

# THE CONSTITUTION AT SCHOOL

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*A Guide for Public High School Principals on the  
Constitutional Rights of Students on Campus*

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## *A Guide for Public High School Principals on the Constitutional Rights of Students on Campus*

Special thanks to the Individual Rights & Responsibilities Section  
of the State Bar of Texas

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# INTRODUCTION

In our system, state operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school 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.

Justice Abe Fortas

*Tinker v. Des Moines* (1969)

This is a guide to the United States Constitution and how the American judicial system has interpreted it to govern the campus lives of public high school students. When the delegates to the Constitutional Convention gathered in 1787, they could not have foreseen how the document they crafted would be applied in the educational context. But applied it is – and often to the puzzlement of high school administrators. This guide briefly summarizes the constitutional rights possessed by public high school students while they are on campus.

# TABLE OF CONTENTS

THE RIGHTS OF STUDENT JOURNALISTS .....	1
RELIGIOUS LIBERTY ISSUES .....	5
THE RIGHTS OF STUDENTS TO FREEDOM OF EXPRESSION .....	7
THE RIGHTS OF STUDENTS TO FORM CLUBS AND MEET ON CAMPUS .....	11
STUDENT PRIVACY RIGHTS .....	13
EQUAL PROTECTION: THE RIGHT OF STUDENTS TO BE FREE FROM DISCRIMINATION .....	15
CONCLUSION .....	17



# THE RIGHTS OF STUDENT JOURNALISTS

Court decisions concerning the freedom accorded to student journalists attempt to balance the need to maintain an appropriate learning environment with the recognition that our society depends on a free and vital press. Developing the journalists necessary to ensure a free and vital press means granting student journalists the freedom to pursue stories that may make administrators uncomfortable. This balance is not easy to establish. Courts grant high school administrators substantial discretion over certain student publications in the hope that administrators will exercise their discretion wisely and permit their student journalists the freedom necessary to develop journalistic skills.

## ADMINISTRATION CONTROL OF STUDENT PUBLICATIONS

The U.S. Supreme Court's 1988 decision in *Hazelwood School District v. Kuhlmeier* gave public high school officials substantial discretion over the content of school-sponsored student publications. Administrators may control content in publications that may be perceived as having school sponsorship so long as their decisions are reasonably related to a legitimate educational concern, meaning the story would substantially interfere with the school's work or impinge on the rights of other students, or is poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. The Court upheld a principal's decision to censor a story about student pregnancy and the effects of divorce on students due to his belief that the stories invaded the privacy of certain students and that the references to sexual activity and birth control were unsuitable for the school's younger students. As a result of this decision, school administrators now have substantial discretion in deciding what to permit in most school newspapers.

This discretion, however, does not apply to any publication that a school has opened up as a public forum for student expression. A public forum exists where school officials have given student editors authority over content decisions through official policy or by allowing a publication to operate with editorial independence. In that event, administrators may only control content that will cause a material or substantial disruption of the school environment or will intrude on the rights of others (known as the *Tinker* standard).

In determining the administration's right to control content, it may be helpful to ask the following question:

Does the school fund the newspaper or permit it to use the school's name, or is the newspaper part of the school's educational program?

If not, the administration's ability to control the newspaper probably is governed by the *Tinker* standard. But if the answer is "yes," the administration should ask the following additional question:

Have students overseeing the publication been given the authority, either by policy or practice, to make content decisions free from administrative supervision?

If the answer is "yes," the publication probably is governed by the *Tinker* standard. If the answer is "no," the publication probably is governed by the *Hazelwood* standard. Again, those standards are:

*Hazelwood:* Can the school show a valid educational purpose for exercising control, and show that exercising control is not intended to silence a particular viewpoint?

*Tinker:* Can the school show a material and substantial disruption from the story, or that the story will intrude on the rights of others?

## **LIABILITY FOR LIBEL**

Student journalists, like all journalists, must have credibility to be believed and trusted. To ensure that credibility, student journalists should adhere to the highest standards of ethics and objectivity. But even the most scrupulous journalists make mistakes. And sometimes those mistakes lead to legal liability for libel. Student journalists are subject to libel claims just like other journalists, and may expose their schools to liability.

Libel is the printed false defamation of character. The best defense to libel is accurate reporting, because truth is a defense to libel. Moreover, libel must be based



on a false statement of fact – an opinion cannot be libelous. Journalists may also report what is said (so long as they do it accurately) in legislative or judicial proceedings without fear of libel exposure. Finally, student journalists may voice their opinions freely in reviewing books, films, and music so long as they do not make false statements of fact about the material.

Journalists have added protection from libel involving a public figure. To establish libel, a public figure must prove the journalist acted with actual malice, meaning the journalist either knew the statement was false or printed it with reckless disregard for the truth. The line separating private citizens and public figures can be confusing. While most courts probably would hold that high school principals are public figures with respect to their school's student journalists, at least one Texas court has held that a high school teacher is not a public figure. Court decisions indicate that a school which does not control the content of a student publication may be protected from liability for libel.

## **UNDERGROUND NEWSPAPERS**

Most courts hold that school control over underground newspapers is very limited if the publications are not distributed on school grounds. If they are distributed at school, underground newspapers probably are subject to the *Tinker* standard, meaning school officials can exercise control only to prevent material or substantial disruption, or to protect the rights of others (remember, though, that schools always can impose reasonable restrictions on the time, place, and manner of distribution to prevent foreseeable material and substantial disruptions on school grounds).

## **SHIELDING SOURCES**

In 2009, the Texas Legislature enacted the Free Flow of Information Act, providing a limited privilege to journalists. The new law provides both civil and criminal protection to journalists seeking to protect confidential sources. The civil section applies to confidential and non-confidential sources as well as work materials, and substantially limits the situations in which this information may be sought by subpoena. The criminal section is more complicated, but also provides substantial protection to sources and work product. Legal counsel should be consulted to determine the applicability of the protection to any particular situation, because once they make that promise they are legally bound to keep it.



## **RELIGIOUS LIBERTY ISSUES**

Religious liberty issues fall under the two religion clauses of the First Amendment, known as the Establishment Clause and the Free Exercise Clause. The Establishment Clause is concerned with the separation of church and state. The Free Exercise Clause, in contrast, prohibits government intrusion on the free exercise of religion. Together, these provisions prohibit public schools and their officials from promoting or inhibiting religion. In applying these provisions, it may be helpful to ask the following preliminary question:

Who would a reasonable person believe is promoting or engaging in the religious activity?

If the answer is “the school or its employees,” the activity probably is prohibited by the Establishment Clause. If the answer is a “student,” the activity probably is protected by the Free Exercise Clause (provided the student’s religious belief is sincerely held and the activity is neither disruptive nor coercive).

### **FREE EXERCISE OF RELIGION**

Students are free to pray at school, subject to reasonable time, place, and manner restrictions to prevent foreseeable material and substantial disruptions (a student may not, for example, pray out loud while the biology teacher is presenting the day’s lesson).

Schools may not require students to pledge allegiance to any government or symbol if doing so conflicts with a sincerely-held religious belief. Students may not be required to remove religious symbols or clothing, such as a yarmulke, hijab, cross, or Star of David, if wearing the symbol or clothing is dictated by the student’s sincerely-held religious belief.

Schools may not penalize students for referring to religious beliefs in school work. Of course, if the work lacks academic merit, the fact that it includes religious references is immaterial. For example, some students wish to address scientific issues such as evolution in religious terms. That is permissible, but the failure to address the relevant scientific issues of evolution may permissibly result in a poor grade.

## RELIGIOUS SPEECH

The Supreme Court said in *Hazelwood* that schools may not punish students for expressing their personal views on school premises unless school authorities have reason to believe that such expression will “substantially interfere with the work of the school or impinge upon the rights of other students.” This means that students have a right to distribute religious tracts on campus, subject to reasonable time, place, and manner restrictions to prevent foreseeable material and substantial disruptions. The Ninth Circuit Court of Appeals held in *Lassonde v. Pleasanton Unified School District* (2003), though, that a school district did not violate a student’s First Amendment rights by requiring the removal of proselytizing comments from a graduation speech. The court upheld the decision by school officials that references to God as they related to the student’s own beliefs were permissible, but proselytizing comments were not (the school did allow the student to hand out copies of the unedited speech outside of the graduation).

## SCHOOL PROMOTION OF RELIGION

While *students* are free to pray at school, *school officials* may not participate in, direct, or encourage student prayer. In evaluating the applicability of the Establishment Clause to public schools, the Supreme Court has made clear the need for public schools to remain neutral toward religion (meaning a school may not promote one religion over another, and may not prefer religion in general over non-religion).

The law concerning student-led prayer at school events is among the more confusing areas of school law, and continues to evolve. The Supreme Court has made clear that school officials may not present, direct, or encourage prayer by anyone at school events, and may not invite guests to present prayers at such events (including commencement). In the 1992 case of *Lee v. Weisman*, the Court held that a school’s policy of inviting local clergy to deliver a prayer at commencement violated the Establishment Clause. The issue of student-led prayer is more confusing, though the Court did hold in the 2000 case of *Doe v. Santa Fe* that student-led prayer before a school event violates the Establishment Clause where the school participates in planning or presenting the prayer.

# THE RIGHTS OF STUDENTS TO FREEDOM OF EXPRESSION

Students do not shed their constitutional right to free expression upon entering a high school. In 1969, the Supreme Court decided *Tinker v. Des Moines Independent Community School District*, establishing that public high school students have a First Amendment right to free expression on campus. In *Tinker*, the school suspended three students for wearing black armbands at school to protest the Vietnam War. The Supreme Court held that the school violated the students' First Amendment rights because wearing the armbands was not disruptive and the school was punishing the students solely for expressing their political message.

In the context of free expression, a natural tension exists between teachers and administrators on the one hand, and students on the other – especially students who wish to express unpopular or “anti-establishment” ideas. Public schools are created to educate students. Schools may only limit expression – whether through words, actions, or clothing – where it would materially and substantially interfere with the educational purpose. It is not enough that teachers or administrators want to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

## STANDARDS FOR STUDENT SPEECH

Courts traditionally have divided student speech into three categories:

- (1) Vulgar, lewd, or obscene speech (evaluated under the *Fraser* standard);
- (2) School-sponsored speech (evaluated under the *Hazelwood* standard);  
and
- (3) All other student speech (evaluated under the *Tinker* standard).

The Supreme Court enunciated the *Fraser* standard in the 1968 case of *Bethel School District v. Fraser*, upholding the suspension of a student who gave a vulgar and lewd speech before a student assembly. The Court said that “the 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.” Under the *Fraser* standard, a school may limit vulgar, lewd, or obscene speech. The Supreme Court extended this standard with its 2007 holding in *Morse v. Frederick* (also known as the “Bong Hits for Jesus” case). In that case, the Supreme Court held that a public high school may limit speech that may reasonably

be regarded as promoting illegal drug use. But the Court declined to go further and hold that student expression may be banned because it is offensive. “After all,” the Court said, “much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick’s speech was offensive, but that it was reasonably viewed as promoting illegal drug use.”

As previously discussed, school-sponsored speech generally is subject to the *Hazelwood* standard. While this most often concerns student publications, it might also extend to speech by a school mascot, for example. To limit speech subject to this standard, the school must show a valid educational purpose for the limit, and show the limit is not intended to silence a particular viewpoint.

All other student speech probably remains subject to the *Tinker* standard enunciated by the Supreme Court. Under *Tinker*, a school may limit student speech only where the school reasonably believes the student expression will lead to either a substantial disruption of the school environment or an invasion of the rights of others. This belief, moreover, must be based on evidence and not on an undifferentiated fear or apprehension – in other words, there must be some specific basis for the school’s prediction of disruption from the speech.

### **TIME, PLACE, AND MANNER RESTRICTIONS**

Even when students have the right to express themselves, schools may place reasonable limits on the time, place, and manner of that expression to prevent foreseeable material and substantial disruptions. These restrictions are permissible so long as (1) they are content-neutral (meaning they do not treat speech differently based on its content); (2) they are narrowly tailored to serve a school interest (meaning there is a legitimate educational reason for them, and they are no broader than necessary to achieve it); and (3) they leave open ample alternative means of communication (meaning they leave open plenty of opportunities for the speech to take place). Schools may, for example, limit student distribution of materials to certain times and places, as long as the restrictions are reasonable and nondiscriminatory.

### **CLOTHING AND DRESS CODES**

Clothing and dress codes are two sides of the same coin, and among the most contentious areas of student expression. Courts consistently recognize that student dress can be a means of expression implicating the First Amendment. As more

schools turn to mandatory uniforms, the rules governing student dress under the First Amendment grow more confusing.

The Supreme Court has never decided a dress code case. Several federal courts, however, have upheld student dress codes as constitutional. But some of these same courts also have recognized the right of students to protest school policies so long as they are not disruptive in doing so. For example, one court upheld the right of a student to wear a black armband to protest his school's adoption of a dress code.

Clothing, especially T-shirts, can express cultural, religious, or political opinions. But clothing that is appropriate in another social setting might be too distracting or disruptive in the classroom. School limits on clothing usually are evaluated under the *Tinker* standard, meaning schools can enforce rules concerning clothing to avoid material and substantial disruption (of course, schools can almost certainly limit obscene, lewd, or vulgar clothing under the *Fraser* standard). Often, application of these standards is highly subjective. Bans on T-shirts with controversial messages, such as "Homosexuality is shameful," "Be Happy, Not Gay," "Free the Jena 6," and even just a picture of the Confederate flag, have been upheld in court. Intermediate appellate courts differ over First Amendment protection for T-shirts, and this area of the law remains unsettled.

## **HAIR STYLE RESTRICTIONS**

Students have long argued that how they wear their hair is an expression of who they are. In recent years, certain hair styles were associated with opposition to a war, racial heritage, and white supremacy and neo-Nazism, to name just a few causes. Courts disagree about the constitutional protection that should be afforded to choices concerning hair style and color. Federal courts covering Texas generally appear unwilling to extend substantial constitutional protection to a student's choice of hair color or style, unless it is dictated by the student's sincerely-held religious belief. So long as the school can articulate some reasonable basis for its policy concerning hair style and color, there is a good chance it will be upheld.

## **HARASSING OR THREATENING SPEECH**

In recent years, schools have grown more sensitive to harassing and threatening speech. Schools can restrict student speech if (1) they can reasonably forecast material and substantial disruption (the *Tinker* standard), or (2) the speech is a threat. Threats

are not protected by the First Amendment. But there is no clear test for determining what constitutes a threat, and court decisions in this area continue to evolve.

Schools also have an obligation to protect their students from harassment, including harassing speech. While students have speech rights on campus, those rights do not include a right to harass other students. A student's repeated intimidation of another student is the type of behavior that usually will be classified as harassment not protected by the First Amendment.

## **LIBRARY CENSORSHIP**

In 1982, the Supreme Court held in *Board of Education v. Pico* that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library. The Constitution protects the right to receive information and ideas, and “the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.” The Court held that school officials may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” But the decision is limited to the removal of books, not to their acquisition. And schools may remove educationally unsuitable books from their libraries.

## **OFF-CAMPUS SPEECH**

Traditionally, courts hesitated to restrict student speech that took place off campus. But the rise of the Internet is changing this traditional view. Courts disagree over how much authority school officials have over off-campus speech. Some courts continue to distinguish clearly between on-campus and off-campus speech, while other courts allow school officials to penalize off-campus student speech, including blogs and websites. Most of these courts hold that off-campus speech may be penalized under the *Tinker* standard where it is reasonably likely to materially and substantially disrupt the educational process.



# **THE RIGHTS OF STUDENTS TO FORM CLUBS AND MEET ON CAMPUS**

In 1984, Congress passed the Equal Access Act (EAA) in response to school districts' concerns about their potential liability for violating the separation of church and state by permitting student religious groups to meet on school grounds. The Supreme Court upheld the EAA as constitutional in 1990.

## **FORMATION OF CLUBS**

The EAA covers student-initiated and student-led clubs, and prohibits public high schools that have established a "limited open forum" from denying equal access to, or discriminating against, any students seeking to conduct a meeting within that forum on the basis of the religious, political, philosophical, or other content of the speech at the meeting.

A limited open forum exists where a public high school permits one or more "non-curriculum related groups" to meet on campus during non-instructional time. The forum is limited because only the school's students can take advantage of it. Curriculum-related student groups, like the Spanish Club or Math Club, do not create a limited open forum. But a limited open forum exists where a high school permits a non-curriculum related group, like the Chess Club or Scuba Club, to meet on campus. Once a limited open forum exists, the school must permit student-led groups to use school facilities on an equal basis. Thus a gay/straight alliance and a Christian study group have equal access to meeting spaces, the PA system, school periodicals, and bulletin board space.

## **STAFF AND PUBLIC PARTICIPATION IN MEETINGS**

Neither the school nor its employees may sponsor a non-curriculum related group. Although school officials may monitor meetings, they may not direct, control, or otherwise participate in them. Non-school personnel may attend meetings occasionally as guests, but may not direct, conduct, control, or regularly attend activities of student groups.

## **SCHOOL LIMITS ON MEETINGS**

The EAA does not prevent high schools from establishing reasonable time, place, and manner restrictions even in a limited open forum. A school may establish

reasonable meeting times on selected school days, limit the rooms student groups are permitted to use, and enforce regular order and discipline during meetings. But all these regulations must be uniform, not discriminatory, and neutral in viewpoint (in other words, the rules must apply equally to all groups). High schools may exclude student groups that are unlawful or encourage unlawful activity, or that materially and substantially interfere with the orderly conduct of educational activities. But a student group cannot be denied equal access simply because its ideas are unpopular or controversial.

# STUDENT PRIVACY RIGHTS

Court decisions concerning students' privacy rights generally balance the student's privacy interest against the school's interest in maintaining order. While students have more privacy rights at school than at home, they generally receive less protection within the educational context than they do in society at large.

## DRUG TESTING

In 2002, the U.S. Supreme Court broadened the authority of public schools to test students for illegal drugs. Voting 5-4, the Court held in *Board of Education of Pottawatomie County v. Earls* that testing students who participate in extracurricular activities is a reasonably effective means of addressing a school district's legitimate concerns in preventing, deterring, and detecting drug use. But the Court stopped short of authorizing all school drug testing, instead applying a balancing test that considers (1) the nature of the privacy interest allegedly compromised by the drug testing; (2) the character of the intrusion imposed by the testing policy; and (3) the nature and immediacy of the government's concerns and the efficacy of the testing policy in meeting them. A concurring opinion in the case suggested the result might have been different had the school extended its mandatory testing policy to include all students.

## SEARCHES

In the 1985 case of *New Jersey v. T.L.O.*, the Supreme Court held that a "reasonable cause" standard – a lesser standard than probable cause – applies to searches of public school students and their possessions by school officials. At least one Texas court has held that the reasonable cause standard also applies to off-campus searches conducted on school-related field trips.

Under ordinary circumstances, the search of a student by a teacher or other school official will be upheld when (1) there are reasonable grounds for suspecting the search will turn up evidence that the student has violated or is violating either the law or school rules, and (2) the measures adopted are 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.

Reasonable cause requires the existence of some articulable grounds for conducting the search, and must be more than simply a hunch that wrongdoing has occurred.

While the “reasonable cause” standard continues to govern most searches, the U.S. Supreme Court recently held that a more intrusive search, such as a search of a student’s underwear, is in a category of its own, demanding its own specific suspicions. A general belief that students hide contraband in their clothing is not enough to justify such a search. A search that extensive requires the support of reasonable suspicion that contraband is hidden in a student’s clothing. “Reasonable suspicion” requires “some justification in suspected facts;” a “suspicion that [the search] will pay off.”

## **RELEASE OF INFORMATION TO THE ARMED FORCES**

The No Child Left Behind Act requires public high schools to provide student contact information to military recruiters. But students and their parents have the right to request that the student’s name, address, and telephone listing not be released without prior parental approval – and the school is required to notify parents of their option to make this request. The required notice should be given to parents before the student’s contact information is released to military recruiters. Once the request is made, the school must comply with it.

## **RELEASE OF EDUCATION RECORDS**

The Family Educational Rights and Privacy Act (FERPA), also known as the Buckley Amendment, gives students the right to inspect and review their education records, request corrections, halt the release of personally identifiable information, and obtain a copy of their school’s policy concerning access to educational records. It also prohibits educational institutions from disclosing “personally identifiable information” in education records without written consent from the student (or, if the student is a minor, the student’s parents). Schools that violate FERPA risk losing their federal funding.

Schools must inform parents of their rights under FERPA. Generally, schools must obtain written consent from parents and eligible students before disclosing any personally identifiable information from a student’s education record other than directory information. There are, however, several exceptions to this rule. A school may release records without the student’s consent: (1) to school officials with a legitimate educational interest; (2) to other schools to which a student seeks or intends to enroll; (3) to education officials for audit and evaluation purposes; (4) to accrediting organizations; (5) to parties in connection with financial aid to a student; (6) to organizations conducting certain studies for or on behalf of a school; (7) to comply with a judicial order or lawfully issued subpoena; (8) in the case of health and safety emergencies; and (9) to state and local authorities within a juvenile justice system.

## **EQUAL PROTECTION: THE RIGHT OF STUDENTS TO BE FREE FROM DISCRIMINATION**

The Constitution requires that all high school students be given equal educational opportunity no matter what their race, ethnic background, religion, or sex, or whether they are rich or poor, citizen or non-citizen. Even students in the country illegally have the right to a free public education. Schools may base class placements on ability and potential without violating the Constitution. But those placements must be based on legitimate educational factors – never on racial, religious, or class preferences.

Pregnant students also have the right to a public education. Both federal and Texas law prohibit public schools from discriminating against or expelling pregnant students. A pregnant student is entitled to a public high school education identical to that of any other student, and a school may not inhibit a pregnant student from participation in school programs or extracurricular activities, or limit her course offerings. Finally, a school may not require any sort of physician's note or clearance from a pregnant student unless such a note or clearance is required of all students.

Students with disabilities also have the right to an appropriate public education under the Individuals with Disabilities Education Act. Under this law, students with disabilities must be placed in the "least restrictive environment appropriate" for them. Public high schools must provide individualized assistance for these students where that assistance would permit them to succeed in a regular classroom. If instruction in a regular class, even with assistance, would not benefit the disabled student, the student may be placed in a more restrictive setting. Most court decisions support placing students with disabilities in the regular school environment unless the school can prove the student is not benefitting socially or academically from the placement. Even then, the school must place the student in the least restrictive appropriate environment.



## CONCLUSION

As you can see, many constitutional issues may arise in the high school context. Most of the time, high school administrators can resolve these issues by reference to basic legal concepts, and by balancing the need to maintain order in the school environment with the need to respect the legitimate constitutional rights of students (even where those students seek to annoy others or provoke controversy).

Remember, though, that this guide is only a starting point, published as a public service by the Texas Young Lawyers Association and the Individual Rights & Responsibilities Section of the State Bar of Texas. It provides only a brief overview of the many constitutional issues that may confront high school administrators and is not intended to replace legal advice from an attorney. If you have specific legal questions, you should seek counsel from an attorney.

## RESOURCES

Resources on Student Press Issues:

The Student Press Law Center  
<http://www.splc.org>

The National Scholastic Press Association  
<http://www.studentpress.org>

**Resources on Student Speech and Religious Liberty Issues:**

The First Amendment Center  
<http://www.firstamendmentcenter.org>

## NOTES

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