



FLORIDA OFFICE:

PO Box 540774
Orlando, FL 32854
Tel 407-875-1776
Fax 407-875-0770
www.LC.org

DISTRICT OF COLUMBIA OFFICE:

122 C Street NW, Ste. 360
Washington, DC 20001
Tel 202-289-1776
Fax 407-875-0770

VIRGINIA OFFICE:

PO Box 11108
Lynchburg, VA 24506
Tel 407-875-1776
Fax 407-875-0770
liberty@LC.org

STUDENTS' RIGHTS ON PUBLIC SCHOOL CAMPUSES

Mathew D. Staver, Esq.

A. FREEDOM OF SPEECH

1. Expression

Students on public school campuses enjoy constitutional protection of free speech, including religious speech. Student speech can be prohibited only when the speech activities “substantially interfere with the work of the school, or impinge upon the rights of other students.”ⁱ *In Tinker v. Des Moines Independent School District*, the United States Supreme Court stated:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in schools as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.ⁱⁱ

The Supreme Court further stated: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”ⁱⁱⁱ

The Court recognized that when a student is “in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions.”^{iv} Students may exercise their constitutional right to free speech while on public school campuses before and after school, in between class, in the cafeteria, or on the playing field. Students have a right to free speech during non-instructional time.

Students are compelled to be in school until age sixteen. While they are under compulsory attendance, the State must protect their constitutional rights to freedom of expression. As soon as students walk on the premises of any public school, kindergarten

through college, they carry with them the First Amendment's protection of free speech. Students certainly do not shed their Constitutional rights when they enter the schoolhouse gate.^v

Schools may prohibit student speech only if there is specific evidence that the speech materially and substantially interferes with the orderly operation of the school. Merely because others disagree or are offended by the message is no reason to prohibit student speech.

Everyone would agree that when a student exits the school bus on the way to class, the student has the right to converse with another student. One student can say to another student, "I like you." The same student can go even further and say, "I love you." Moreover, the student can invite a friend to his or her house after school for a birthday party or some other after-school program. This is not only constitutionally correct, it just makes common sense. Since students may speak about secular topics, they may also speak about religious topics. The same student during non-instructional time may state, "Jesus loves you." This student may also invite another student to an after school church function.

2. Literature Distribution

The right to free speech includes the right to distribute literature.^{vi} The Supreme Court considers the distribution of printed material as pure speech.^{vii} Indeed, peaceful distribution of literature is a protected form of free speech just like verbal speech.^{viii}

The Supreme Court has correctly recognized "that the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the speech and press clauses of the First Amendment."^{ix} "From the time of the founding of our nation, the distribution of written material has been an essential weapon in the defense of liberty."^x Literature distribution includes anything in printed format such as brochures, pamphlets, newspapers, cards, stamps, books, symbols and pictures.

Religious speech enjoys the same protection as political speech.^{xi} Students not only have the right to verbal and written speech, they have the right to persuade, advocate and even proselytize a religious viewpoint. The Supreme Court recognized that "free trade and ideas mean free trade and the opportunity to persuade, not merely to describe facts."^{xii} Merely because other students or school officials disagree with the content of the message is no reason to deny student speech.^{xiii} The Supreme Court could not make this point any clearer than it did in *Tinker*:

Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.^{xiv}

It is impermissible for schools to require students to submit their literature to a school official for review prior to distribution. It is important to remember that printed speech enjoys the same rights as verbal speech. Just as it would be unconstitutional and ludicrous for schools to preview all student verbal communication before it occurs, it is

similarly unconstitutional to do so with respect to printed communication. Indeed, the Supreme Court's decision in *Tinker* in no way suggests that students may be required to announce their intentions of engaging in a certain conduct beforehand so school authorities may decide whether to prohibit such conduct.^{xv} The Supreme Court has unequivocally stated that prior notification is "quite incompatible with the requirement of the First Amendment."^{xvi} Certainly the "delay inherent in advanced notice requirements inhibits free speech by outlawing spontaneous expression."^{xvii} Indeed, when "an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."^{xviii} Finally, with respect to literature distribution, schools should not confine the distribution of literature to a designated location or to a bulletin board. Just as a school cannot require all students to report to a designated location before engaging in verbal communication, schools should not limit literature distribution in this manner. Student speech through literature cannot be confined to a bulletin board. Students have a constitutional right to free speech during non-instructional time, and this includes the right to speak through literature. Speech does not lose any constitutional protection simply because it is transformed from verbal expression to the printed page.

3. Clothing and Jewelry

Students may communicate a message through words or symbols on clothing or by wearing jewelry. Indeed, students in the *Tinker* case wore black armbands to school as a symbolic protest of the Vietnam War. The Supreme Court held that such expression was protected by the First Amendment.^{xix} The only difference between clothing and jewelry as opposed to verbal or written speech is that clothes and jewelry are carried into the classroom during instructional time. Students cannot turn off the message on a t-shirt in the same manner that they can stop speaking when they enter the classroom or refrain from literature distribution during class time. Schools may therefore place some restrictions on clothing or jewelry if worn during class. However, if the school allows t-shirts or jewelry with secular messages or symbols, the school cannot prohibit students from wearing religious t-shirts or jewelry. If a school allows students to wear a t-shirt with a Nike symbol or the slogan, "Just Do It," the school cannot prohibit students from wearing a t-shirt with the message, "Jesus died for you." Students have a constitutional right during non-class time to communicate through clothing or jewelry.^{xx} If the First Amendment teaches us anything it teaches that "[a]ll ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion-- have the full protection of the guarantees [of the First Amendment]."^{xxi}

4. Class Discussion and Reports

While students have a constitutional right to free speech during non-instructional times, schools may place certain restrictions on speech during class time. Students may express their viewpoint on any subject being taught so long as it is consistent with the subject matter discussed at that time. While a student may pass out a religious tract during non-instructional time, the student may not pass out the same tract during a math class. However, students may express a religious view point during math class so long as it is consistent with the subject being studied.

If students are asked to give verbal or written reports, then students may also give reports on religious topics so long as the report falls within the parameters of the assignment. For example, in a literature class, if students are required to read a secular

book and give an oral or written report, then these students may also read a religious book. Teachers may not prohibit students from giving written or oral reports solely because the content is religious.^{xxii} Some younger grades have what is known as “Show and Tell.” This is a time where students are asked to bring in personal items to show to the rest of the class and then talk about these items. So long as the student’s item brought into the Show and Tell is consistent with the assignment, schools should not prohibit students from either showing or telling about their item solely because the content is religious. Students have a constitutional right to show and tell their item even if the item centers on religion.^{xxiii}

B. EQUAL ACCESS

The Equal Access Act and the First Amendment guarantee that students have the right to form student clubs.^{xxiv}

If a public secondary school receives federal funds and allows one or more non-curriculum related student groups to meet on campus, then the school cannot prohibit other non-curriculum related student groups from meeting on campus unless such clubs “materially and substantially interfere with the orderly conduct of educational activities within the school.”^{xxv} A non-curriculum related student group is interpreted broadly to mean “any student group that does not directly relate to the body of courses offered by the school.”^{xxvi} The Supreme Court has indicated that “a student group directly relates to a school’s curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses of the whole; if the participation in the group is required for a particular course; or if participation in the group results in academic credit.”^{xxvii} Examples of non-curriculum related student groups are chess clubs, stamp collecting clubs, community service clubs, environmental clubs, or special interest clubs.

Equal Access means exactly what it says -- equal access to every facility of the school which is used by at least one or more non-curriculum related student groups. This includes use of class room facilities, copy machines, intercom systems, bulletin boards, school newspaper, yearbook, annual club fairs, funding, bank accounts, and any other benefit or facility afforded to secular student clubs. There must be no discrimination and no denial with respect to access of any school facility. All clubs must be treated equally regardless of the content of the message.

SUMMARY OF STUDENT RIGHTS

- May engage in verbal speech during non-instructional time.
- May distribute literature during non-instructional time.
- Schools may not preview literature prior to its distribution.
- Schools may not confine literature distribution to a designated spot or to a bulletin board.
- May meet around the flag pole with other students during non-instructional time for prayer.
- May engage in free speech during class so long as the speech is consistent with the topic being studied.
- May wear clothing with religious messages or symbols including religious jewelry on the same basis and in the same manner as the school allows secular words, symbols, or jewelry to be worn and displayed.

- May wear clothing with religious words and symbols and wear religious jewelry during non-instructional time.
- May give oral and written reports on religious topics so long as the report or presentation is consistent with the assignment.
- May show and tell religious items so long as the item and the presentation is consistent with the assignment.
- May form Bible clubs so long as the school allows at least one other non-curriculum student club.
- Bible clubs must be treated equally to other non-curriculum related student clubs and be afforded equal access to school facilities such as the bulletin board, intercom system, annual club fair, school newspaper, yearbook, copy machine, financial sponsorship, or any other benefit or facility afforded to secular student clubs.

INDEX TO CITATIONS

-
- i. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969).
 - ii. *Id.* at 511.
 - iii. *Id.* at 506.
 - iv. *Id.* at 512-13.
 - v. *Id.* at 506.
 - vi. *Martin v. City of Struthers*, 319 U.S. 141 (1943).
 - vii. *Texas v. Johnson*, 491 U.S. 397, 406 (1989).
 - viii. *United States v. Grace*, 461 U.S. 171, 176 (1983) (“leafleting is protected speech.”); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (“liberty of circulating is as essential to [freedom of speech] as liberty of publishing; indeed without circulation, the publication would be of little value.”).
 - ix. *ISKCON v. Lee*, 505 U.S. 672, 702 (1992).
 - x. *Paulsen v. County of Nassau*, 925 F.2d 65, 66 (2d Cir. 1991).
 - xi. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (citations omitted).
 - xii. *Thomas v. Collins*, 323 U.S. 516, 537 (1945).
 - xiii. *Clark v. Dallas Indep. Sch. Dist.*, 806 F. Supp. 116, 120 (N.D. Tex. 1992).
 - xiv. *Tinker*, 393 U.S. at 508-09 (citations omitted).
 - xv. *Fujishima v. Bd. of Educ.*, 460 F.2d 1355, 1358 (7th Cir. 1972). *See also Nitzberg v. Parks*,

525 F.2d 378, 383-85 (4th Cir. 1975); *Baughman v. Bd. of Educ.*, 478 F.2d 1345 (4th Cir. 1973); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971); *Riseman v. Sch. Comm.*, 439 F.2d 148 (1st Cir. 1971); *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994); *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280 (E.D. Penn. 1991); *Riveria v. Bd. of Regents*, 721 F. Supp. 1189, 1197 (D. Col. 1989); *Sullivan v. Houston Indep. Sch. Dist.*, 333 F. Supp. 1149 (S.D. Tex. 1971); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D. N.Y. 1969). *But see Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997); *Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993); *Bystrom v. Friedley High School*, 822 F.2d 747 (8th Cir. 1987); *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972).

xvi. *Thomas*, 323 U.S. at 540.

xvii. *NAACP v. City of Richmond*, 743 F.2d 1346, 1455 (9th Cir. 1984) (citations omitted).

xviii. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969).

xix. *Tinker*, 393 U.S. at 506, 511.

xx. *See McIntire v. Bethel Indep. Sch. Dist.*, 804 F. Supp. 1415, 1421 (W.D. Ok. 1992).

xxi. *Roth v. United States*, 354 U.S. 476, 484 (1957).

xxii. *See DeNooyer v. Livonia Public Schools*, 799 F. Supp. 744 (E.D. Mich. 1992), *aff'd sub nom, DeNooyer v. Marinelli*, 1 F.3d 1240 (6th Cir. 1993); *Duran v. Nitsche*, 780 F. Supp. 1048 (E.D. Penn. 1991). These particular cases generally stand for the proposition that a student must give a report within the parameters of the assignment. If the report is given within the parameters of the assignment, then the school is prohibited from restricting the report solely because the content is religious.

xxiii. *See Dept. of Educ., Religious Expression in Public Schools*, www.ed.gov/Speeches/08-1995/religion.html

xxiv. *Bd. of Educ. of the Westside Comm. Sch. v. Mergens*, 496 U.S. 226 (1990).

xxv. *Id.* at 236, 241

xxvi. *Id.* at 237.

xxvii. *Id.*