

“What are students’ free speech rights – and responsibilities – on and off campus?”

The crowd was steaming with illustrious anger. This Clark County School District board meeting was debating a district-wide staff vaccination mandate. In the prior hours, at least two dozen employees voiced their opposition. But my friend had been the first to represent the voice of the students like me, who were concerned over our health and safety.

This was his 1st Amendment right. A right so sacred to our democracy that it was the first amendment to be incorporated against the states.¹

But as a student, I expect my school to procure a safe learning environment. Doing so sometimes requires restrictions on the very freedoms I am taught. While the Courts have granted broad 1st Amendment rights to students, especially speech occurring off-campus, students have a *responsibility* to restrict their speech in ways and uphold an institution’s educational mission.

I Free Speech in Educational Settings is a Cornerstone to Our Democracy

Both courts and state legislatures have granted free speech rights to students.

A Court Precedent

Because public schools fall under state governments, they are subject to 1st Amendment regulations. The Supreme Court did not rule on students’ free speech rights until 1969². Before then, appellate court decisions established basic principles – namely, the 5th Circuit ruled in *Burnside v. Byars* (5th Cir. 1966) that Students expressing pure political speech (in this case, protesting discrimination and unequal voting rights), are protected.

Using this as precedent, the Supreme Court granted broad 1st Amendment rights in the famous “Black Armband” case - *Tinker v. Des Moines Independent Community School District* (393 U.S. 503). Specifically, the Supreme Court established what became the *Tinker* test for determining whether a public school’s restrictions on free expression passes constitutionality:

*“Conduct by the student, in class or out of it, which for any reason, whether it stems from the 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.” (emphasis added)*

¹ In *Gitlow v. New York*, 268 U.S. 652 (1925), the 1st Amendment was incorporated against the states. This requirement forces public schools to comply with 1st Amendment protections and court precedent.

² Before 1969, and even today, students are subject to free speech restrictions that apply to all individuals in the United States. Examples of such restrictions include prohibition of fighting words in *Chaplinsky v. New Hampshire* (315 U.S. 568).

This *Tinker* test – a metaphorical one-sentence *shield* defending my rights – is frequently used today. For example, the clause preventing speech that *invades the rights of others* was the basis of the decision in *Kowalski v. Berkeley County Schools* (4th Cir. 2011), which prohibited bullying – whether on-campus, off-campus, or electronic.

However, in the decades following *Tinker*, the Supreme Court restricted the broad rights they had previously granted:

- In *Bethel School District v. Fraser* (478 U.S. 675), the court prohibited speech that is vulgar, lewd, obscene, or plainly offensive, after a student delivered an age-inappropriate speech.
- In *Hazelwood School District v. Kuhlmeier* (484 U.S. 260), the court empowered schools to restrict speech that bears the imprimatur of the school. (such as publications to my school’s website)
- In *Morse v. Frederick* (551 U.S. 393), the court prohibited speech advocating for illegal drug use.

Outside of *Morse*, the Supreme Court’s rulings had focused on on-campus student speech. But, in 2021, *B.L. v. Mahanoy Area School District* (594 U.S. ___) reached the court.

This case, which involved messages posted to Snapchat off-campus, represented a new area for the court’s rulings. In Justice Alito’s concurring opinion, he explained that such off-campus speech cannot be treated with equal regulatory authority as on-campus speech. Doing so would, among other reasons, subject students’ to free speech regulations at all times of the day.

While the Court did not precisely delineate students’ rights off campus, the case set the important precedent that off-campus speech is afforded greater freedoms than on-campus speech. In many instances, speech originating off-campus must clearly violate the *Tinker* test to be regulatable (for example, see *Doninger v. Niehoff* (2nd Cir. 2008), where a students’ blog posts and mass emails constituted a ‘substantial disruption’ to school activities).

B State Legislatures Extend Students’ Rights

Some state legislatures have passed laws extending students’ free speech rights. In my state, Nevada, NRS 388.077 Section 3 protects *all* student publications from disciplinary action as long as it includes a disclaimer and does not “substantially disrupt the ability of the public school to perform its educational mission.”³

California Education Code Section 48950 extends 1st Amendment protections to students of private schools, prohibiting disciplinary action against student speech that, “when engaged in

³ This section of Nevada Law, called the “New Voices Act”, was signed into law in 2017. It differs from the ruling in *Hazelwood v. Kuhlmeier* (484 U.S. 260), because in *Hazelwood*, schools were given the power to regulate speech sponsored by the school itself. Under NRS 388.077, however, such speech originates by students, is not sponsored by the school, and must have an explicit disclaimer stating such.

outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution [...]”.

II Our Responsibilities, as Students, is to Uphold Education *and* Promote Discourse

Students, as citizens of our country, have the *responsibility* to incite productive discourse and disagreement. It is imperative that, in educational settings, students express their views and hear from others. Students have a *responsibility* to incite controversy, by criticizing society, organizations, and even their own schools – because criticism, discussion, and opposition drives our country forward.

At the same time, students have a responsibility to use their rights for *productive* reasoning. Speech like that of Mathew Fraser serves minimal benefit towards education.⁴

Educational institutions are responsible for restricting student speech that interferes with a safe and effective learning environment. For example, in *Jacobs v. Clark County School District* (9th Cir. 2013), Liberty High School upheld this responsibility by establishing a school uniform policy, which restricted student expression but reduced distractions and improved the learning environment.

When these ideals come into conflict, the courts have a responsibility to reconcile them. Because, in many states (such as Nevada), school attendance is mandatory, courts should favor a school’s mission to create an effective learning environment.⁵ The 9th Circuit did so in *Karp v. Becken* (9th Cir. 1976), when they allowed schools to restrict protests in favor of safety.

My friend, during the CCSD Board Meeting, was interrupted twice by the enraged crowd. I feared his view would be dismissed. Yet, after hours of discourse, the board passed the resolution.

This is the power of the 1st Amendment. The same power that incited the American Revolution is still used to advance civil rights, equality, and liberty. Defending free speech begins where it is taught – within the schoolhouse gate.

⁴ See *Bethel School District v. Fraser* (478 U.S. 675)

⁵ Under Nevada Revised Statutes 392.040, students between the ages of 12 and 17 are required to attend school.