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NMSBA

Free Speech in
Public Schools



Constitutional Law – First Amendment



Students' Free Speech

Tinker v. Des Moines Independent Community School District (1969)

Facts: Students planned to wear black armbands to signify their support for a truce in the Vietnam war. Principals of the school district caught wind of the plan and created a policy that said any student wearing an armband would be asked to remove it, with refusal to do so resulting in suspension. Three students were suspended and sued the school district.

Held: The suspension of the students violated their First Amendment rights.

“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

Market Place of Ideas

“The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.”

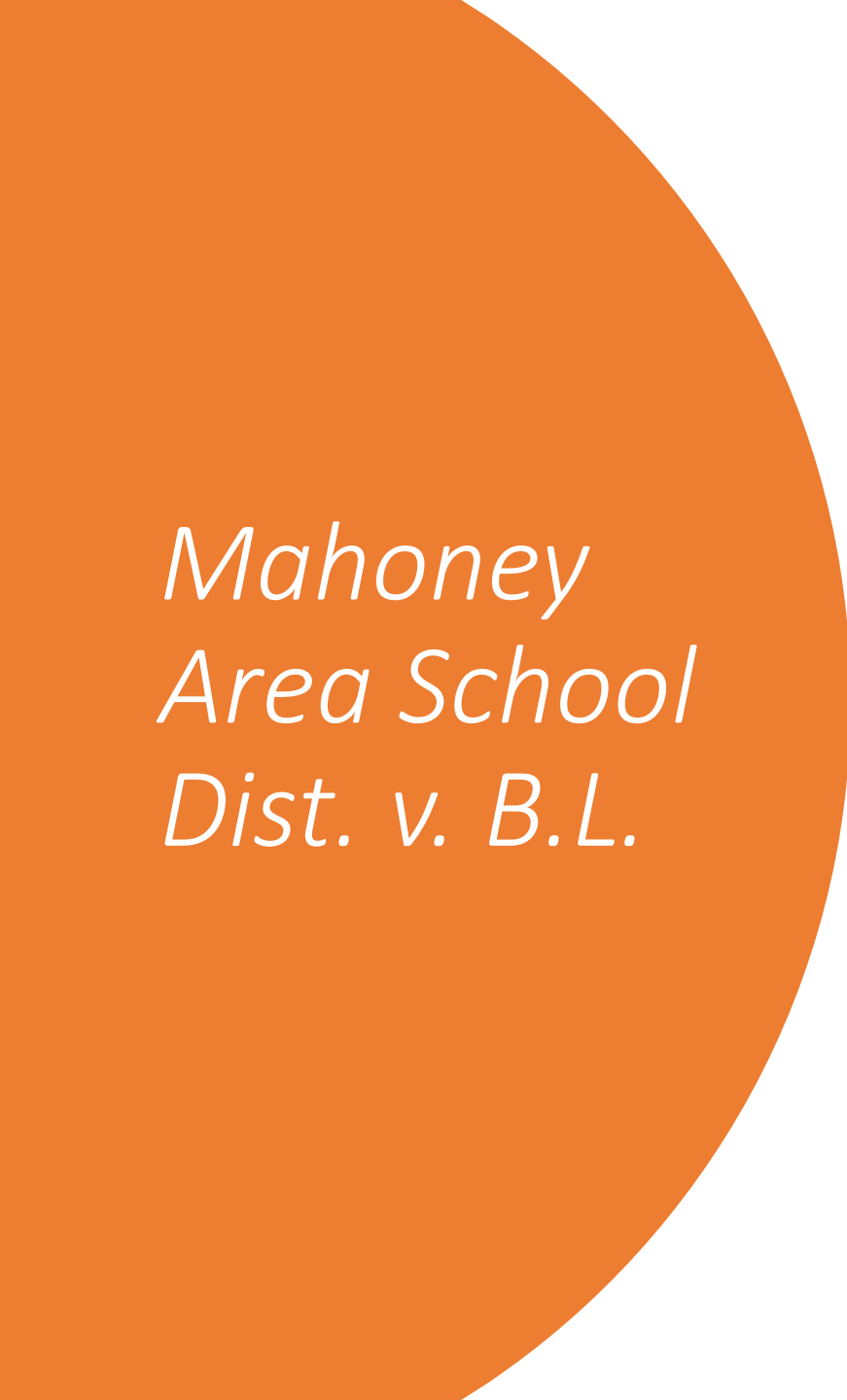
Market Place of Ideas

“A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without ‘materially and substantially interfere(ing) with the requirements of appropriate discipline in the operation of the school’ and without colliding with the right of others. *Burnside v. Byars, supra, 363 F.2d at 749*. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”

Tinker v. Des Moines Independent Community School District (1969)

First Amendment takeaways:

- The Court called this demonstration “Pure speech”
 - Certain clothing choices, aggressive, disruptive action, and even group demonstrations do not fall under this “pure speech”
- Schools can regulate a student's speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” .
 - Fear or apprehension of a disturbance is not sufficient. The school must be able to show actual disruption.



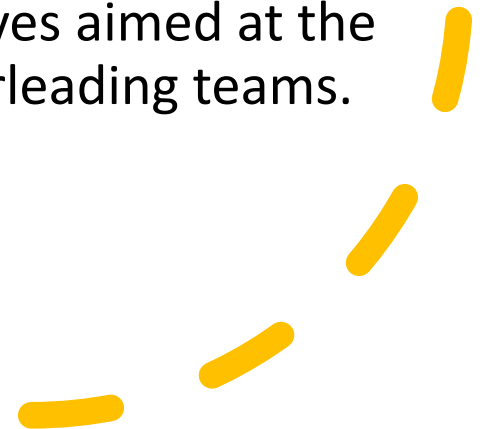
*Mahoney
Area School
Dist. v. B.L.*

- Involves a cheerleader and a school's right to regulate a student's speech made off-campus, such as speech made on social media.
- Mahoney City, Pennsylvania.
- Decided by the United States Supreme Court on June 23, 2021.



*Mahoney
Area School
Dist. v. B.L.*

- High School student B.L. tried out for her school's varsity cheerleading team and for right fielder on a private softball team.
- B.L. only made junior varsity cheerleading.
- B.L. was frustrated with this outcome.
- Over the weekend and off school campus, B.L. posted two pictures to her "Snapchat story."
- The pictures were captioned with expletives aimed at the school and the school's softball and cheerleading teams.



*Mahoney
Area School
Dist. v. B.L.*

- The images spread and were eventually brought to the attention of the cheerleading coach and the principal.
- B.L. was suspended from the junior varsity cheerleading team for one year.
- B.L. sued the school alleging violation of her First Amendment rights



What did the Court say?

- Schools can regulate student speech on and off-campus, to a certain extent.
- Schools can regulate speech in four instances:
 1. Indecent, lewd, or vulgar speech on school grounds;
 2. Speech promoting illicit drug use during a class trip;
 3. Speech that others may reasonably perceive as bearing the imprimatur of the school (such as a school newspaper); and
 4. Speech that materially disrupts classwork or involves substantial disorder or invasion of the rights of others.



BUT

- Schools have more ability to regulate these areas when a student is on campus.
- Regulating off-campus speech requires a heavier burden because:
 1. Off-campus speech normally falls under the dominion of parental responsibility, not school responsibility;
 2. Applying on-campus regulations to off-campus speech could overly deprive a student of their First Amendment rights; and
 3. The school itself has an interest in protecting student's unpopular opinions – Schools are the nurseries for democracy and should teach democratic principles.



So

- B.L.'s off-campus speech was her parent's responsibility and not the schools.
- B.L.'s off-campus speech did not cause substantial disruption to her classmates or threaten to harm the rights of others.
- Therefore, her Snapchat posts were protected by the First Amendment, which the school violated by her suspension from JV cheerleading.



What does
this mean?



Source: *Dos and Don'ts of Social Media* – Celarity, Google Images.

**Regulating off-campus speech
should be done especially
cautiously.**



NMAA Handbook – Section VI

Eligibility (Bylaws)

6.1 STUDENT PARTICIPATION

Student participation in interscholastic activities plays a significant role in personal and educational development. It is used as a means of developing wholesome attitudes and well-rounded citizens, who are better prepared to face the challenges of adult life as a result of their interscholastic experiences. **Participation is a privilege, not a right.** Students earn the privilege to participate by adhering to high standards of personal conduct and academic performance. Personal conduct and attitude of Student participants must reflect high standards of respect, integrity and responsibility.

Students participating in interscholastic activities represent the school, depict its character, and serve as role models to other Students. Accordingly, participants are subject to a standard of academic performance and to **higher standards of conduct both in and out of the school setting.** Continued participation in interscholastic activities is conditioned upon observing and maintaining such standards. It is the responsibility of the Local School District to ensure that necessary disciplinary measures are strictly enforced.

New Mexico Administrative Code

6.12.7.7 NMAC

“Bullying” means any repeated and pervasive written, verbal or electronic expression, physical act or gesture, or a pattern thereof, that is intended to cause distress upon one or more students in the school, on school grounds, in school vehicles, at a designated bus stop, or at school activities or sanctioned events. Bullying includes, but is not limited to, **hazing**, harassment, intimidation or menacing acts of a student which may, but need not be based on the student’s race, color, sex, ethnicity, national origins, religion, disability, age or sexual orientation.

“Cyberbullying” means electronic communication that:

Targets a specific student; is published with the intention that the communication be seen by or disclosed to the targeted student; is in fact seen by or disclosed to the targeted student; and creates, or is certain to create, a hostile environment on the school campus that is so severe or pervasive as to substantially interfere with the targeted student’s educational benefits, opportunities or performance.

District X Policy

Athletic Discipline


- A. Student athletes are under the same disciplinary criteria as all other student. Schools outline that procedure.
- B. **Conduct Unbecoming an Athlete:** Athletes will not display behavior **on or off** the playing field, which, **in the opinion of the coaching staff, is considered insubordinate or inappropriate to standards of conduct, attitude or sportsmanship.**
- C. **Sanction:** The coach and or school Administration will handle punishment. The range of punishment goes from verbal warning to dismissal from the team.

District X Policy

HAZING

Hazing will not be permitted. Hazing is defined as follows:

- A. To harass by exacting unnecessary, disagreeable or degrading tasks or activities which may result in harm or bodily injury to an individual.
- B. To play abusive and/or humiliating tricks on an individual by way of initiation.
- C. Head Coaches at all levels will have a no-hazing policy. **A signed copy by the player, parent/guardian must be returned to head coach before participation.**



Employee Free Speech

Employee Free Speech

- As the Court's decisions have noted, for many years “the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.” That dogma has been qualified in important respects. The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.

Garcetti v. Ceballos, 547 U.S. 410, 417, 126 S. Ct. 1951, 1957, 164 L. Ed. 2d 689 (2006) (internal citations omitted)

Employee Free Speech

Pickering v. Bd of Education of Township HS (1968)

What Happened:

- A high school teacher in Illinois sent a local newspaper a letter that was critical of how the School Board that employed him handled previous revenue proposals.
- He was fired for writing and publishing the letter.

What the Court Said:

- The First Amendment protects a teacher from being terminated for exercising their right to comment on matters of public importance absent proof that the teacher knowingly or recklessly made false statements.
- The School Board's interest in limiting the teacher's speech was no greater than limiting similar critiques made by a member of the general public. Therefore, the teacher's speech should be held to the same standard as a member of the public.

Employee Free Speech

Pickering v. Bd. Of Education of Township HS

- Balancing Test:
- Does the employee's speech involve a matter of public concern. If the answer is yes, then:
- The Court must balance the employee's interest to comment upon a matter of public concern vs. the public employer's interest in promoting an efficient workplace.
- If this balancing weights in favor of the employee, the employee must show that the speech was a "substantial factor or a motivating factor in the detrimental employment decision."
- If the employee can meet this burden, the public employer must then show that it would have taken the same action even without the protected speech.
- Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ., 232 F.3d 1334, 1338–39 (10th Cir. 2000) (internal citations omitted)

Employee Free Speech

Garcetti v. Cebellos (2006)

What Happened:

- A deputy district attorney was concerned about an affidavit used for a search warrant.
- He reported his concerns, but his supervisors decided to go forward with the prosecution
- He claimed he was a victim of retaliation afterwards

What the Court Said:

- Speech, even on matters of public concern, is not protected under the First Amendment if it is made as part of an employee's duties (i.e. if the individual is speaking as an employee as opposed to speaking as a free citizen).

Employee Free Speech

Lane v. Franks (2014)

What Happened:

- Edward Lane testified against Suzanne Schmitz in two federal criminal matters.
- Lane was later terminated himself and alleged that his termination was in retaliation of his testimony against Schmitz and therefore violated his First Amendment right to free speech.

What the Court Said:

- Lane did not testify as part of his employment responsibilities.
- Even though he learned some of the subject matter of his testimony through the course of his employment, that was not enough to make the testimony part of his employment responsibilities
- Therefore, his speech was protected by the First Amendment

Employee Free Speech

Rock v. Levinski (10th Circuit) (2015)

What Happened:

- Joyce Rock was terminated from her position as a principal after speaking at a public meeting
- Rock voiced her opposition to a proposal by the District to close her school
- Rock sued the District's Board of Education and Superintendent alleging they violated her First Amendment rights to free speech.

What the Court Said:

- Rock's speech was in the scope of her employment duties
- Rock's speech did not unveil corruption or a secret, just her displeasure with the Administration
- Rock was a principal, and as a higher-ranking official had a greater burden of caution for what she said
- This was not protected under the First Amendment

So where
does it stand
today?

Employees have a right to free speech BUT:

- 1) Government employers can limit First Amendment rights of employees in certain instances
- 2) Speech may not be protected if it is made pursuant to an employee's job duties
- 3) The government can limit an employee's speech if that speech is more harmful coming from a government employee than a private citizen.

