance of District influence.
- Speakers need to be selected on the basis of genuinely neutral, even-handed criteria.
- Here, the clergy is being selected for the obvious reason of leading a prayer.

School Prayer and Graduation

Can a student lead prayer at graduation?

- A. No. Not if the student is selected solely for purpose of delivering the prayer.
- B. Never. Schools must review all speeches to ensure they contain no prayer.
- C. Yes, if the student leads the prayer during a speech where she was selected as the speaker on the basis of genuinely neutral, even-handed criteria ... i.e. she was the class valedictorian.

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School Prayer and Graduation

Administrative Review of Graduation Speeches

- Student prayer was allowed in a Florida school as long as there was no District “regulation of the content of the speech.” The court ruled the student must have “complete autonomy over the message he eventually delivers at graduation.”
 - *Adler v. Duval County School Board*, 250 F. 3d 1330 (11th Cir. 2001).
- District review of speeches needs to be only cursory to ensure the speech is not inappropriate for an audience of families (i.e. not laden with curse words or intended to ridicule other students or staff)

School Prayer and Graduation

Board President in Nebraska gave the welcome speech at graduation, he recites an impromptu prayer. A patron sues. How did the 8th Circuit (includes Arkansas) rule?

- Upheld. Not an establishment clause violation of the Constitution.
 - District had not prior knowledge
 - Board president was selected to speak because of his position, not his speech
 - Board member was acting as a private citizen

School Prayer at Student Events

Can students lead prayer over the PA system?

- **No.** Even if the prayer is student- led, it appears school endorsed.
 - Organized by the school
 - School controls the PA system

Can students gather on the field or court to pray?

- Yes, if not disruptive to activities
- School would have to accommodate other groups
- Cannot be organized by school
- Staff cannot participate

School Prayer at Student Events

The football team wants to have a player-led prayer before exiting the field house for the game. A coach wants to know how to handle this? Should he allow or prohibit the prayer? Can he join?

Nothing requires the coach “from treating students’ religious beliefs and practices with deference and respect; indeed, the Constitution requires this. Nothing compels [coaches] to make their non-participation vehemently obvious or to leave the room when students pray in [a group setting].” *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. Tex. 1993)

Prayer at Board Meetings

Constitutionally permissible?

- **Unclear**

- **Argument For:** Courts have consistently held prayer at legislative and town council meeting are permissible.
 - Crowd is usually adults
 - Role of these bodies is not to develop policy for students
 - Rich history of prayer in these types of meetings
- California federal court upheld school board prayer
 - Court held it is a meeting of adults
 - No susceptibility of a child to religious indoctrination

No other federal court or federal appeal court has upheld school board meeting prayer

Prayer at Board Meetings

Constitutionally permissible?

- **Argument Against:** Its not a legislative meeting, but a meeting regarding school business
 - The Board regularly invites students to attend
 - The Board addresses student matters
 - Not a history of prayer in these settings (founding fathers)
- View upheld by 6th Circuit and 3rd Circuit Courts
- *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999)
- *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011).

School Prayer and Staff

Can a high school teacher participate in a student-led prayer group before school starts?

- Yes
 - Overall context must make clear teacher is not participating in her “teacher” capacity.
 - Should not be during school hours.
- Can a teacher lead a prayer group before school?
 - Yes
 - Teacher cannot promote the meeting during class.

Wigg v. Sioux Falls Sch. Dist., 49-5, 382 F.3d 807, 815 (8th Cir. S.D. 2004)

School Prayer and Staff

Can an elementary teacher lead an afterschool Bible program for elementary students?

- Yes. But here, the court emphasized “students needed parental permission.”
- Needs to follow District facility-use policy

Wigg v. Sioux Falls Sch. Dist., 49-5, 382 F.3d 807, 815 (8th Cir. S.D. 2004)

Teacher Religious Expression

Can a teacher post Bible verses in his classroom, readily viewable by students?

- Probably not.
- First, they are being displayed during school hours, during his teaching duties.
- Next, remember the **Lemon Test**
 1. Does it have a religious purpose?
 2. Is the primary purpose to advance religion?
 3. Unnecessary entanglement of religion?

Silver v. Cheektowaga Cent. Sch. Dist., (2d Cir. (NY) 2016)

Teacher Religious Expression

Can a teacher post Bible verses in his classroom on the wall near his desk, located near other family photos and mementos?

- Probably.
- Not on display for all to see
- Clearly part of teacher's personal effects
- Located in area not accessible to students

School Christmas Spectacular

Can the District have a “Christmas Spectacular” which includes *O Holy Night*, a narrative of Jesus’ birth, the nativity scene, and other seasonal and secular music, including *Secret Agent Santa*?

- A. No. Showing the nativity conveys a deeply religious message, despite other secular displays.
- B. Yes. Religious content can intersect with secular education. This program would not convey an endorsement of religion.
- C. No. The program included too much religious-themed songs and depictions which appeared to be an endorsement of religion.

School Christmas Spectacular

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- B. Yes. Religious content can intersect with secular education. This program would not convey an endorsement of religion.

Freedom From Religion Foundation v. Concord (116 LP 39902 (N.D. Ind. 09/14/16))

- Fact intense inquiry. Be cautious, ensure there is not an excessive religious message.
- Courts are still struggling with these issues today.

Actual Cases: First Amendment and Staff

- In *Helland v. South Bend Community School Corp.* (1996), the 7th Circuit ruled that school officials did not violate the First Amendment rights of a substitute teacher who proselytized in elementary school classrooms. The teacher claimed that school officials removed him from the substitute-teaching list because of his religious beliefs. School officials countered that they had a right to remove the teacher to avoid establishment-clause problems.
- The 7th Circuit sided with the school officials: “A school can direct a teacher to refrain from expressions of religious viewpoints in the classroom and like settings.”

Actual Cases: First Amendment and Staff

- In *Downing v. West Haven Board of Education* (2001), a federal district court determined that high school administrators did not violate the First Amendment rights of teacher Ella Downing when they ordered her to remove or cover up a T-shirt reading “JESUS 2000 — J2K.”
- “In short, whatever First Amendment rights were implicated by Downing wearing her T-shirt must give way to the defendants’ legitimate concerns about a potential Establishment Clause violation in a public school,” the court wrote.

Actual Cases: First Amendment and Staff

- In its 1999 decision *Marchi v. Board of Cooperative Educational Services*, the 2nd Circuit ruled that school officials could order a special education teacher to refrain from using religious references in his instructional programs. Dan Marchi, who converted to Christianity, had modified his teaching program to discuss subjects like God, forgiveness and reconciliation.
- “For his part, the employee must accept that he does not retain the full extent of free exercise rights that he would enjoy as private citizen,” the 2nd Circuit wrote. “A school risks violation of the Establishment Clause if any of its teachers’ activities gives the impression that the school endorses religion.”

Actual Cases: First Amendment and Student Discipline

- FIFTH CIRCUIT U.S. COURT OF APPEALS (2007)
- School officials learned that a student kept a journal which included a description of a violent, Columbine-style attack on the school and expelled the student. The student and his mother sued, alleging that the journal was merely “creative writing.”
- HELD: The U.S. District Court agreed that the writings did not amount to a true threat that would justify disciplinary action.
- The Appeal Court reversed and ruled in favor of the school, concluding that the student’s writings were not entitled to constitutional protection:
- “School administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance.”

Actual Cases: First Amendment and Student Discipline

- SECOND CIRCUIT U.S. COURT OF APPEALS (2007)
- An 8th grader used an icon on his instant messages depicting a gun firing a bullet at a person's head with blood spattering. The student used this icon with the caption "Kill Mr. VanderMolen" in messages to 15 friends, some of whom were classmates. All this was done from home. The messages were available on the Internet for three weeks. Another student brought the messages to the attention of Mr. VanderMolen, the student's English teacher, resulting in a semester-long suspension from school. The parents sued alleging violation of the First Amendment.
- HELD: The Court ruled for the school district, holding that even though the conduct occurred off campus, it was reasonably foreseeable that the messages would reach the school and cause a material disruption.

Actual Cases: First Amendment and Student Discipline

- ELEVENTH CIRCUIT U.S. COURT OF APPEALS (2007)
- A student recorded a dream in her notebook in which she shot her math teacher during class. A teacher obtained the notebook after seeing the girl pass it to a classmate. The student was suspended and recommended for expulsion. The parents sued claiming infringement of her First Amendment right to free speech.
- HELD: The Court ruled for the school district, holding that by taking the narrative to school and failing to exercise strict control over the book in which it was written, the student increased the likelihood that the narrative would be seen by others. The same analysis could easily be applied to a Facebook post or other social media platforms.

Actual Cases: First Amendment and Student Discipline

- THIRD CIRCUIT U.S. COURT OF APPEALS (2011) (En Banc)
- An 8th grade student was suspended for creating a fake “MySpace” profile of his principal. The profile included statements attributed to the principal that his time at school was spent “f*****g in my office, hitting on students and their parents. I am a sex addict with a small p***s” and my wife, a counselor at the school “looks like a man.” The parents sued, alleging the actions were protected by the First Amendment.
- HELD: A very divided Third Circuit overturned the suspension, concluding that the profile was so outrageous that it was unlikely anyone would believe it was genuine and the speech did not create a material and substantial disruption of school. Six judges on the court dissented, noting that the decision “allows a student to target a school official and his family with malicious and unfounded accusations about their character in vulgar, obscene, and personal language . . . leaving school officials defenseless to protect . . . against such attacks and powerless to discipline students for the consequences of their actions.”

Actual Cases: First Amendment and Student Discipline

- FOURTH CIRCUIT U.S. COURT OF APPEALS (2011)
- A high school senior, cheerleader, and reigning “Queen of Charm” created a MySpace webpage designed to ridicule and demean a fellow student, and invited classmates to join in the attack, and many did. The website included a picture of the other student with the caption: “Portrait of a Whore.” The student was suspended by school officials and the student sued.
- HELD: Even though everything the student did on the MySpace account was done from home, the court upheld the school district’s actions.

Actual Cases: First Amendment and Student Discipline

- FIFTH CIRCUIT U.S. COURT OF APPEALS (2015) (En Banc)
- An 18 year old high school student published a rap song on Facebook and YouTube. The rap included the N-word, the B-word, the S-word, the P-word, the MF-word, and the F-word. The rap further was defamatory to identifiable people, accusing two coaches of sexual misconduct with students, comments on the size of the breasts of the one of the coach's wives (using the T-word), and suggesting that one of the coaches will “get a pistol down your mouth/Pow.” The school expelled the student and the student sued alleging violation of his First Amendment rights.

Actual Cases: First Amendment and Student Discipline

- HELD: A three-judge panel held that the student's expulsion violated the Constitution because the school district could not produce evidence of any serious disruption at the school and the rap was written and produced off campus, there was no basis to infringe on the student's off-campus artistic expression. However, upon en banc review by the entire Fifth Circuit, the court reversed and ruled in favor of the district. The court recognized that when the U.S. Supreme Court decided its first free speech case in 1969, the digital world and social media did not exist, which now presents new challenges for school administrators. The court also noted the large increase in school violence and that the student's intent, while the rap was produced and recorded off campus, was intentionally directed at the school community. Finally, the court recognized that the cornerstone of public education is the teacher and coach, and any act which threatens, harasses, or intimidates the educator impedes if not destroys the ability to educate.