

FIRST AMENDMENT FREE
SPEECH:

BEYOND THE
SCHOOLHOUSE GATES

SCSBA SCHOOL LAW CONFERENCE
AUGUST 28, 2021

DFL
DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

1

The First Amendment

- The First Amendment to the Constitution states, in part: “[Government] shall make no law [or policy or take any action] . . . abridging the freedom of speech...”
- “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . .
- **BUT** “courts must apply the First Amendment in light of the special characteristics of the school environment.”

DFL
DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

2

What is “speech”

- Verbal acts
- Written statements
- Choice of clothing
- Symbolic expression
- Sharing, “liking” or “retweeting”



DFL
DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

3

3

Tinker v. Des Moines Sch. Dist. (1969)

- In 1965, a group of students decided to protest U.S. involvement in Vietnam by wearing black armbands to their junior high and high school for a couple of weeks.
- School officials learned about the planned protest and issued a no armband policy (but did not prohibit wearing other symbols).
- John and Mary Tinker wore their armbands anyway – they were suspended and not allowed to return to school with armbands on.

DFL
DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

4

4

Tinker v. Des Moines Sch. Dist. (1969)

- Neither “students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
- “the Court 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.”



DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

5

5

Tinker v. Des Moines Sch. Dist. (1969)

- Court held that the school violated the student’s first amendment rights.
- “silent, passive expression of opinion, unaccompanied by any disorder or disturbance . . . no evidence whatever of . . . interference, actual or nascent, with the schools' work or of collision with the rights of other students . . .”



DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

6

6

Tinker v. Des Moines Sch. Dist. (1969)

- *Tinker* Standard – Schools can regulate speech (punish students for speech) that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”

DFL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

7

7

Tinker v. Des Moines Sch. Dist. (1969)

- “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”
- “something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”

DFL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

8

8

Tinker v. Des Moines Sch. Dist. (1969)

- There must be facts which might reasonably lead school authorities to forecast substantial disruption or material interference with school activities.

DFL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

9

9

Material Disruption – factors to consider

- nature and content of the speech
- objective and subjective seriousness of the speech
- severity of the possible consequences should the speaker take action
- intent of the student for the speech to reach the school
- whether the speaker expressly identified an educator or student by name or reference
- past incidents arising out of similar speech
- time needed to deal with concerns and ensuring that appropriate safety measures were in place

DFL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

10

10

Invasion of the rights of others

- **Safe Schools Climate Act of 2006**—Prohibits harassment, intimidation and bullying of public-school students.
- The Act defines harassment, intimidation and bullying as a gesture, electronic communication or written, verbal, physical or sexual act that is “reasonably perceived” to have the effect of harming a student physically or emotionally, damaging a student’s property, placing a student in reasonable fear of personal harm or property damage, or insulting or demeaning a student or group of students causing substantial disruption or interference with the school’s orderly operations.

DFL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

11

11

Bethel School District No. 403 v. Fraser (1986)

- Fraser’s speech:
 - "I know a man who is firm -- he's firm in his pants, he's firm in his shirt, his character is firm -- but most . . . of all, his belief in you, the students of Bethel, is firm. . . ."
 - Jeff is a man who will go to the very end -- even the climax, for each and every one of you. . . ."

DFL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

12

12

Bethel School District No. 403 v. Fraser (1986)

- “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”
- “Surely it is a highly appropriate function of public-school education to prohibit the use of vulgar and offensive terms in public discourse.”


DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

13

13

Bethel School District No. 403 v. Fraser (1986)

- Court held: The school district “acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.”


DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

14

14

Bethel School District No. 403 v. Fraser (1986)

- *Fraser* Standard - Schools can prohibit speech that is vulgar, lewd, indecent or plainly offensive.

15

Hazelwood School District v. Kuhlmeier (1988)

- Student staff members of a high school newspaper sued their school when it chose not to publish two of their articles.
- One article described three students' experiences with pregnancy, and the other article discussed the impact of divorce on students at school.

16

Hazelwood School District v. Kuhlmeier (1988)

- “The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.”

DFL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

17

17

Hazelwood School District v. Kuhlmeier (1988)

- “A school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.”
- “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”

DFL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

18

18

Hazelwood School District v. Kuhlmeier (1988)

- Court held school's decision to prevent the publishing of the two articles in the school newspaper was reasonable and did not violate the students' First Amendment Rights.

19

Hazelwood School District v. Kuhlmeier (1988)

- *Hazelwood* Standard – “[S]chool sponsored” speech can be censored if “reasonably related to legitimate pedagogical concerns.”

20

Morse v. Frederick (2007)

- Student suspended after unfurling “BONG HITS 4 JESUS” banner at school-sponsored event on a public street near the school.

DFL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

21

21

Morse v. Frederick (2007)

- “The ‘special characteristics of the school environment,’ and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.”

DFL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

22

22

Morse v. Frederick (2007)

- Majority: “a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.”
- Dissent: “The First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner does neither . . .”

23

Morse v. Frederick (2007)

- *Morse* Standard - Schools may restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.

24

Student Speech Standards

- **Fraser Standard** – schools can prohibit speech that is vulgar, lewd, indecent or plainly offensive speech.
- **Morse Standard** – schools may restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.
- **Hazelwood Standard** – “school sponsored” speech can be censored if “reasonably related to legitimate pedagogical concerns.”
- **Tinker Standard** – for all other speech, *Tinker* applies such that schools cannot regulate such student speech unless it would materially and substantially disrupt classwork and discipline in schools.

DFL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

25

25

Mahanoy Area School District v. B.L (2021)

- Rising Sophomore Brandi Levy did not make varsity cheer and did not get her preferred softball position.
- That weekend, at a local convenience store, Brandi posted photos to Shapchat with her middle finger raised with captions “F*** school, F***softball, F*** cheer, F*** everything!”
- Brandi was suspended from the team for the upcoming school year.

DFL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

26

26

Mahanoy Area School District v. B.L (2021)

- Court held: *Tinker* “substantial disruption” standard can apply to off-campus speech.
- BUT, in this case, no substantial disruption and therefore, school’s actions violated Leavy’s First Amendment rights.

DFLL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

27

27

Mahanoy Area School District v. B.L (2021)

- “[B.L.’s] posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B.L. also transmitted her speech through a personal cell phone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless . . . diminish the school’s interest in punishing B. L.’s utterance.”

DFLL

DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

28

28

Mahanoy Area School District v. B.L (2021)

- Schools “regulatory interests remain significant in some off-campus circumstances.”
 - serious or severe bullying or harassment targeting particular individuals;
 - threats aimed at teachers or other students;
 - the failure to follow rules concerning lessons;
 - the writing of papers, the use of computers, or participation in other online school activities; and
 - breaches of school security devices, including material maintained within school computers.


 DUFF FREEMAN LYON
 ATTORNEYS AND COUNSELORS AT LAW

29

29

Scenario – T-Bizzy

- 12th Grader Taylor “T-Bizzle” Bell performs an original rap song at the student talent show that uses crude language and curse words.
- Will it violate his first amendment rights if the school suspends him?
- Does it make a difference if the school’s talent show is held outside at a local park?


 DUFF FREEMAN LYON
 ATTORNEYS AND COUNSELORS AT LAW

30

30

Scenario – T-Bizzy

- What if T-Bizzy’s song is not part of the talent show, but is posted on You-tube and very popular among students?
- What if T-Bizzy’s song calls out the school’s coaches of sexually harassing players on the girl’s basketball team?
- What if T-Bizzy’s song includes lyrics like: “middle fingers up if you want to cap that chump”?



DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

31

31

Scenario – Lea Bacon, Soccer Team Captain

- Lea Bacon is the Captain of the Soccer Team. After a big loss, she goes on explitive-filled rant on social media criticizing the referees and the opposing team.
- Can she be suspended from school?
- Can she be suspended from the team?
- Can she be removed as team Captain?



DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

32

32

Scenario – Principal Belding’s Tinder Profile

- High school buddies, Zack and Screech create a fake dating profile on the dating app Tinder, using a picture of their principal, Mr. Belding. The Tinder profile is in “incognito mode” so it is not viewable by the public. However, Zack and Screech share a screen shot of the profile among a small group of friends. When the principal finds out, Zack and Screech are suspended for two weeks.



DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

33

33

Scenario – Principal Belding’s Tinder Profile

- What if Zack and Screech make the Tinder profile public and other students at the school “swipe right” on him and start posting lude comments on the profile?
- What if Zack and Screech use the Tinder profile to make it appear that Principal Belding is “swiping right” on other students at the school?



DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

34

34

Scenario – Kelly’s Facebook Group

- Kelly, a high school senior, creates a discussion group Facebook page, from home on her home computer. She invites around 100 people on her “friends” list to join. Another student, Ryan, joins the group and posts a picture of himself holding a sign which refers to another student, Sarah, as having an STD. Kelly comments on Ryan’s picture, “Ryan you are sooo funny!” Ryan posts a picture of Sarah, adding a caption that reads, “Portrait of a Prostitute.” Other students began posting comments about Sarah’s pictures such as, “LOL,” “This is awesome,” “Kelly and Ryan are my heroes,” and “Sarah is such a slut.”



DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

35

35

Scenario – Kelly’s Facebook Group

- Can Kelly be suspended for creating the Facebook Group?
- Can the other students who commented on the photos be disciplined?



DUFF FREEMAN LYON
ATTORNEYS AND COUNSELORS AT LAW

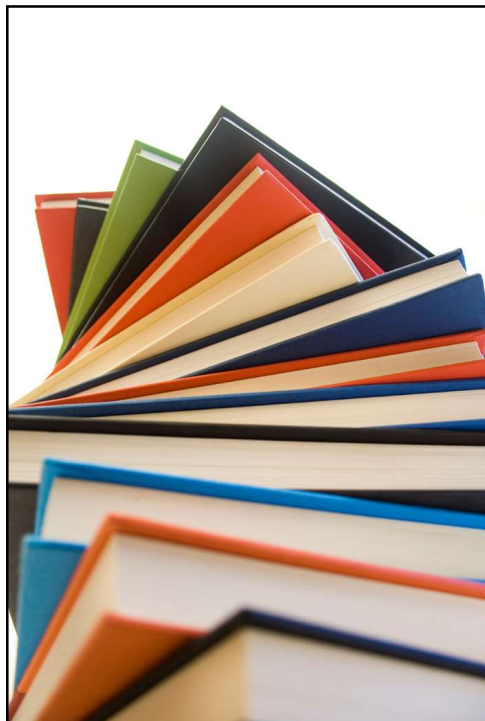
36

36

Scenario – Plot Twist

- On Monday, Springfield High School is evacuated because of an anonymously called-in bomb threat. No bomb is found. Monday night, at home on his family computer, Bart jokingly posts to his Instagram - “plot twist, bomb isn't found and goes off tomorrow. Ha ha!”
- Can Bart be disciplined?

37



QUESTIONS?

38

38

Contact us

 **Duff Freeman Lyon, LLC**

 **DFL-LAWFIRM.COM**

 **Email**
dlyon@dfi-lawfirm.com
tbutler@dfi-lawfirm.com

 **Phone**
803-790-0603

 **DUFF FREEMAN LYON**
ATTORNEYS AND COUNSELORS AT LAW 39