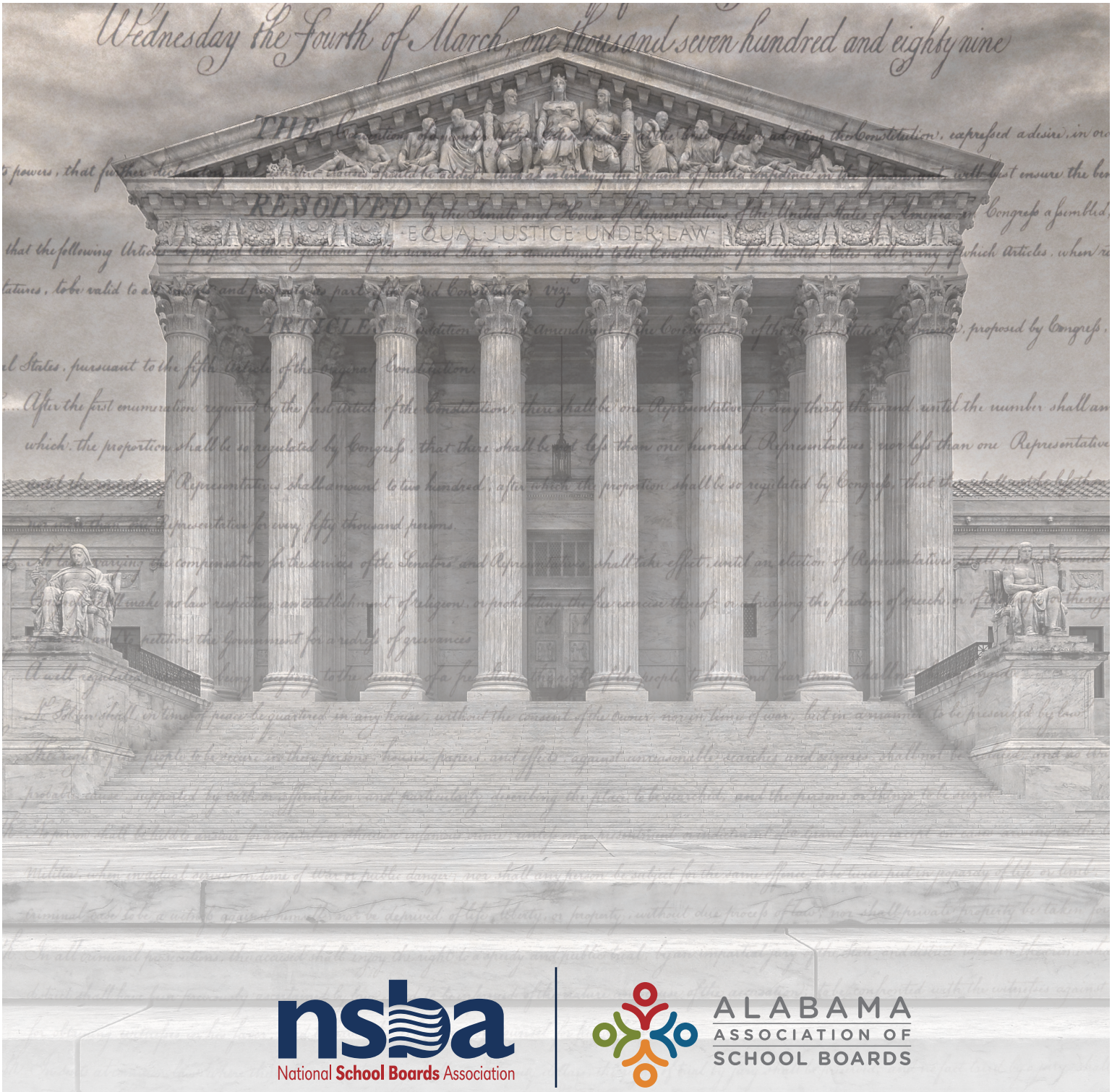

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COERCION, CONSCIENCE, AND THE *First Amendment*

A Legal Guide for Public Schools on the Regulation of Student and Employee Speech

"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."

—First Amendment to the U.S. Constitution

COERCION, CONSCIENCE, AND THE *First Amendment*

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Introduction: Finding Balance

In politically-charged times such as these, as the public raises its many voices on social issues like police shootings of unarmed African-American men, sexual harassment and violence, and immigration, we witness the First Amendment at work. Through its protections, the public expresses and debates ideas, lobbies policy-makers, and informs itself through the media, producing a robust dialogue and rich resource for democratic decision-making. People march in the streets, and spread their message far and wide through modern media. This marketplace of ideas is just what our founders had in mind, and why they protected the rights of free speech, press, petition, assembly and religion so prominently in our Constitution. And courts interpreting these rights often have bolstered them in the face of government attempts to restrict them.

Public schools, as units of government, must follow the First Amendment's guidelines. Students and employees do not check their First Amendment rights at the schoolhouse gate.[1] But a public school is not a public street. Schools have a duty, and recognized authority, to limit expression to maintain order, to protect the safety of the school community, and to provide a nurturing environment for learning. In today's climate, as political and social debates find their way into school communities, school officials face the often-daunting challenge of balancing the constitutional rights of students and employees with their responsibility to maintain a safe and orderly environment for learning.

It is not always easy to determine which interest—individual free speech rights or collective order—should outweigh the other in a given situation. If student-athletes wish to "take a knee" during the pre-game National Anthem, modeling protests they've seen NFL players make, may schools prevent that? What if a teacher, or coach, engages in similar protest during the Anthem? Does it matter who the protester is (student, teacher, bus driver)? Does it matter where the speech takes place (on-campus or off)?

This guide raises questions school officials may be asking as they approach student and employee speech in politically-charged environments. The answers provided here should help public school boards get a sense of the legal framework that applies to student and employee speech, and how that framework might be applied in sticky, real-life situations. As you consider your own district's policies and practices, we urge you to consult with a member of NSBA's Council of School Attorneys, as well as your state school boards association. We hope the guide ultimately will encourage the rich and thoughtful conversations envisioned by our founders as you develop policy to reflect community values and legal standards.

A. Students

1 Do students have a constitutional right to free speech at school?*

Yes. Students have a constitutional right to free speech at school, but schools may regulate speech that interferes with the operations of the school or infringes upon the rights of others.

The U.S. Supreme Court first recognized students' free speech rights in *Tinker v. Des Moines Indep. Comm. Sch. Dist.*[2] In *Tinker*, three public school students in Des Moines, Iowa, were suspended from school for wearing black armbands to protest the United States government's policy in Vietnam. The students sued the school district, and the Supreme Court ultimately ruled in favor of the students, saying that schools cannot regulate student speech unless it materially or substantially interferes with the operations of the school or impinges on the rights of others.

2 Is a student's right to free speech at school absolute?

No. Schools can also regulate speech when the school reasonably forecasts material disruption.

Because courts most frequently apply the *Tinker* standard when deciding whether a public school violated student free speech rights, it is helpful for school officials to be familiar with the type of circumstances that courts have identified as constituting "material and substantial disruption" or "impingement" of the rights of others.

One court decided that a school district's action banning a student from wearing clothing that displayed the Confederate flag at school[3] was permissible. Citing examples of past racial incidents that had occurred in the school, the court concluded that school officials could have reasonably foreseen that allowing students to wear clothing that displayed the Confederate flag at school would materially and substantially disrupt the work and discipline of the school.[4] In another case, a court ruled that administrators did not violate a student's First Amendment right to freedom of speech when they prohibited him from expressing support for a friend accused of shooting a police officer, because of its potential to incite gang violence.[5] In that case, the court explained that "past incidents of gang violence and increased tension caused by intimidation from gang members served as justification for the ban of a slogan clearly associated with a gang."[6] In yet another case, a court held that a school could regulate student speech if it had reason to think that the speech would lead to a decline in student test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms, therefore, of substantial disruption.[7]

Far fewer courts have addressed the extent to which schools may regulate student speech based on its impingement on the rights of others.[8] In a case where a student wrote a string of increasingly violent and threatening instant messages bragging about his weapons and threatening to shoot specific classmates, a court did not hesitate to rule that this type of violent threat impinges on the rights of others.[9] At least one court[10] has suggested that protecting students from harassment under Title

**Throughout this guide, "schools" refers to K-12 public schools, as First Amendment principles apply to action by government.*

"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 Ind. Comm. Sch. Dist. (1969)

IX would satisfy "the interference with the rights of others" requirement,[11] while another has permitted school officials to prohibit students from wearing shirts with messages that condemn and denigrate other students on the basis of their sexual orientation.[12]

Since *Tinker*, the Supreme Court has expanded the areas in which schools may regulate student speech to include lewd speech, school-sponsored speech (as in school newspapers) and speech that promotes illegal drug use or criminal activity.

Tinker and Beyond—School officials may regulate student speech that:

- materially disrupts the school setting or interferes with the right of others;
- is lewd, vulgar or obscene on the ground that such speech undermines "the school's basic educational mission;"[13]
- is school-sponsored speech, provided their actions are reasonably related to legitimate pedagogical concerns;[14] or
- promotes activities that are illegal, such as illegal drug use.[15]

3 Is protest a form of protected student speech?

Yes. Protest is a recognized form of protected student speech. In *Tinker*, the student speech/expression in question involved students wearing black arm bands in protest of the U.S. government's military involvement in Vietnam.[16] Courts, including the Ninth Circuit Court of Appeals, have noted that the First Amendment applies with "particular force" to protest activities.[17] The Supreme Court has also observed that speech protesting "racial discrimination is essential political speech lying at the core of the First Amendment."[18]

Because the law favors protecting political speech, courts generally will require a critical examination of the stated reasons for restricting it. An example is the case involving "I Heart Boobies" bracelets,[19] in which middle school students wore bracelets imprinted with the phrase to school for several weeks to promote cancer awareness and the need for research funds. When some teachers complained that the message on the bracelets was lewd, the school forbade the students from wearing them. Some students refused to remove the bracelets on breast cancer awareness day, and the school imposed in-house suspension. The parents sued, alleging that the school had

violated their students' First Amendment rights. The Third Circuit Court of Appeals ruled in favor of the students, finding that the bracelets were not lewd, as they commented on social issues, and that wearing them did not result in a disruptive school environment. The court went to great lengths to explain the reasoning for its decision, which illustrates how the law favors protection of political speech: if student speech is only ambiguously (not plainly) lewd, school officials cannot restrict it, if it can plausibly be interpreted as political or social speech.[20]

4 Can a student refuse to stand for the Pledge of Allegiance or National Anthem?

Yes. Students can refuse to stand for the Pledge of Allegiance. In 1943, the Supreme Court ruled in *West Virginia State Bd. of Educ. v. Barnette* that a West Virginia school board's mandatory flag salute regulation violated students' First Amendment right to freedom of speech.[21] "If there is any fixed star in our constitutional constellation," the Court said, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[22]

5 What if my state's law ***requires*** students to stand for the Pledge or Anthem?

Lower courts that have addressed the issue have ruled that state laws requiring students to stand for the Pledge of Allegiance or National Anthem are unenforceable. To meet constitutional standards, participation in the exercises must be voluntary.[23]

> ***"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."***
>
> ***— West Virginia State Bd. of Educ. v. Barnette (1943)***

6 What if a student wants to "take a knee" during the National Anthem?

Based on the Court's rulings in *Barnette* (see Q.4 above) and *Tinker*, students likely have a protected First Amendment right to engage in protest by "taking a knee" while the National Anthem is being played, unless such speech would substantially disrupt school operations. Some courts, including the U.S. Supreme Court, have suggested that student athletes and other participants in extracurricular activities may subject themselves to a higher level of regulation than non-participants, however.[24] Even so, when weighing the balance between curtailing a First Amendment

right and school policy, at least one recent decision suggests the scales tip in favor of protecting student expression. In *V.A. v. San Pasqual Valley Unified School District*, a federal district court ruled in favor a varsity football player who knelt during the playing of the National Anthem to protest racial injustice. In response to parental concerns about the potential for violence, the superintendent had prohibited students from engaging in certain forms of protest including kneeling during the National Anthem at athletic events at any home or away games, under penalty of removal from the team and subsequent teams during the school year. The court specifically found the student's kneeling to constitute the kind of speech that the school could not prohibit unless it demonstrated the kneeling would cause a substantial disruption or interfere with the rights of others.[25]

As public school students mirror protests by professional athletes who have "taken a knee" during the playing of the National Anthem, situations like *San Pasqual Valley* are sure to arise more often. The following examples highlight the varying approaches of school districts across the country to this socio-political phenomenon.

Texas. One school board president in Texas defended members of the girls' volleyball team and cheerleading squad who refused to stand during the National Anthem at games in protest of recent shootings of African-American men by the police. "Yes, there are possibly greater ways to get that message across; however, we are sitting here in 2016 and the messages that were brought forth in the '60s were somehow lost in translation," explained the board president. "Yeah, we can criticize the method but we have to listen to the message."[26]

Minnesota. A Minnesota school district issued a similar statement of support after an entire high school volleyball team knelt in a line before a home match and seven members of a high school football team did the same at their game. The school district's statement said administrators "respect our students' right to freedom of speech as long as their actions do not threaten the safety and security of others."[27]

But not all school districts agree that student-athletes "taking a knee" during the Anthem should be allowed.

Louisiana. The superintendent of schools in a Louisiana school district issued a letter stating that student athletes were expected to stand for the Anthem. "It is a choice for students to participate in extracurricular activities, not a right, and we at Bossier Schools feel strongly that our teams and organizations should stand in unity to honor our nation's military and veterans." A high school principal in the district sent a letter to athletes and parents, saying athletes were required to stand "in a respectful manner" during the Anthem. "Failure to comply will result in loss of playing time and/or participation as directed by the head coach and principal. Continued failure to comply will result in removal from the team."[28]

School leaders should consider carefully any requests by students wishing to "take a knee" during the National Anthem, or to protest in some other non-disruptive manner. Work with your NSBA Council of School Attorneys member and your state school boards association to arrive at policy decisions that balance a student's right to free speech or expression with the school's interest in maintaining a safe environment free from disruption, and make sure to implement the policy even-handedly. Lastly, consider the benefits of the teachable moment in minimizing the risks of litigation, while conveying important civics lessons where students can discuss the value of political expression, its implications, and the importance of selecting the forum in which the message is conveyed.

7 Can a school require a student to remain in a locker room or other alternative area in lieu of protesting until the National Anthem or Pledge of Allegiance is over?

Likely not, unless school officials have reasonably forecasted disruption or interference with the rights of others. For reasons explained in Q.5 and Q.6 above, a school in most cases cannot require students who wish to protest during the Pledge of Allegiance or National Anthem to remain in a locker room or remove themselves from a setting such as a classroom to a hallway or other alternative area until the Pledge or Anthem is completed.

As the Supreme Court noted in *Tinker*, a protest is a form of political speech that cannot be curtailed or regulated unless it is disruptive or impinges on the rights of others. In order to avoid a constitutional violation, schools must generally show that the potential for disruption and the harm to the rights of others is real, likely, and more than speculative.

8 Can a school regulate student speech at a school-sponsored activity, like a football game?

Yes, school-sponsored activities are still considered to be within the school setting.

9 May an athletic association require in its "code of conduct" or rulebook that students refrain from protesting as a condition of participating in extracurricular athletics?

It depends on whether the athletic association is considered a "state actor." The provisions of the First Amendment only apply to public entities. If an athletic association is private, it could require students to adhere to a code of conduct that prohibits protesting as a condition of participating in extracurricular athletics. However, if the athletic association were considered to be an arm of the state, it would need to adhere to the same First Amendment requirements as any other public entity.

This specific issue was addressed in *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n,* in which a school sued a not-for-profit statewide interscholastic athletic organization regulating competition among public and private schools in Tennessee for violating its First Amendment rights. The United States Supreme Court found that the close nexus between the

state and the athletic association (State officials were pervasively entwined in the athletic association's structure.) meant the association was a state actor for First Amendment purposes. Therefore, when the athletic association restricted the school's speech, it did so as a state actor and violated the school's First Amendment rights.[29]

10 Can a school discipline or bar a student from participating in an extracurricular activity for failing to comply with school rules that regulate expression?

Participating in extracurricular athletics or other activities is a privilege. Courts have held that although students have a constitutional right to engage in educational activities, they do not have a similar right to participate in extracurricular activities.[30] And, the Supreme Court has indicated that students who voluntarily submit themselves for participation in extracurricular activities like athletics, can also be held to higher standards of conduct and greater regulation.[31] However, no legal precedent expressly holds that a student can be disciplined or barred from participating in an extracurricular activity for failing to comply with school rules that regulate speech or expression.

One federal appellate court has issued a decision on this issue. In *Doe v. Silsbee Indep. Sch. Dist.,* the Fifth Circuit Court of Appeals rejected a high school cheerleader's claim that school officials violated her free speech rights when they dismissed her from the cheerleading squad after she refused to cheer for a member of the boys' basketball team, whom she had accused of sexually assaulting her.[32] The court stated that even assuming that the student's refusal to cheer was protected speech, the First Amendment did not require the school district to promote the student's message by allowing her to cheer as she saw fit. The court further stated that her refusal to cheer constituted a substantial interference with the work of the school that could be regulated by the school. Caution should be taken when relying on *Doe*, however, because as an unpublished decision, the ruling may have limited precedential value.[33] School districts would do well to confer with their NSBA Council of School Attorneys member and state school boards association when setting conditions for student participation in extracurricular activities that may implicate freedom of speech.

11 Doesn't wearing a school or team uniform mean the student represents the school, and if so, shouldn't a school get to say what a student can or cannot do while representing the school?

Yes, a student is generally considered to be representing a school when the student is a member of a team or involved in an activity that is sponsored by the school. Only one federal appellate court appears to have ruled on the issue of whether a school gets to say what a student can or cannot do while the student is representing the school.

According to the Sixth Circuit Court of Appeals, in *Lowery v. Euverard*,[34] "[r]estrictions that would be inappropriate for the student body at large may be appropriate in the context of vol-

untary athletic programs."[35] Even so, schools will likely have to show that restricting the student athlete's speech or behavior is appropriate, because it will reasonably result in disruption.[36]

As a general rule, a school can regulate the conduct of students who represent it at sporting events or other off-campus events. However, even though a school can regulate student behavior, it should be cautious about attempting to regulate expressive behavior, such as peaceful protests, which could be looked upon as pure political speech or expression. Courts protect the right to speak on political and social issues more than other types of expression, despite school officials' significant authority to regulate the conduct of extracurricular participants.

12 May a school discipline a student for inciting other students to protest?

A school could, in some circumstances, constitutionally discipline a student for inciting other students to protest and for planning a mass protest in advance. The key issue is whether the school's regulation of the student's speech meets the *Tinker* standard. If the school reasonably could forecast that the mass protest, e.g., walkout, sit-in, would result in substantial disruption, then school officials would be able to discipline that student without violating his/her First Amendment speech rights. One federal appellate court upheld school officials' decision to discipline a student—by restricting her from participation in student government—who had encouraged other students to deluge the district office with complaints about the cancellation of a popular event.[37]

13 Is there a difference between religious speech and political speech?

From a First Amendment Free Speech Clause standpoint, religious speech and political speech are protected similarly. Schools should note, however, that the First Amendment religion clauses give individuals the right of free exercise of religion, and prohibit government from establishing religion. Schools must permit students to exercise their religion, but may not endorse or promote one religion over another.[38]

14 What is a sincerely held religious belief, and are expressions of such beliefs protected by the United States Constitution?

Yes, the Constitution protects expression of sincerely held religious beliefs, with some limitations. According to the U.S. Supreme Court in *U.S. v. Seeger*, a sincerely held religious belief is "a conviction based upon religious training and belief."[39] The Supreme Court added in *Welsh v. U.S.* that for expression of such beliefs to be protected by the United States Constitution they must be "held with the strength of traditional religious convictions."[40]

15 What if a student doesn't label his speech religious or political?

As a general rule, students are not required to signal the type of speech/expression in which they are engaging to enjoy First Amendment protection.

16 Can schools place restrictions on speech that is otherwise protected by the Constitution?

Yes, under certain circumstances. Schools can place reasonable time, place and manner restrictions on the exercise of free speech in order to avoid disruption.[41] In such situations, courts will consider to what extent the school has an "open" or "closed" forum, or something in-between. In closed forums, schools have a large degree of control over the kinds of expression they can exclude. Most schools create limited open forums, in which they allow expression of a variety of points of view not endorsed by the school, but place certain recognized time, place and manner limitations on that expression. Schools often create a limited open forum when creating policies for student-led extracurricular clubs and distribution of literature of non-school sponsored groups. Schools may consider criteria like appropriateness to the school setting for regulating expression in these limited public forums, but when schools begin restricting expression based on viewpoint, courts will generally rule against them in the absence of a legitimate reason for the regulation. A complete discussion of limited public forums is beyond the scope of this publication, but schools would be well-served by conferring with an NSBA Council of School Attorneys member and state school boards association when determining school board policies and practices in this area.

17 Can schools discipline students for protests that result in harm to public/school property?

Yes. Vandalism and other criminal activity is not protected by the First Amendment. Schools can punish students for protests or other actions that result in harm to school or other public property.

Applying First Amendment Free Speech Standards for Students

When assessing whether a public school can regulate an individual instance of student speech:

1. Determine whether student expression is protected speech, such as a protest, or is political or religious in nature.
2. If the expression is protected, ask whether the student expression is likely to cause material disruption.
   a. Identify the disruption.
   b. Determine whether the disruption is actual or speculative.
   c. Be clear about which past facts support a forecast of disruption.
3. If the expression is not likely to cause material disruption, determine whether the student expression is lewd, school-sponsored (in a student newspaper or school blog), or harmful (i.e., promotes criminal behavior or drug use). If so, schools have some leeway to regulate the expression.

When examining district policy on student free speech:

1. Review school policies and practices to ensure they do not compel students to engage in an expression of a particular political creed.
2. Consider the teachable moment as an alternative to discipline.
3. Identify the community values and lead the community in dialogue about how those are reflected in the district's policies.

B. Employees

1 Do school employees have First Amendment rights equal to those of students?

School employees have First Amendment rights within the workplace, but the contours of those rights differ from those of students. When courts consider *student* speech rights, they tend to focus on schools' ability to maintain safe and productive learning environments. When considering *employee* speech rights, courts look at whether the employee is speaking as a citizen on a matter of public concern; and they look at the district's interest in directing the work of staff and maintaining the integrity of the workplace.

2 What are the limitations on the First Amendment rights of employees?

School district employee speech is protected under the First Amendment if the employee is speaking as a private citizen on a matter of public concern *and* the employee's interest in commenting on matters of public concern outweighs the interests of the school district in promoting the efficiency of its operations or services. A teacher's letter to a local newspaper about a defeated school board proposal to raise taxes, for example, is generally protected speech.[42] Courts determine the interference with the employer's operations by looking at factors like:

- whether the speech interfered with the employee's performance;
- whether the speech created disharmony among the employee's co-workers;
- whether the speech undercut an immediate supervisor's authority over the employee; and
- whether the speech would destroy the relationship of loyalty and trust required of the employee.[43]

When "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," the employee enjoys the least amount of speech protection.[44] For instance, a school district could discipline an employee for circulating a questionnaire that deals only with personal and internal office issues (rather than matters of great public concern).[45]

And, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[46] In other words, school districts can hold teachers and other employees to certain standards when those employees speak on behalf of the school district.

> ***"When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[47]***

Applying First Amendment Free Speech Standards for Employees

When assessing whether a public school can regulate an individual instance of employee speech, ask:

- Is the employee speaking as a private citizen or in her capacity as a school district employee, pursuant to her official duties. If she is speaking as an employee, there is more authority to regulate the speech.
- Is the employee speaking about a matter of public concern or a matter of personal interest? (Note: Not all employee speech about his/her employment is unprotected "employee speech.") If she is speaking on a matter of personal interest, there is more authority to regulate the speech.
- Does the employee's speech interfere with the district's orderly operations (i.e., Does the speech impair workplace discipline? Affect harmony among co-workers? Result in loss of confidence/loyalty?) If so, there is more authority to regulate the speech.

3 Does it matter if the employee is a teacher or other school-related employee, like a bus driver or cafeteria worker?

No. The Supreme Court's framework for government employee free speech rights applies to all public employees.

While courts tend not to distinguish between the First Amendment rights of teachers and school-related personnel, the employee's role within the school system is relevant when a court balances the interests of the district against the employee's right to speak. Many courts have ruled that school teachers are role models and as such are held to a higher standard of speech or conduct than non-certificated employees, including custodians, bus drivers and food service workers. Similarly, a federal court of appeals noted that schools confer on school counselors an "inordinate amount of trust and authority," and it upheld a district's decision to fire a school counselor who had published a highly sexualized book on relationships. The court agreed that the district had reasonably assumed that the book would interfere with the school's learning environment. In this instance, the school district's interest in protecting the integrity of counseling services at the school "dwarfed" the counselor's interest in publishing the book.[48]

4 May a school district limit an employee's religious expression at school?

While public schools have a constitutional duty under the First Amendment's Free Exercise Clause to accommodate the religious beliefs of both students and employees, they are prohibited by the First Amendment's Establishment Clause from endorsing or promoting a specific religion. Therefore, public schools have not just the authority, but the obligation, to restrict employees from proselytizing students.

For instance, a federal appellate court held that a California school district did not violate a high school teacher's free speech rights when the school's principal ordered the teacher to remove banners containing religious references displayed in his classroom.[49] Because teachers hold positions of trust and authority, and interact with "impressionable young minds," they act officially when at school or a school function, in the general presence of students.[50] When weighing a public employee's rights to express a religious belief in the workplace over the rights of schools to enforce speech rules, courts often allow restriction of the employee's rights in part because students are a "captive audience."[51]

5 When may a school district regulate employee proselytizing and other expression of religious belief?

Public schools can constitutionally restrict school district employees from proselytizing students. But, religious expression directed at non-students is a different matter because it is a form of religious expression. According to the U.S. Equal Employment Opportunity Commission (EEOC), both public and private, employers "should not try to suppress all religious expression in the workplace,"[52] but need only accommodate religious expression to the "extent that they can do so without undue hardship on the operation of the business."[53]

"In determining whether permitting an employee to pray, proselytize, or engage in other forms of religiously oriented expression in the workplace would pose an undue hardship," the EEOC says, "relevant considerations may include the effect such expression has on co-workers, customers, or business operations.... An employer can restrict religious expression where it would cause customers or co-workers reasonably to perceive [the expression to be] the employer's own message, or where the item or message in question is harassing or otherwise disruptive."[54]

6 What is religious garb? Are schools allowed to regulate employees' religious attire or jewelry?

Although there is no generally-accepted legal definition of apparel that constitutes religious garb, one federal court in Pennsylvania has provided a helpful description. The court identified three categories of religious attire:[55]

- The first is attire that is religious on its face and worn for religious reasons. Examples include robes worn by religious orders such as monks and nuns or the hijab worn by some Muslim women.
- The second category includes attire that is worn for religious reasons and is regularly perceived as religious. An example of this might be a cross worn by a Christian.
- The third category includes attire worn for religious reasons, but not generally recognized as such until its significance is explained by the person wearing it. Examples of such attire might include the dark suit worn by an Amish man or a wig worn by a married Orthodox Jewish woman. One court has held that attire falling into this category is not considered "religious garb or attire" because it does not indicate the wearer's religious affiliation.[56]

The issue of whether public school teachers must be allowed to wear religious attire has been litigated on several occasions, and states historically have addressed it through statute. One state currently has a rarely-enforced law prohibiting teachers from wearing religious garb or attire while teaching in a public school.[57] In states with no statute, courts generally have permitted teachers to wear religious attire, finding that the wearing of religious clothing alone does not violate the Constitution.[58] It is important to keep in mind that under Title VII, which prohibits discrimination in employment, a school district must accommodate an employee's need for an exception to its dress and grooming policy based on a religious belief or practice, unless the exception would be an undue hardship on the employer's operation.[59]

> As a general rule, schools are required to accommodate an employee's need for an exception to its dress and grooming policy in order to allow the employee to adhere to a religious practice or belief. The only exception to this is if accommodating such a request creates an undue hardship on the district's operations.

7 May a school district regulate employee expression that occurs off-campus and not at a school activity? For example, may a school address speech or expression of an employee who attends a controversial rally or is involved with controversial causes?

Generally, an employee's right to associate with a particular group is protected by the First Amendment, but in at least one case, a federal court has found that a public employer could discipline an employee for his participation in a controversial cause when the participation was contrary to the employer's interest. In *Doggrell v. City of Anniston*, a court held that a police department did not violate an officer's First Amendment association rights by firing him after his speech at the national conference of an organization identified as a "hate group" was publicized. The department had received many complaints about the officer's involvement in a group that "promote[d] a return to segregation, overtly disparage[d] black Americans, believe[d] in white supremacy and the inferiority of black Americans and espouse[d] plainly racist and inflammatory rhetoric." The court found that the police department's interest in maintaining order, loyalty, morale and harmony outweighed the officer's rights to free association.[60]

8 Can a school district discipline an employee for posting content on social media?

Some courts have upheld school district's discipline of employees for content they post on Facebook or other platforms if such posts result in the disruption of the school district's operations or prevents schools from operating efficiently and effectively.

For instance, in *Munroe v. Central Bucks Sch. Dist.*, a federal court of appeals found that the balance tipped in favor of a school district that had fired a teacher who had maintained a blog where she wrote rude, derogatory and demeaning things about her students, their parents, and the school's administrators. The court decided that school district officials had not engaged in

retaliation in violation of her First Amendment speech rights when they fired her.[61] In this case, teacher's speech, "in both effect and tone, was sufficiently disruptive so as to diminish any legitimate interest in its expression, and thus her expression was not protected."[62]

Similarly, in *Czaplinski v. Board of Educ. of Vineland*, a federal court ruled in favor of a New Jersey school district that had fired a school security guard after it received complaints about racist comments on the security guard's Facebook page. Because the guard's performance of her daily duties required her to be unbiased and to exercise impartial judgment, which included respect and tolerance for diversity, the court concluded that her comments impaired the district's ability to "operate efficiently and effectively."[63]

9 Can schools require employees to stand for the National Anthem or to recite the Pledge of Allegiance?

It depends. While *Barnette* and its progeny bar school districts from compelling student speech that is contrary to a student's beliefs, those restrictions do not automatically apply to employees. In 1979, a federal court of appeals held that a teacher could be compelled to recite the Pledge of Allegiance, even though it conflicted with her religious beliefs as a Jehovah's Witness, because patriotic exercises were part of the curriculum.[64]

But other courts have ruled that a teacher could not be compelled to lead a class in the recitation of the Pledge of Allegiance, or to recite it, in the absence of *Tinker* disruption.[65] These courts also rely on a key idea from *Barnette*: "that the right to remain silent in the face of an illegitimate demand for speech is as much a part of First Amendment protections as the right to speak out in the face of an illegitimate demand for silence."[66]

When school officials are considering taking action against an employee who refuses to stand for the National Anthem or to salute the flag, it is best to use the well-established test established by the Supreme Court in *Pickering* and its progeny to determine whether the teacher's speech is protected:

- First, is the employee speaking or acting as a private citizen, or as an employee?
- Second, is the employee speaking on a matter of public concern? For example, if he refuses to salute the flag because he is objecting to racial discrimination, he could be looked upon as speaking on a matter of public concern.
- Finally, does the school district's interest in maintaining efficient operations outweigh the employee's right to speak on a matter of public concern? The more disruptive the behavior, the more likely it is that the school district can regulate the behavior. It is here that the employee's role as a teacher or counselor could be important.

Closing: Toward the Teachable Moment

Public schools play an important role in educating young people about their role in our democracy, not only by teaching history and civics, but also by modeling and supporting constitutional freedoms. Teaching students about the right of protest and political and religious expression is fundamental to preparing an engaged electorate and a functioning society. And, yet, those rights of student expression can come into conflict with the safe and efficient operation of schools. If schools cannot maintain order and minimize disruption, learning cannot happen. And therein lies the tension built into our democracy by our founders.

Today, students are more engaged and socially literate than previous generations. Due in part to the explosive growth of social media and instantaneous access to the internet through smart devices, students are exposed to wider array of ideas than ever before in our history. So, it should not come as a surprise that students are doing more than listening. They are engaging with the world of ideas literally at their fingertips; they are expressing themselves. And, this means that the tension between freedom of expression and a school's need to carry out its educational mission can be significant.

Community values may differ when it comes to student expression like "taking a knee." For some, such actions may be seen as unpatriotic; for others, quite the opposite. Regardless of the conventional wisdom, one legal principle is clear: the law favors protection of political expression even in the face of "the discomfort and unpleasantness that always accompany an unpopular viewpoint."[67] Knowing the requirements of the law, working with an NSBA Council of School Attorneys member, and using the resources of state school boards associations can help schools ease the tension that sometimes accompanies acts of protest. Armed with that knowledge and those resources, school boards can engage their communities and establish clear policies and procedures that minimize legal risk and respect constitutional guidelines. We hope this guide assists you in taking steps toward that goal.

ENDNOTES

[1] *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969).
[2] *Id.*
[3] *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426 (4th Cir. 2013).
[4] *Id.* at 438.
[5] *Brown v. Cabell Cnty. Bd. of Educ.*, 714 F. Supp.2d 587 (S.D. W.Va. 2010).
[6] *Id.* at 597.
[7] *Nuxoll v. Indian Prairie Sch. Dist.* #204, 523 F.3d 668, 674 (7th Cir. 2008).
[8] *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1071 (9th Cir. 2013).
[9] *Id.* at 1072.
[10] *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*,725 F.3d 293, 322-23 (fn. 25) (3d Cir. 2013).
[11] *Id.* at 322-23.
[12] *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006), *cert. granted and judgment vacated*, 549 U.S. 1262 (2007) (on the grounds of mootness).
[13] *Bethel Sch. Dist. No. 405 v. Fraser*, 478 U.S. 675 (1986).
[14] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).
[15] *Morse v. Frederick*, 551 U.S. 393 (2007).
[16] *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969).
[17] *U.S. v. Baugh*, 187 F.3d. 1037, 1042 (9th Cir. 1999).
[18] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982).
[19] *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293 (3rd Cir. 2013).
[20] *Id.* at 308-09.
[21] *West Virginia State Bd. of Educ v. Barnette*, 319 U.S. 624 (1943).
[22] *Id.* at 642.
[23] *Lipp v. Morris*, 579 F.2d 834, 836 (3rd Cir. 1978); *Sherman v. Comm. Consol. Sch. Dist. 21 of Wheeling Tw'p*, 980 F.2d 437, 442 (7th Cir. 1992).
[24] *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).
[25] *V.A. v. San Pasqual Valley Unified Sch. Dist.*, No. 17-2471 (S.D. Cal. Dec. 21, 2017).
[26] Jason Whitely, School board president defends students kneeling during anthem, WFFA (Oct. 2, 2016), http://www.wfaa.com/news/local/education/school-board-president-defends-students-kneeling-during-anthem/328389124.
[27] Paul Walsh and Liz Sawyer, *Edina, Minneapolis athletes take a knee at games, join national anthem protest*, Star Tribune (Sept. 21, 2016), http://www.startribune.com/athletes-at-two-minneapolis-high-schools-take-knee-during-national-anthem/394120041/.
[28] Christine Hauser, *High Schools Threaten to Punish Students Who Kneel During Anthem*, The New York Times (Sept. 29, 2017), https://www.nytimes.com/2017/09/29/us/high-school-anthem-protest.html.
[29] *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001).
[30] *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007).
[31] *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).
[32] *Doe v. Silsbee Indep. Sch. Dist.*, 402 Fed. Appx. 852 (5th Cir. 2010).
[33] *Kountze Indep. Sch. Dist. v. Matthews*, No. 09–13–00251, 2017 WL 4319908, *3 fn. 4 (Ct. App. Tex. Sept. 28, 2017).
[34] *Lowery v. Euverard*, 497 F.3d. 584 (6th Cir. 2007).
[35] *Id.* at 597.
[36] *Id.* at 596.
[37] *Doninger v. Niehoff*, 527 F.3d 41, 50-53 (2d Cir. 2008); 642 F.3d 334, 346-347 (2d Cir. 2011).
[38] See *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).
[39] *U.S. v. Seeger*, 380 U.S. 163, 176 (1965).
[40] *Welsh v. United States*, 398 U.S. 333, 340 (1970).
[41] *Walz v. Egg Harbor Tp. Bd. of Educ.*, 342 F.3d 1295 (7th Cir. 1993); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740 (5th Cir. 2009).
[42] *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).
[43] *Id.*

[44] *Connick v. Myers*, 461 U.S. 138 (1983).
[45] *Id.* at 147.
[46] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
[47] *Id.*
[48] *Craig v. Rich Tp. High Sch. Dist. 227*, 736 F.3d 1110, 1119-1120 (7th Cir. 2013).
[49] *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011).
[50] *Id.* at 968.
[51] *Fowler v, Board of Educ. of Lincoln Cnty.*, 819 F.2d 657, 668 (6th Cir. 1987).
[52] *Questions and Answers: Religious Discrimination in the Workplace*, U.S. Equal Employment Opportunity Commission, Question No. 13 (Jan. 31, 2011), https://www.eeoc.gov/policy/docs/qanda_religion.html.
[53] *Id.*
[54] *Id.*
[55] *U.S. v. Board of Educ. for Sch. Dist. of Philadelphia*, 911 F.2d 882 (3d Cir. 1990), *reh'g denied*, Sept. 12, 1990.
[56] *EEOC v. Reads, Inc.*, 759 F. Supp. 1150, 1158 (E.D. Pa. 1991).
[57] 24 P.S. § 11-1112 (2017). In 1990, a federal appellate court decided that, because Pennsylvania had determined that the wearing of religious attire by teachers is a threat to the maintenance of religious neutrality in public schools – a compelling state interest—and because the state statute banning all religious attire was being enforced in a non-discriminatory way, it would impose an undue hardship on the school district to require it to disobey the state law to accommodate a Muslim teacher's request to wear her religious garb to school. *U.S. v. Bd. of Educ. of Sch. Dist. of Philadelphia*, 911 F.2d 882 (3rd Cir. 1990).
[58] Reviewed and updated by Deryl A. Wynn and A. Dean Pickett, *A School Law Primer - Religion: Legal Pointers for Public Schools, Council of School Attorneys* (2015), https://cdn-files.nsba.org/s3fs-public/reports/Religion%20Primer%20Legal%20Pointers%20for%20Public%20Schools.pdf?IxuMGD4U2nGt_HsJ8IgR_AWF.CIkNUGq; *Moore v. Board of Educ.*, 212 N.E.2d 833 (Ohio Comm. Pl. 1965); *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956); *City of New Haven v. Town of Torrington*, 43 A.2d 455 (Conn. 1945); *Johnson v. Boyd*, 28 N.E.2d 256 (Ind. 1940); *Gerhardt v. Heid*, 267 N.W. 127 (N.D. 1936); but see *Zellers v. Huff*, 236 P.2d 949 (N.M. 1951).
[59] *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, Equal Employment Opportunity Commission, available at https://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm.
[60] *Doggrell v. City of Anniston*, No. 16–CV–0239–VEH, 2017 WL 4340449 (N.D. Ala. Sept. 29, 2017).
[61] *Munroe v. Central Bucks Sch. Dist.*, 805 F.3d 454 (3d Cir. 2015).
[62] *Id.* at 465.
[63] *Czaplinski v. Board of Educ. Of Vineland*, No. 15–2045 (JEI/JS), 2015 WL 1399021 (D.N.J. Mar. 26, 2015).
[64] *Palmer v. Board of Educ. of City of Chicago*, 603 F.2d 1271, 1274 (7th Cir. 1979).
[65] *Hanover v. Northrup*, 325 F. Supp. 170 (D. Conn. 1970).
[66] *Russo v. Central Sch. Dist. No. 1*, 469 F.2d 623, 634 (2d. Cir. 1972).
[67] *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 509 (1969).

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