First Amendment Issues in K-12 Education
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May 5, 2015

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, First Amendment.

> The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.

Minnesota Constitution, Article 1, Sec. 3.

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Minnesota Constitution, Article 1, Sec. 16.

I. School speech

The leading case on the subject of student speech is Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), in which the students, to protest the Vietnam war, wore black armbands to school, in violation of a rule prohibiting those armbands.

The Court observed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and held that the students' resulting suspension was unconstitutional:

> 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. There is here no evidence whatever of petitioners' interference,

> actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.
>
> In our system, state-operated schools may not be enclaves of totalitarianism.

But the Court also noted that it has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."

An example of that other end of the spectrum is best shown by Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986), in which the student made a speech at a required assembly in favor of a candidate for a school election. "During the entire speech, [the student] referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor."

The student was suspended. In upholding this discipline, the supreme Court stated:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.... The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

II. Establishment Clause

In Lemon v. Kurtzman, 403 U.S. 602 (1971), a Rhode Island law provided a 15% salary supplement to be paid to teachers in nonpublic schools at which the average per-pupil expenditure on secular education is below the average in public schools. The majority of the beneficiaries of this law were teachers in Catholic schools.

In holding this statute unconstitutional, the court announced a three-part test. In order for a state action to be held constitutional, it must satisfy all three prongs of the following test:

> The action must have a secular purpose.
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> The action must not have the primary effect of either advancing or inhibiting religion.
>
> The action must not result in an excessive entanglement with religion.

The court held that the statute violated the "excessive entanglement" prong of this test.

See also, School District of the City of Grand Rapids v. Ball, 473 U.S. 373 (1985) ("[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents ... as an endorsement, and by nonadherents as a disapproval, of their individual religious choices")(Public school district employees teaching non-religious classes in private religious schools held to be violation of establishment clause.)

III. Free Exercise Clause

In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Supreme Court held that a state compulsory attendance law violated the rights of Amish parents whose religious beliefs prevented them from having their children educated past the eighth grade. The Court held that the statute interfered with the practice of a legitimate religious belief.

The holding in Yoder was weakened by the Court's later decision in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). That case involved use of peyote by Native Americans, in violation of a state law. The Court in Smith held The Court held that a state has the power to accommodate otherwise illegal acts, and that such an accommodation does not violate the establishment clause. But the court went on to hold that the state has no obligation to do so under the Free Exercise clause.

The holding in Smith prompted Congress to pass the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb–1, et seq. When RFRA was held unconstitutional in part by City of Boerne v. Flores, 521 U.S. 507 (1997), Congress responded by adopting the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc et seq. For those wishing to learn more about RFRA and RLUIPA, these will be the subject of an upcoming program.

In re Welfare of T.K., 475 N.W.2d 88 (Minn. Ct. App. 1991), the Minnesota Court of Appeals held that mandatory standardized school testing infringed upon sincerely held religious views of parents, who believed that sending their children to public schools would risk "eternal damnation" and that sending them to parochial schools would interfere with a "personal relationship" with God.

See also, Child Evangelism Fellowship of Minnesota v. Minneapolis Special School District No. 1, 690 F.3d 996 (8h Cir. 2012), discussed below.

IV. Clothing

The issue of the constitutionality of a student dress code has never come before the U.S. Supreme Court. But see Tinker, above. See also, Lowry v. Watson Chapel School

District, 540 F.3d 752 (8th Cir. 2008) (Students had First Amendment right to wear black armbands protesting dress code.)

See also, W. Mahling, Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools, 80 Minn. L. Rev. 715 (1996).

V. School Newspapers and Yearbooks

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988): Administration's editorial control over student speech in school-sponsored activities permissible if reasonably related to legitimate pedagogical concerns.

See also, Annotation, First Amendment Rights of Free Speech and Press as Applied to Public School: Supreme Court Cases, 73 L. Ed. 2d 1466 (2006).

VI. Distribution of Literature

In Doe v. South Iron R-1 School District, 498 F.3d 878 (8th Cir. 2007), the Eighth Circuit affirmed a preliminary injunction against a school district which had allowed a religious organization to distribute Bibles to elementary children during instructional time.

> When government maintains a traditional public forum or creates a limited public forum for debate and expressive activity, any content-based censorship must survive strict judicial scrutiny. Thus, when a public school or other government agency creates a forum generally open to students or to the public but denies access to those who would engage in protected religious speech, it must "satisfy the standard of review appropriate to content-based exclusions" by showing that the exclusion "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." . . . In these circumstances, the interest in avoiding an Establishment Clause violation is no defense to violating the Free Exercise Clause rights of religious speakers....
>
> But this appeal raises an entirely different issue. When a public facility such as a school is not a public forum, by tradition or by design, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." ... Thus, when Supreme Court Justices have debated whether a particular school or other government activity should be enjoined as violating the Establishment Clause, the debates centered on whether the activity constituted impermissible government religious expression, endorsement, or coercion, not on whether the injunction was "content-based." ... The Court's Establishment Clause decisions prohibiting, for example, school prayer or posting the Ten Commandments in public schools are inherently based upon content-based distinctions; "apart from its content, a prayer is indistinguishable from a biology lesson."

VII. Student Clubs

Equal Access Act, 20 U.S.C. 4071:

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Board of Education of Westside Community v. Mergens, 496 U.S. 226 (1990): Since nonreligious groups were allowed to meet on school premises, school violated Equal Access Act in refusing permission to religious group. Equal Access Act was not unconstitutional under Establishment Clause.

In Child Evangelism Fellowship of Minnesota v. Minneapolis Special School District No. 1, 690 F.3d 996 (8h Cir. 2012), the school district allowed after-school meetings by various "community partners," including Boy and Girl Scouts, Big Brothers/Big Sisters, and the Boys and Girls Clubs of the Twin Cities. Students attending these after-school programs had access to district transportation and food services. The religious "Good News Clubs" operated by the plaintiff were not allowed to participate in the after school programs, after a district employee overheard prayer and references to Jesus Christ.

The court held that this action was unconstitutional viewpoint discrimination. "[The plaintiff] provides its enrichment programming from a religious perspective, while the groups who have been allowed to remain in the program do not. Excluding CEF on this basis is prohibited viewpoint discrimination."

> An abridgment of First Amendment speech rights must be justified by a compelling governmental interest, and the government's interest in avoiding an Establishment Clause violation "'may be'" ... However, the Supreme Court has made it clear that the Establishment Clause does not proscribe "private religious conduct during nonschool hours merely because it takes place on school premises." ... Instead, the Establishment Clause requires neutrality, as opposed to hostility, towards religion.

See Minn. Stat. 124D.19.

See also, Hsu v. Roslyn Union Free School District, 85 F.3d 839 (2d Cir. 1996) (School required to provide facilities to student club under Equal Access Act, notwithstanding club's requirement that club officers profess certain religion.)

VIII. Off-Campus Speech

In R.S. v. Minnewaska Area School District No. 2149, 894 F.Supp.2d 1128 (D. Minn. Sept. 6, 2012), the eighth grade student was given detention for posting on her Facebook wall, regarding an adult hall monitor, "[I hate] a Kathy person at school because [Kathy] was mean to me." This posting was visible to the student's "friends", one of whom copied it and gave it to the principal.

After the detention, the student posted on Facebook: "I want to know who the f%$# [sic] told on me." She was then given an in-school suspension and prohibited from attending a ski trip for "insubordination" and "dangerous, harmful, and nuisance substances and articles."

The U.S. district court held that the student's lawsuit could proceed:

> Such statements are protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment and are so egregious as to pose a serious safety risk or other substantial disruption in that environment.
>
> R.S.'s Facebook wall postings were not true threats or threats of any kind. While her statements may have been reasonably calculated to reach a school audience, that possible fact is not sufficient to justify her punishment. The school defendants must also show that the statements posed a substantial disruptive effect.
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> The content of R.S.'s wall postings are a far cry from the statements made by the students in cases in which courts have approved of school intervention.

IX. Book Censorship

> School districts "possess significant discretion to determine the content of their school libraries, but that discretion may not be exercised in a narrowly partisan or political manner. Whether petitioners' removal of books from the libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. Local school boards may not remove books from school libraries 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.'"

Board of Education v. Pico, 457 U.S. 853 (1982)

X. Pledge of Alegiance

> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power, and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

Minn. Stat. 121A.11:

> Subd. 3.Pledge of Allegiance.(a) All public and charter school students shall recite the Pledge of Allegiance to the flag of the United States of America one or more times each week. The recitation shall be conducted:
>
> (1) by each individual classroom teacher or the teacher's surrogate; or
>
> (2) over a school intercom system by a person designated by the school principal or other person having administrative control over the school.
>
> A local school board or a charter school board of directors may annually, by majority vote, waive this requirement.
>
> (b) Any student or teacher may decline to participate in recitation of the pledge.
>
> (c) A school district or charter school that has a student handbook or school policy guide must include a statement that anyone who does not wish to participate in reciting the Pledge of Allegiance for any personal reasons may elect not to do so and that students must respect another person's right to make that choice.
>
> (d) A local school board or a charter school board of directors that waives the requirement to recite the Pledge of Allegiance under paragraph (a) may adopt a district or school policy regarding the reciting of the Pledge of Allegiance.
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> Subd. 4.Instruction. Unless the requirement in subdivision 3 is waived by a majority vote of the school board, a school district must instruct students in the proper etiquette toward, correct display of, and respect for the flag, and in patriotic exercises.

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