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An analysis of selected federal court decisions regarding students' First Amendment rights of expression and speech: Principles for principals.

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AN ANALYSIS OF SELECTED FEDERAL COURT DECISIONS REGARDING STUDENTS' FIRST AMENDMENT RIGHTS OF EXPRESSION AND SPEECH: PRINCIPLES FOR PRINCIPALS

by

GEORGE MITCHELL THEODORE

A DISSERTATION

Submitted to the graduate faculty of The University of Alabama and The University of Alabama at Birmingham, in partial fulfillment of the requirements for the degree of Doctor of Philosophy

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ABSTRACT OF DISSERTATION
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Title An Analysis of Selected Federal Court Decisions Regarding Students' First Amendment Rights of Expression and Speech: Principles for Principals

The purpose of this study was to analyze federalcourtcases pertaining to students' First Amendment rights of expression and speech in public schools. Each case was analyzed by means of a case brief method of research. The cases were litigated in the United States District Courts, the United States Courts of Appeal, and the United States Supreme Court. Operational principles for practicing school administrators were derived from the rulings issued by these courts and may be utilized by administrators who are faced with First Amendment issues regarding student expression and speech.

This study encompasses federal court decisions related to public school students' rights of free expression and free speech rendered from 1943 to June 6, 1997, which is the date of the most recent case in this study. Chapter 2 provides a review of the literature, and Chapter 3 supplies a description of the methodology and procedures. In Chapter 4, 151 federal cases are briefed and categorized according to 19 relevant First Amendment issues. Chapter 5 offers an

analysis of selected cases and lists operational principles which correspond to the 19 categories. A total of 88 principles are included in Chapter 5 and may serve as guidelines for school administrators in making decisions which implicate students' First Amendment rights of expression and speech. Chapter 6 contains a summary of the results of the study, conclusions, and recommendations for further study.

DEDICATION

This study is dedicated to my wife, Zona, and our three children, Mitchell, Nick, and Marianne, who have made countless sacrifices on my behalf and who have given their wholehearted support and encouragement throughout this endeavor. The study is also dedicated to my parents, Theo and Mary Theodore, who instilled in me the value of education and perseverance.

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CHAPTER 1

INTRODUCTION TO THE STUDY

Law provides the authority for the establishment and control of American public education (McCarthy & Cambron-McCabe, 1992).

> Law may be defined as a body of principles, standards, and rules that govern human behavior by creating obligations as well as rights, and by imposing penalties. Law in our nation is made up of constitutional provisions, legislative enactments, court precedents, lawyers' opinions, and evolving customs. (Hudgins & Vacca, 1991, p. 2)

America's public schools are, in fact, the products of the law (Hudgins & Vacca). The operational framework within which school decisions are made is grounded in state and federal constitutional and statutory provisions (McCarthy & Cambron-McCabe). The Tenth Amendment to the United States Constitution specifies that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Because public school systems are created by state constitutional or legislative mandates, most activities encompassed within the daily operation of public schools possess a legal dimension (Hudgins & Vacca).

Federal Government, States, and Public Schools

Historically, application of the Tenth Amendment and lack of specific language in the United States Constitution pertaining to education and schools has delegated the responsibility of establishing and maintaining public school systems to the state governments. As a result, there is no single, national public school system, but rather 50 different state public school systems in which each state assumes complete control of education within its boundaries. It would be necessary, therefore, to study the school codes and related court decisions from each state to understand fully the legal aspects of public education (Hudgins & Vacca, 1991). Coupled with this scenario is the fact that separate legal systems exist in each of the 50 states, the District of Columbia, and the federal government, and for the most part, each of these systems applies its own body of law. In general, however, our system of government provides a comprehensive structure of laws that protects individual rights and guarantees certain freedoms, including freedom of religion, press, and the right of each individual to call upon the courts or the government to correct injustices (Shoop & Dunklee, 1992). Within this context, Shoop and Dunklee conclude

> Legislators and courts are involved in a constant process of attempting to strike a balance that allows individuals as much freedom as possible, and at the same time, allows society to function without unreasonable interference from the conduct of individuals. The United States Constitution provides particular protections of individual rights. Various state and federal statutes protect the welfare of society and

> implement the constitutional rights of individuals. (p. 3)

Competing interests in the political process affect school law. When parties cannot achieve their goals by agreement, they may pursue those goals by lawsuits to request courts to impose legal obligations or restraints on opposed parties. For this reason, law on particular facets of education may vary among states. Irrespective of locale, one fact is certain: the obligations or functions of the public schools are expanding as the diverse demands and interests of governments, communities, and families find their way into the law (Valente, 1994). As Edwards (1971) states,

> The courts . . . have been called upon repeatedly to define the function of the public schools. Whatever vagaries may have been entertained by educational reformers or others, the courts have been forced by necessity to formulate a theory of education based upon what policy they deem to be fundamental principles of public policy. (p. 23)

Federal Courts and Public Schools

Since the late 1800s, the court system in the United States has played a significant role in shaping public education (Jeffers, 1993). Article III, Section 1 of the United States Constitution stipulates that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." State courts, under Article III, Section 1, are presumed to have the authority of general jurisdiction. That is, state courts have the authority to

hear all cases that involve the state's constitution and the state's law, unless a showing is made to the contrary. Federal courts, on the other hand, possess limited jurisdiction, which means that a federal court lacks jurisdiction, unless a plaintiff can show the court that the problem presented for judicial review involves a federal question, namely a question relevant to the United States Constitution or federal law (Wright, 1970).

This study will deal exclusively with cases adjudicated in the federal court system. The federal court system is composed of three levels. The United States Supreme Court is at the highest level and, in addition to having original jurisdiction in certain matters, has the power to review all cases in lower courts as well as all cases of state courts which involve the meaning or effect of a federal statute or a constitutional provision (Bolmeier, 1973). The intermediate level, that is, the next level below the Supreme Court, consists of 13 United States Courts of Appeal. These courts primarily have appellate jurisdiction over their particular circuits. Below the Courts of Appeal is the third and final level, which houses the more than 90 United States District Courts. The District Courts function as the trial courts of the federal judicial system (Hudgins & Vacca, 1991).

Only a small percentage of school-related cases reaches the Supreme Court. Most cases concerning public school issues go no higher than the intermediate appellate level. However, when school cases are heard by the Supreme Court, certain provisions of the United States Constitution

come into play more than others. It is these provisions that have served as foundations for individuals seeking relief in federal court. Among the most utilized provisions are those that stem from the First Amendment. Generally speaking, the majority of Supreme Court cases center on claims that a state's legislation or the policies of a school board have in some way violated the petitioners' constitutional rights or some provisions of federal statutory law (Hudgins & Vacca, 1991).

Judicial Trends

Federal courts, traditionally, have been reluctant to address educational concerns. In fact, fewer than 300 cases had been initiated in the federal court system prior to 1954 (Hogan, 1985). However, beginning with the landmark school desegregation decision in Brown v. Board of Education of Topeka (1954), federal courts assumed a major role in resolving school-related conflicts, and by the end of the 1970s, more legal challenges to educational policies and practices had occurred than in the preceding seven decades combined (McCarthy & Cambron-McCabe, 1992). Many of the decisions rendered altered the daily operations of public school systems throughout the nation and focused on the protection of individual rights, including students' rights to free expression and speech, curriculum censorship, and religious expression (Hudgins & Vacca, 1991; McCarthy & Cambron-McCabe, 1992). It was also in the 1970s that federal litigation regarding legal disputes in the public schools

reached its peak. Since then, with the exception of special education controversies, the volume of federal cases related to public education has stabilized or declined in most areas (Imber & Gaylor, 1988; Zirkel & Richardson, 1989).

Concomitant with the stabilization of federal litigation, there has been a shift in the posture of the federal judiciary (McCarthy & Cambron-McCabe, 1992). In the 1960s and the early 1970s, the federal courts oversaw the expansion of constitutional protections granted to students in public school settings. But since the 1980s, the federal judiciary has been inclined to afford greater latitude to educational policymakers and school administrators and has been more reluctant to extend the scope of individual liberties (McCarthy & Cambron-McCabe). Indeed, Shoop and Dunklee (1992) point out,

> In 1969 the Tinker decision put school officials on notice that they do not possess absolute authority over their students and challenged them to have a greater faith in the democratic process. In 1988 the Hazelwood decision made it clear that the Supreme Court has more faith that school officials will protect students' rights than it has in students' ability to act responsibly. (p. 32)

A consequence of this judicial deference to public school administrators and policymakers has been an increase in the diversity of practices and procedures across states and local school districts. When federal courts are more actively involved in educational matters, standards become more uniform. Conversely, when the courts defer to school boards and school officials, local perspectives become dominant and standards vary. If the federal judiciary continues

to practice self-restraint, volatile political controversies will erupt as educational policymakers and public school administrators struggle with issues that were previously settled by rulings in the federal court system (McCarthy & Cambron-McCabe, 1992).

Nevertheless, implications of the recent judicial trend should not be overstated. The debate continues over whether federal judges possess the requisite competence and experience to determine educational policies and practices and whether such a role is a legitimate function of the federal courts (McCarthy & Cambron-McCabe, 1992). Even in the present-day context, "no one can defensibly argue that courts do not make policy for schools" (Fischer, 1989, p. 702). According to McCarthy and Cambron-McCabe, "Despite the deceleration in federal litigation, the volume of federal school cases is still substantial, far outstripping any other nation" (p. 20).

For more than 100 years, the federal courts have been involved with defining the function of public schools and shaping the policies and practices within which school administrators operate (Jeffers, 1993). For practicing school administrators, it is important to keep in mind that "ignorance of the law" does not provide a valid defense for illegal actions (Wood v. Strickland, 1975). It is, therefore, incumbent on public school officials to be cognizant of the constraints placed on their rule-making prerogatives, including the constraints stipulated by case law in accordance with federal constitutional provisions.

The First Amendment

Comprising the first ten amendments to the Constitution, the Bill of Rights exists to safeguard individual liberties against governmental encroachment (McCarthy & Cambron-McCabe, 1992). Among the liberties considered to be the most fundamental and closely guarded are those embodied in the First Amendment:

> 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 people to peaceably assemble, and to petition the government for redress of grievances.

Hall (1992) describes the significance of the First Amendment in the following manner:

> More than a constitutional guarantee against government interference with the freedom of speech and the press or a guarantee of the separation of church and state, the First Amendment is also one of the nation's foremost normative and cultural symbols. More than any other provision of the Bill of Rights, the First Amendment reflects vital attributes of the American character. It is known by virtually all citizens, who may not be able to recite its precise phrasing but who understand that because of it people are free to speak their minds, practice their religious beliefs, and never be subject to state-imposed religion. (p. 297)

Because of its preeminent status, it is not surprising that the First Amendment has served as the focal point for a host of school-related lawsuits challenging the actions of public school administrators. The religious freedoms contained in the First Amendment have given rise to federal litigation contesting public school policies and practices as advancing religion or impairing free exercise rights. Legal disputes concerning students' rights to express themselves and to distribute literature have been evoked under

the First Amendment guarantee of freedom of speech and press (McCarthy & Cambron-McCabe, 1992).

To gain a better understanding of the theories of jurisprudence that frame the debate surrounding the First Amendment's application to public schools, it is necessary to discuss two competing interpretations of this amendment. Hall (1992) refers to these two interpretations as First Amendment absolutism and First Amendment balancing.

Absolutism

The absolutist interpretation of the First Amendment finds its justification in the unqualified language of the amendment that "Congress shall make no law" abridging the freedoms guaranteed (Schwartz, 1972). Grounded in this assumption,

> The absolutist stance requires a reading of First Amendment rights that permits no "balancing" of individual and societal rights but instead insists that enumerated First Amendment guarantees are absolute in and of themselves and that they cannot be infringed by any governmental action that would inhibit their exercise. (Hall, 1992, p. 299)

The leading proponent of the absolutist position was Justice Hugo Black. Although Black viewed rights such as "speech," "press," and bona fide "religion" as qualifying for absolute protection, he and other absolutists saw "conduct" as falling within the purview of governmental regulation. It is interesting to note that such symbolic expressive manifestations as wearing black armbands in public schools as a protest against the Vietnam War (Tinker v. Des Moines Independent Community School, 1969) was viewed by Black, in

dissent, as "conduct" subject to control, or even prohibition, by school administrators (Hall, 1992).

> Although First Amendment absolutism continues to be embraced by jurists as well as pundits and though the liberal jurisprudence of the modern Supreme Court may have reached a "near-absolutist" level of protection for most forms of expression, the doctrine itself does not command majority support. Deceptive in its simplicity and arguably appealing in its generosity to the exercise of individual freedoms, absolutism has necessarily been subjected to balancing between individual and societal prerogatives and responsibilities. (Hall, 1992, p. 30)

Balancing

By accepting the supposition that "the Constitution does not provide for unfettered right of expression" (Schwartz, 1972, p. 251), a "balancing" between individual and societal rights appears to be a logical compromise between the two extreme views of the First Amendment, namely the absolutist position and the view that the First Amendment only codified English law (Schwartz; Hall, 1992). Although First Amendment rights are vital, it is no less vital that their exercise be compatible with the preservation of other essential rights (Schwartz). As Schwartz emphasizes, "The First Amendment freedoms are not ends in themselves, but only means to the end of a free society" (p. 251). In accordance with this philosophy, the federal judiciary endeavors to draw a viable line between protected constitutional rights of the individual and legitimate governmental intervention of those rights. However, dilemmas arise in attempting to balance individual rights and societal interests. Hill argues that "there is little doubt that the judicial

role encompasses the need to continue to engage in balancing. To what extent the latter tilts toward a 'liberal' or 'conservative' construction of the First Amendment often depends on value judgements" (p. 301).

Certainly, the rights of students to exercise First Amendment freedoms, such as speech and religion, have undergone several major transformations. To illustrate, court decisions upholding schools' rights to set certain limits on student speech (Bethel School District No. 403 v. Fraser, 1986) reflect a changing interpretation of the First Amendment's application to students rights (Shoop & Dunklee, 1992). Based on this circumstance, Shoop and Dunklee assert, "Recent court interpretations support the argument that each generation should be free to interpret the provisions of the Constitution in light of present-day circumstances" p. 119).

Statement of the Problem

A perennial issue in school law in general, and First Amendment controversies in particular, is how to balance the numerous competing interests involved in such litigation. The interests of parents, students, school officials, and the community do not always seem to be in sync. Of all parties interested in the operation of public schools, none has a more immediate interest than students, whose legal rights against school authorities have been increasingly litigated in modern times (Valente, 1994).

Public schools, by their very nature, must encourage free speech and free expression of ideas. Indeed, the fed-

eral courts have affirmed that students' rights of free speech and free expression are protected by the Constitution, assuming that they do not threaten a material disruption of the education process and do not present a clear and present danger. If, in fact, students' expressive activities do threaten the orderly, effective operation of the school, administrators have been granted the legal authority to ban such activities and silence students' speech (Shoop & Dunklee, 1992).

Nonetheless, public school officials have not been granted the authority to censure student expression or speech merely because they find a particular action to be distasteful or anathema to their personal preferences. When exercising any form of control over students' freedom of expression or speech, it is essential that administrators be able to establish an objective, school-related rationale for restricting student conduct. Contemporary school administrators must base their decisions regarding students' First Amendment rights on the reasonable exercise of pedagogical concerns (Hudgins & Vacca, 1991).

Considering all of the aforementioned circumstances, which demand fair and reasonable accommodation of student expression and speech, the overall problem for public school administrators today is one of balancing disparate concerns. In particular, the problem for practicing administrators centers on not being aware of specific principles that can serve as guidelines when addressing student conduct related to expression and speech. The fact that research-based data

regarding student expression and speech are not readily available could lead to missteps by school officials, legal disputes, and discord within the school community. Accordingly, the problem addressed in this study is the need of public school administrators to be informed about First Amendment issues related to student expression and speech.

Purpose of the Study

The purpose of this study is to review selected federal court cases regarding students' freedom of expression and speech in order to provide practicing public school administrators with operational principles. These principles can then be used by administrators as guidelines so that their decisions concerning student expression and speech correspond to current legal thinking.

Significance of the Study

During the course of a school year, public school administrators may well face dilemmas that involve students' rights to express themselves in a particular form, be it through oral expression, written expression, symbolic expression, or religious expression. Even though judicial criteria balancing the competing interests of students and administrators are continually redefined, practicing administrators, as previously noted, cannot plead ignorance of the law as a valid defense for illegal action (McCarthy & Cambron-McCabe, 1992). McCarthy and Cambron-McCabe stress the fact that "educators should be aware of the constraints

placed on their rule-making prerogatives by school board policies and federal and state constitutional and statutory provisions" (p. 20). First Amendment issues not resolved in a judicious manner within established legal parameters could place administrators in a precarious legal position. For example, present-day administrators should realize that they are subject to being sued for damages under Section 1983 of the Civil Rights Act of 1871 if they knew or should have known that their actions violated a student's right to expression or speech. If the First Amendment is implicated in a student's exercise of behavior, public school officials must proceed with care and caution (Hudgins & Vacca, 1991). Thus, it is important for practicing administrators to have knowledge of operational principles that are related to the First Amendment and are based on decisions rendered in the federal courts.

School officials can use these operational principles in an effort to preempt potential conflicts over First Amendment issues, while, at the same time, maintaining a purposeful, orderly school environment. The principles would be pertinent to a variety of areas dealing with student conduct, including symbolic expression, oral expression, publications, and appearance (Hudgins & Vacca, 1991). School authorities will be better prepared to address disputes regarding student expression and speech if provided with concrete operational principles, which have been identified and analyzed in case law from the federal court system.

In addition to being of benefit to practicing public school administrators, this study could be used in other forums. For instance, the results of this study could provide subject matter for professional development workshops designed for teachers and administrators. Similarly, local boards of education could use the operational principles as a basis for training programs to educate board members, parents, and other interested parties about the legal intricacies that accompany the relationship between public schools and certain provisions of the First Amendment. The training programs might be expanded to include personnel employed by state departments of education who have to address First Amendment disputes between school authorities and students or parents. The results of this study could also be incorporated into the school law curricula at institutions of higher education. Besides the educative aspect of the study, the operational principles could be utilized as reference sources by school personnel, central office staff, and boards of education. The study might also serve as the foundation for the development of local policies, procedures, and practices concerning students' First Amendment rights of expression and speech. Ultimately, the results of this study should provide administrators in public schools not only with specific guidelines to assist them in balancing students' rights and effective school management, but also with a rationale for explaining administrative decisions to all concerned parties, including parents, teachers,

board members, superintendents, and those individuals most affected by the decisions, students.

Methodology and Procedures

The procedures employed in this study are based on an analysis of court cases pursuant to students' First Amendment rights in a public school setting. Specifically, the cases to be analyzed focus on students' rights to free expression and free speech. The cases themselves are derived from litigation in the United States Supreme Court, the United States Courts of Appeals, and the United States District Courts. The analysis yields certain operational principles that can be utilized by public school administrators when dealing with matters pertaining to students' freedom of expression and speech.

The specific methodology to be used in this study is referred to as case analysis. In accordance with this methodology, each case is analyzed by a standard form of case analysis called a brief. Statsky and Wernet (1984) describe a brief for the purpose of case analysis as "an analytical summary of what a particular opinion was all about. . . . To 'brief a case' or to 'brief an opinion' is to identify its essential elements" (p. 89). This study employs a modified outline provided by Statsky and Wernet. The outline for a brief is as follows:

1. Citation—descriptive information about a legal document which will enable one to find that document in a law library (Statsky & Wernet, 1984, p. 29).

2. Facts—information describing a thing, occurrence, or event (Statsky & Wernet, 1984, p. 122).

3. Issues—questions of whether or in what manner a particular rule of law applies to a particular set of facts (Statsky & Wernet, 1984, p. 122).

4. Holding—a conclusion of law reached by a court in an opinion (Statsky & Wernet, 1984, p. 122).

5. Reasoning—the explanation of why a court reached a particular answer or holding for a particular issue (Statsky & Wernet, 1984, p. 175).

6. Disposition—whatever must happen in the litigation as a result of the holdings which the court made in the opinion (Statsky & Wernet, 1984, p. 195).

Research Questions

The following research questions guide this study:

1. How have courts at the United States district level and above interpreted cases concerning First Amendment freedom of expression and speech for students in public schools?

2. What is the nature of the issues encompassed by these First Amendment cases?

3. How did the issues regarding freedom of expression and speech for public school students arise?

4. If these issues have been resolved, how have they been resolved?

5. What issues are likely to be the focal points of future litigation for public school administrators?

6. What operational principles can be discerned from the federal courts' rulings on First Amendment cases examined in this study?

Limitations of the Study

The following limitations are pertinent to this study:

1. This study is confined to the analysis of cases selected from the United States Supreme Court, the United States Courts of Appeals, and the United States District Courts. Cases were found by making use of the standard legal resource of Westlaw computerized research systems regarding freedom of expression and freedom of speech.

2. The cases analyzed in this study represent disputes that have been resolved or are ongoing at the time of the study. The cases are limited to those adjudicated in the United States Supreme Court, the United States Courts of Appeals, and the United States District Courts and were acquired by searching the Westlaw directory. "The West's key number system which is the primary indexing system, is subject to inevitable imprecision with regard to the identification, placement, and addition of categories" (Zirkel & Richardson, 1989, p. 769).

3. The United States Supreme Court cases, the United States Courts of Appeals cases, and the United States District Courts cases reviewed in this study concern only the First Amendment as it applies to public school students in kindergarten through twelfth grade.

4. The court cases to be reviewed are limited to those which were adjudicated before the United States Supreme Court, the United States Courts of Appeals, and the United States District Courts from 1943 through June 6, 1997, the date of the most recent case in this study.

5. The case analysis approach employed in this study does not include statutory analysis or legal opinions. It is limited to the courts' interpretation of the First Amendment as it pertains to students' rights to free expression and free speech in the public school setting.

6. The operational principles gleaned from this study are limited to the decisions rendered by the United States Supreme Court, the United States Courts of Appeals, and the United States District Courts concerning the First Amendment and freedom of expression and speech for public school students.

Assumptions of the Study

This study is predicated on the following assumptions:

1. The cases found in the Westlaw reporter systems are a fair representation of all federal court cases involving students' First Amendment rights of expression and speech in public schools.

2. The cases reviewed provide an accurate representation of the holdings of the United States Supreme Court, the United States Courts of Appeals, and the United States District Courts in litigation related to the First Amendment

and the issues of free expression and free speech for public school students.

3. The decisions of the United States Supreme Court, the United States Courts of Appeals, and the United States District Courts are binding for all public school administrators within their respective jurisdictions.

4. The holdings of the United States Supreme Court, the United States Courts of Appeals, and the United States District Courts in the cases analyzed lead to the development of specific operational principles that public school administrators can employ when dealing with students' expression and speech.

5. The cases adjudicated before the United States Supreme Court, the United States Courts of Appeals, and the United States District Courts regarding First Amendment questions of expression and speech for public school students have universal relevance for practicing public school administrators.

6. Adjudicated cases are those which have attained a final recorded judgement.

7. The operational principles reported in this study are those identified through an analysis of the cases reviewed.

8. The operational principles reported in this study primarily concern policy decisions that public school administrators might make in regard to student conduct related to expression and speech.

Definitions

The key terms used in this study are defined as follows:

Action—a suit or lawsuit (Shoop & Dunklee, 1992, p. 327).

Adjudicate—to hear the facts and settle the case in a legal proceeding (Shoop & Dunklee, 1992, p. 327).

Analogy—identity or similarity of proportion, where there is no precedent in point. In cases on the same subject, lawyers have recourse to cases on a different subject matter, but governed by the same general principle. This is reasoning by analogy (Black, 1979, p. 77).

Analysis—In this study, the analysis of court decisions will include a comprehensive examination of each case adjudicated by the United States Supreme Court, the United States Courts of Appeals, or the United States District Courts as each case relates to the First Amendment's application to students' freedom of expression and speech in public schools.

Appeal—a petition to a higher court to alter the decision of a lower court (McCarthy & Cambron-McCabe, 1992, p. 517).

Appellant—the party who appeals a lower court decision to a higher court (Shoop & Dunklee, 1992, p. 327).

Appellate court—a tribunal having jurisdiction to review decisions on appeal from inferior courts (McCarthy & Cambron-McCabe, 1992, p. 517).

Appellee—the party in a cause against whom an appeal is taken; that is, the party who has an interest adverse to setting aside or reversing the judgement, sometimes also called the respondent (Black, 1979, p. 77).

Brief—a document containing brief statement of the facts of a case, issues, and arguments; used most commonly on appeal, but also used at trial level when requested by the trial judge (Black, 1979, p. 803); a written argument presented by lawyers in court (Shoop & Dunklee, 1992, p. 327).

Case—a court opinion; a dispute that is currently before the court (Statsky & Wernet, 1995, p. 450).

Case analysis—the techniques required to make predictions concerning the applicability of opinions. The predominant question posed by case analysis is whether a given opinion is analogous to the client's case. One analyzes and applies opinions by analogizing them (Statsky & Wernet, 1984, p. 5).

Case law—the aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law (Black, 1979, p. 196); generally referred to as court opinions (Statsky & Wernet, 1984, p. 5).

Certorari—a writ of common law origin issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein. The writ is issued in order that the court may inspect the pro-

ceedings and determine whether there have been any irregularities. It is most commonly used to refer to the Supreme Court of the United States, which uses the writ of certorari as a discretionary device to choose the cases it wishes to hear (Black, 1979, p. 207).

Circuit—judicial divisions of a state or the United States. There are now 13 federal judicial circuits wherein the United States Courts of Appeal are allocated the appellate jurisdiction of the United States (Gifis, 1991, p. 71).

Civil law—that body of law which every particular nation, commonwealth, or city has established peculiarly for itself; those laws concerned with civil or private rights and remedies, as contrasted with criminal laws (Black, 1979, p. 223).

Common law—As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgements of the courts recognizing, affirming, and enforcing such usages and customs. Common law consists of those principles, usage and rules of action applicable to government and security of persons and property which do not rest their authority upon any express and positive declaration of the will of the legislature (Black, 1979, pp. 250-251).

Concurring opinion—a statement by a judge or judges, separate from the majority opinion, that endorses the result

of the decision but expresses some disagreement with the reasoning of the majority (McCarthy & Cambron-McCabe, 1992, p. 517).

Declaratory relief—judicial declaration of the rights of the plaintiff without an assessment of damages against the defendant (Shoop & Dunklee, 1992, p. 328); a binding adjudication of the rights and status of litigants even though no consequential relief is awarded (Black, 1979, p. 368).

De minimis—a violation that is so minimal as to not be worthy of judicial review (Shoop & Dunklee, 1992, p. 328).

Disposition—whatever must happen in the litigation as a result of the holdings which the court made in the opinion (Statsky & Wernet, 1984, p. 195).

Dissenting opinion—a statement by a judge or judges who disagree with the decision of the majority of judges in a case (McCarthy & Cambron-McCabe, 1992, p. 578).

En banc—a session where the entire membership of the court rather than the regular quorum will participate in the decision. The Courts of Appeal usually sit in panels of judges but for important cases may expand to a larger number, when they are said to be sitting en banc (Black, 1979, pp. 472-473).

Enjoin—To require a person, by writ of injunction, to perform, or to abstain or desist from, some act (Black, 1979, p. 475).

Equal Access Act (1984)—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.

Express—to make known distinctly and explicitly, and not leave to inference (Black, 1979, p. 521).

Expression—refers to a variety of ways in which individuals in our society may express themselves, including the written word, pictures and drawings, gestures, symbols, and the spoken word (Hudgins & Vacca, 1991, p. 348).

Fact—information describing a thing, occurrence, or event (Statsky & Wernet, 1984, p. 122).

Federal courts—the courts of the United States as created either by Article III of the United States Constitution or by Congress (Black, 1979, p. 550). For the purpose of this study, the term federal courts or federal court system will refer specifically to the United States Supreme Court, the United States Courts of Appeal, and the United States District Courts.

Free exercise clause—one of two religious guaranties (the other being the Establishment Clause) provided by the United States Constitution which withdraws from public power exertion of any restraint on free exercise of religion. It secures the right of religious belief and the right to practice and propagate one's faith unrestricted by governmental action (Schwartz, 1972, p. 279).

Freedom of expression—Over the years, mainly through the process of selective incorporation, the federal courts have acted to create the substantive right to freedom of expression (Hudgins & Vacca, 1991, p. 349).

Freedom of speech—a right guaranteed by the First Amendment of the United States Constitution (Black, 1979, p. 598).

Holding—the court's application of particular rule(s) of law to the particular facts of a dispute in litigation (Statsky & Wernet, 1984, pp. 4-5); the legal principle to be drawn from the opinion (decision) of the court (Black, 1979, p. 658). It is binding on the parties to the litigation and can be used as precedent for similar disputes in future litigation (Statsky & Wernet, 1984, p. 122).

Injunction—a judicial process requiring the person to whom it is directed to do or refrain from doing a particular thing (Black, 1979, p. 705).

Issue—a question of whether or in what manner a particular rule of law applies to a particular set of facts. A legal issue in an opinion will involve the interpretation and application of one or more rules of law (Statsky & Wernet, 1984, pp. 160-161).

Jurisdiction—the lawful authority to manage or decide particular activities or disputes (Valente, 1994, p. 606); the right of a court to hear a case; also the geographic area within which the court has the right and power to operate (Shoop & Dunklee, 1992, p. 329).

Limited open forum—A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time (Equal Access Act, 1984).

Litigation—a lawsuit; legal action, including all proceedings therein; contest in a court of law for the purpose of enforcing a right or seeking a remedy (Black, 1979, p. 841).

Nonverbal expression—refers to symbolic speech (Hall, 1992, p. 593).

Opinion—the court's written explanation of how it reached the holdings (Statsky & Wernet, 1984, p. 5).

Petitioner—one who presents a petition to a court, officer, or legislative body. In legal proceedings begun by petition, the person against whom action or relief is prayed, or who opposes the prayer of the petition is called the respondent (Black, 1979, p. 1031).

Precedent—an adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law. Courts attempt to decide cases on the basis of principles decided in prior cases. Prior cases which are close in facts or legal principles to the case under consideration are called precedents; a rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases (Black, 1979, p. 1059).

Principle—a fundamental truth or doctrine, as of law; a comprehensive rule or doctrine which furnishes a basis or origin for others; a settled rule of action, procedure, or legal determination; a truth or preposition so clear that it cannot be proved or contradicted unless by a proposition which is still clearer (Black, 1979, p. 1074).

Prior restraint—official government obstruction of speech prior to its utterance (Shoop & Dunklee, 1992, p. 131).

Reasoning—the explanation of why a court reached a particular answer or holding for a particular issue. The process of issue resolution in opinions is as follows: (a) the court targets the rule of law to be interpreted and applied; (b) the court identifies what is unclear or debatable about the application of the rule of law to the facts of the dispute; (c) the court provides the meaning of the rule of law in question and explains how it arrived at its meaning. The meaning is then applied to the facts to resolve the dispute (Statsky & Wernet, 1984, pp. 175-176).

Religion—a personal, social, and institutional expression of some explicit faith in God. It is wider than any one church, or than all Christian and Jewish congregations (McBrien, 1987, p. 203). The United States Supreme Court has not attempted to define the meaning of religion as used in the Constitution (Valente, 1994, p. 86).

Remand—to send a case back to the original court for additional proceedings (McCarthy & Cambron-McCabe, 1992, p.

518); a return of a case, for further proceedings, to the tribunal from which it was appealed (Valente, 1994, p. 606).

Render—to pronounce, state, declare, or announce the judgement of the court in a given case or a given set of facts (Black, 1979, p. 1165).

Respondent—in appellate practice, the party who contends against an appeal; that is, the appellee (Black, 1979, p. 1179).

School—For the purpose of this study, the term school will be synonymous with public schools in the United States, kindergarten through twelfth grade.

School administrators/authorities/officials—These terms will be inclusive of personnel who assume supervisory responsibilities for individuals who teach, work, or attend classes in the local public schools.

Stare decisis—to abide by, or adhere to, decided cases; policy of courts to stand by precedents and not to disturb settled point. Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where facts are substantially the same (Black, 1979, p. 1261).

Statutes—acts by the legislative branch of government expressing its will and constituting the law within the jurisdiction (McCarthy & Cambron-McCabe, 1992, p. 519); enactments of elected legislatures which comprise the second highest level of law, constitutions being the highest form of law. Courts determine the meaning and validity of stat-

utes, but so long as they satisfy constitutional requirements, they are binding on all citizens and government officials (Valente, 1994, p. 6).

Strict scrutiny—a standard used by federal courts to assess the constitutionality of legislation or governmental activity. To pass muster, a challenged governmental action must be "closely" related to a "compelling" governmental interest. In contrast to ordinary scrutiny, where courts presume that the legislation or challenged governmental activity is constitutional and the plaintiff has the burden of showing a constitutional violation, strict scrutiny assumes that it is unconstitutional and the government has the burden of demonstrating its compelling interest. Courts must focus on government's purpose rather than merely on the effect of governmental action to determine the validity of a challenged law or regulation (Hall, 1992, p. 845).

Suit—a generic term of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of justice in which the plaintiff pursues, in such court, the remedy which the law afforded him for the redress of an injury or the enforcement of a right, whether at law or in equity (Black, 1979, p. 1286).

Symbolic speech—a person's conduct which expresses opinions or thoughts about a subject and which may or may not be protected by the First Amendment; actions which have as their primary purpose the expression of ideas, as in the case of students who wore black armbands to protest the war

in Vietnam. Such conduct is generally protected under the First Amendment as "pure speech" because very little conduct is involved (Black, 1979, p. 1299).

Time, place, and manner rule—a doctrine holding that government may protect society by controlling the harmful individual effects of speech so long as such regulation meets certain requirements: first, it must be neutral concerning the content of expression, and, second, it may not even incidentally burden the flow of ideas to a substantial extent (Hall, 1992, p. 874).

United States Code, Title 42, Section 1983—Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Vacate—to annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgement (Black, 1979, p. 1388).

Organization of the Study

Chapter 1 is an introduction to the study. Included in this chapter is the statement of the problem, the purpose of the study, the significance of the study, and the research questions.

Chapter 2 focuses on a review of the literature regarding the First Amendment and its relationship to America's public schools. In particular, this chapter discusses the function of public schools and examines two competing models concerning student expression and speech.

Chapter 3 offers a description of the methodology and procedures to be utilized in this study and also describes the case analysis method which is used.

Chapter 4 provides briefs of the significant cases. Each case is briefed according to the methodology and procedures stipulated in Chapter 3.

Chapter 5 presents an analysis of the cases and the operational principles gleaned from the case analyses.

Chapter 6 includes a summary of the results of the study, conclusions, and recommendations for further study.

CHAPTER 2

THE FUNCTION OF PUBLIC SCHOOLS

Introduction

"If we turn . . . to the actual history of nations we shall find public education, in some sort or other, always existing" (Harris, 1990, p. 13). It is incumbent upon the government of a republic to educate all its people. History indicates that there appears to be agreement on the fact that the well-being of the nation as a whole, and of its individual citizens, is directly linked to an educated populace (Harris). However, disparate views exist in regard to what the major function of schools should be (Jarolimek, 1981).

Lack of Consensus

Jarolimek (1981) posits that disagreement concerning the function of schools stems, in part, from the fact that, unlike nations that have centralized systems of education, the American public school system has no nationally defined, overriding function. There is no organization that can provide unifying, systemic direction for our schools. As a result, educational efforts in the United States lack a singleness of purpose, and at times, it appears that segments of the educational enterprise are working at cross-purposes (Jarolimek).

Another factor contributing to the lack of consensus about the function of schools is the nation's heterogeneity (Jarolimek, 1981). In the past, attaining consensus about the function of schools was less problematic because communities tended to be more homogeneous than they are today with respect to social, economic, ethnic, and religious backgrounds. Most communities in present-day America are highly heterogeneous, making it difficult to arrive at a unity of opinion concerning how schools ought to function. As Jarolimek states, "With the amount of diversity that characterizes most communities today, it is little wonder we cannot agree on what schools are supposed to accomplish" (p. 65).

Levin's (1976) correspondence principle also provides a means of understanding why there is a continuing debate over the proper function of schools in American society. He asserts that "all educational systems serve their respective societies such that the social, economic, and political relationships of the educational sector will mirror closely those of the society of which they are a part" (p. 26). Given this circumstance, certain political, social, and economic conditions external to the school serve to influence significant school policies and trends (Jarolimek, 1981). Because these conditions may vary from community to community and perceptions of what these conditions signify may vary within an individual community, it is likely that some segment of society will take exception to the schools' programs. In general, when the larger society is ambiguous

about its values or is uncertain about its priorities, the schools tend to reflect these same uncertainties (Jarolimek). As noted in the literature,

> The schools have become battlegrounds for value conflicts that originate in the larger society. In this century legislators and the courts as well as educators and school boards have decided which values the schools should attempt to transmit to the younger generation. (Van Scotter, Haas, Kraft, & Schott, 1991, p. 87)

Similarly, Hurn (1978) puts forth the belief that there will continue to be controversy surrounding the appropriate function of public schools because of the increasing cultural diversity in American society. This increase in cultural diversity suggests that it would be difficult to recapture a consensus about the kinds of values and behaviors students should exhibit. As Hurn points out, "Schools cannot manufacture consensus where none exists. Students are exposed to an enormous variety of values, ideals and information outside the school over whose content educational institutions have no control" (p. 23).

Despite the conditions that mitigate against reaching consensus regarding the function of public schools, there is little problem achieving agreement in those areas where schools have either complete or no responsibility. There is, however, great difficulty in achieving agreement regarding the proper function of schools in nebulous areas, namely those areas in which the schools share responsibility with other agencies such as the home, the church, or the community. This arena is the largest component of an individual's

education and includes most of what schools do (Jarolimek, 1981).

In the United States, given the vast expenditures spent on schools and their increasing importance in our society, it is easy to overlook the fact that, although there is general agreement that schooling is necessary and good, there is a diversity of opinion concerning what should be taught and how the instruction should be accomplished (Clabaugh & Rozycki, 1990). America's failure to agree on the purpose of education and the function of its schools is not without precedent, however. In fact, an examination of our Western intellectual heritage indicates a long history of disagreement about the purpose of public education and the function of schools that can be traced to the ancient Greeks:

> Three hundred and fifty years before Christ . . . Aristotle observed: That education can be regulated by law and should be an affair of state is not to be denied, but what should be the character of this public education, and how young people should be educated are questions which remain to be considered. (Clabaugh & Rozycki, 1990, p. 12)

Differing Educational Philosophies

Goodlad (1979) contends that the difference of opinion regarding the function of our schools is based on a philosophical debate that has existed in education for centuries—the rights of the individual versus the good of society. It has been argued that educating the individual to serve the state is the antithesis of developing individuals to their fullest potential. These contradictory philosophies

do not lend themselves to the development of a cohesive educational system. Whatever schools may be able to accomplish in the promotion of critical thinking is offset by the necessity of imparting a sense of devotion to the nation-state (Goodlad). According to Van Scotter et al. (1991), liberal critics of the schools tend to claim that schools must respond more to the needs of individual students, whereas conservatives tend to emphasize discipline, basic learning, and traditional values.

These perspectives about the function of public schools are articulated in the context of three major schools of educational thought: traditionalism, progressivism, and essentialism.

Traditionalism

The traditional philosophy of education, born at the turn of the century, values efficiency and uniformity. Consequently, schools driven by a traditional set of values stress order and discipline rather than freedom and favor effort rather than interest (Gutek, 1986). The overall function of the traditional school is to inculcate respect and obedience in students for teachers and administrators as well as for society in general and its cultural traditions (Hurn, 1978). The first requisite of the school is order, and in accordance with this requisite, students must be taught to conform their behavior to the prescribed standard (Fiske, 1992). In the traditional school of thought, the values of the educational institution take precedence over

the rights of the individual (Benson & Lyons, 1990). Traditionalists adapt the factory model to the school setting, instituting a system of centralization, standardization, and accountability based on following rules (Fiske, 1992). In fact, Fiske claims that "the principles of the factory-model school still provide the basic organizing structure under which all educators function. Few have ever questioned its underlying assumptions" (p. 33). Clabaugh and Rozycki (1990) assert that the factory-model school discourages questioning of its basic authority because its values and goals are preordained. School people, administrators in particular, tend to prefer the factory model. Benson and Malone (1990) lend support to these assertions: "Historically schools reflect the management system of business and industry. Job specialization, being on time, and compliance to authority are common characteristics of schools and businesses. Teachers and students are expected to be docile and compliant to school authorities" (p. 23).

In the traditional view of education, schools should preserve the cultural heritage by transmitting knowledge to the young (Gutek, 1986), and through conservative school policies, provide a balancing mechanism for society by deterring unnecessary, and potentially deleterious, changes (Jarolimek, 1981).

Progressivism

Contrary to the concepts of traditionalism, the progressive philosophy of education emerged in the late nine-

teenth century. Although it reached its peak in the 1920s and 1930s, progressivism still exerts influence on the educational practices of today. Progressive philosophy is the educational manifestation of the liberal movement that characterizes the traditional school as being hostile to the enabling ideology of democracy and oppressive toward its students (Van Scotter et al., 1991). Progressives reject the lock-step uniformity and authoritative administrative style incorporated in the philosophy of traditionalists (Gutek, 1986). John Dewey, the foremost advocate of progressive thought, argues that the primary function of schools is to foster thinking as opposed to transmitting knowledge and instilling values (Van Scotter et al., 1991). For Dewey (1916), if students are to serve and maintain a democratic way of life, they must have opportunities to learn what that way of life means. Accordingly, Dewey contends that education's sole purpose is to contribute to the personal and social growth of individuals. Knowledge in and of itself is not important. The importance of knowledge is derived from the belief that it should be used as an instrument to solve problems. The public school, from Dewey's progressive viewpoint, should introduce students to society and to their heritage based on each student's own needs, interests, and problems. By so doing, the school functions as a learning laboratory in which students are allowed to test their ideas and values (Ornstein & Levine, 1989). As Ornstein and Levine note, in Dewey's philosophy of progressivism, "cultural heritage, customs, and institutions are all subject to critical

inquiry, investigation, and reconstruction" (p. 140). To facilitate and encourage genuine inquiry in schools, Dewey opposes the traditional authoritarian, coercive style of administration and teaching. However, Dewey's conception of school does not tolerate educational anarchy and rejects the romantic view of freedom which gives students the license to follow their impulses (Ornstein & Levine). The truly progressive school, in Dewey's educational scheme, fosters a learning environment in which educational theories are tested in practice (Lauderdale, 1981). A vital element in this type of environment is the freedom to explore and encounter problems (Jarolimek, 1981).

Ultimately, Dewey and the proponents of progressivism are united behind several guiding principles in opposition to certain traditional school practices. They condemn authoritarianism and passive learning while advocating principles that include allowing students to be free to develop naturally; utilizing the teacher as a guide to learning, not as a taskmaster; and establishing the school as an educational laboratory for pedagogical reform and experimentation (Graham, 1967; Gutek, 1986). Progressivism also promotes a cultural realism by critically appraising and often rejecting traditional value commitments (Ornstein & Levine, 1989). In brief, the overall unifying theme of progressive philosophy is "the liberation of the [student] through the liberalizing of the school" (Gutek, 1983, p. 60).

Essentialism

Essentialism, following the philosophical path of the traditionalists, developed in the 1930s in opposition to the liberal, student-centered tenets espoused by the followers of progressivism (Gutek, 1983). Essentialism continues to be a strong force in American education in this century (Jarolimek, 1981). In fact, Van Scotter et al. (1991) describe essentialism as "the dominant philosophy in American education" today (p. 72) because it possesses constant currency and appeal, particularly for those who are leaders in education and in society. As does traditionalism, essentialism espouses a conservative position in regard to the function of public schools. In fact, because of the conservative principles embedded in essentialism, it can be examined as a defense of educational traditionalism (Ornstein & Levine, 1976). In accordance with traditionalist thought, the essentialist philosophy adheres to the belief that schools should not function as social agencies, but rather as academic institutions where the teacher is the authority figure and learning is teacher-directed (Gutek, 1986). In response to progressivism, essentialists argue that "an erroneous theory of child freedom [has] been used to eliminate discipline, order and sequence from American schools" (Gutek, 1986, p. 50). The teacher, as the mature adult, is to control and direct the instruction of the immature students, thereby enabling students to acquire the essential social skills, knowledge, and behaviors that are necessary for successful living in American society (Gutek, 1986; Ornstein

& Levine, 1989; Van Scotter et al., 1991). As with the traditionalist philosophy, essentialism supposes that schools must function from an adult-centered approach, which contradicts the progressive notion of student-centered education. From the essentialist perspective on the function of public schools, students are to master a subject-matter curriculum by means of disciplined attention and hard work (Ornstein & Levine, 1989). In addition to the essential knowledge of the curriculum, schools are to transmit certain values, namely the cultural and social values of the dominant class in society. To ensure cultural continuity by teaching the traditions of society, schools have to impart traditional values to their students (Van Scotter et al., 1991). Manifest in society's traditional values is the idea that schooling requires discipline and a respect for authority. The ultimate function of the school, as derived from the essentialist philosophy of education, is to civilize human beings (Ornstein & Levine, 1989).

Debate Over Democratic Schools

As can be seen from a review of the literature, various philosophies of education suggest different approaches related to the function of public schools. These philosophies are incorporated in traditionalism, progressivism, and essentialism, and are reflected in the debate over democratic schools. Proponents of democratic schools tend to follow Dewey's progressive, liberal line of thought. These progressive educators favor democratic education and school-

ing that values student freedom and development, and consider the use of democratic school policies to be a prelude to community and social reform (Gutek, 1986; Ornstein & Levine, 1989; Van Scotter et al., 1991). Today's more traditional, conservative educators, referred to by Ornstein and Levine as neoessentialists, are apt to be less concerned with democracy in schools and more likely to want schools to transmit the nation's cultural heritage and teach respect for authority.

Proponents of Democratic Schools

Certainly the debate over democratic schools is not a recent phenomenon. In fact, Campbell, Cunningham, Nystrand, and Usdan (1980) state that the concept of democratic schools, those schools which permit a greater degree of student autonomy and encourage students to be involved in decisions about their education, dates back to the days of Plato and Aristotle. Despite this long-lived notion of democratic schools, critics of present-day public schools contend that the term democratic schools is itself an oxymoron (Beane & Apple, 1995). These critics argue that traditional schools encourage passivity and are organizations where students are coerced and controlled (Hurn, 1978). Instead of teaching students to think critically and independently, America's public schools emphasize docility based on following rules and regulations (Silberman, 1970). In broad terms, those who advocate democratic schools believe that schools should be institutions that promote human liberation, in-

stead of merely transmitting a cultural heritage in an authoritarian fashion (Hurn, 1978). The contradictory functions of public schools, namely developing individuals to their fullest potential while educating them to serve the state, should not exist. Nor should there be dissonance between educational practice and educational rhetoric, which encourages the cultivation of individual autonomy and independent thought. Proponents of democratic schools, however, see educational practice acquiescing to school authority when devotion and allegiance to the state are challenged (Goodlad, 1979). To critics such as Goodlad, there must be no dichotomy between practice and rhetoric. Public schools must educate students to think critically to ensure the continuation of a free, democratic society. Accordingly, public school officials and their policies do not warrant immunity from critical examination, for without the ability to think freely and examine educational pronouncements critically, schools become institutions of indoctrination and training rather than institutions of education (Goodlad). Fiske (1992) shares a similar view of schools today, declaring that most schools and most school officials espouse authoritarianism and loyalty to the system at the expense of developing and fostering thinking and problem-solving skills. From Fiske's perspective, the most destructive characteristic of nondemocratic schools is not that the teachers and administrators have all the answers, but that they control all the questions. This type of restrictive system, which successfully socializes a large percentage of stu-

dents, adheres to the principle of uncritical acceptance of the status quo (Goodlad, 1984).

Transmission of and commitment to the status quo has been assumed to be a virtue of America's educational system (Goodlad, 1984). Recently, however, advocates of democratic schools, following Dewey's (1916) philosophy, have questioned this assumption and have portrayed schools as static institutions lagging behind American business and industrial organizations in the implementation of democratic systems (Campbell et al., 1980; Fiske, 1992; Tanner & Tanner, 1987; Wirth, 1983). The lack of democracy within public schools becomes apparent when assessed in light of the purpose of education in particular and the expressed values of American society in general. Tanner and Tanner (1987) appeal for democratic schools on both issues. They assert that the purpose of education, by its very nature, presupposes the development of productive self-control and self-direction. Consequently, schools that mandate and impose sheer control over students by authority are not only nonfunctional but miseducative as well. In regard to American society in general, Tanner and Tanner make the point that public schools operate in a broad cultural context and, therefore, must take into consideration the norms and values of the culture if they are to function in an effective manner. Given this premise, autocratic schools operate in ways that are in opposition to a society that values democratic processes. The individuals within such schools then become resentful and resistant to the schools' goals and the schools' leader-

ship. In a similar vein, Campbell et al. (1980) depict student activism and unrest as the product of conflict between the democratic nature of American society and the traditional, antidemocratic nature of America's public schools. Predating the thoughts of Goodlad (1979), Caswell (1942) maintains that schools proclaim democratic ideals, but in reality, they violate these ideals in regard to both organizational arrangements and the relationships that exist between and among students, teachers, and administrators: "There can be little doubt that many plans of school government violate elementary principles of democratic procedure" (Caswell, p. 65). In response to this circumstance, Caswell suggests the development of schools that foster democratic values and recognize the principle of democratic action.

Beane (1990) provides a set of democratic principles to serve as the foundation for America's public schools. These principles include an open flow of ideas, regardless of their popularity, which enables students to be as fully informed as possible; faith in the individual and collective capacity of people to create solutions to problems; and the use of critical analysis to evaluate problems, ideas, and policies. Those who support democratic schools believe that our schools should cultivate these principles so that students can be introduced to and experience the democratic way of life, ultimately learning the meaning of democracy from their school experience (Beane). Greene (1985) is also in favor of a democratic approach to schooling: "It is an obligation of education in a democracy to empower the young to

become members of the public, to participate, and play articulate roles in the public space" (p. 4).

Proponents of democratic schools realize, however, that the exercise of democracy in public schools necessarily entails conflict, tension, and contradiction. Beane and Apple (1995) see this conflict being grounded in the fact that, throughout their history, America's public schools have been remarkably undemocratic institutions. They contend that the dominant traditions of schooling, such as efficiency and hierarchical power, are at odds with the notion of transforming schools to offer access to and critical examination of a variety of ideas. Consequently, educators who advocate democratic practices believe that teachers and administrators must learn to accept conflict because a school fails in its educative function unless it exists in a state of productive tension (Benne, 1990; Schwab, 1976). To facilitate and utilize such tension, administrators must make explicit attempts to put in place arrangements and opportunities that promote democratic action in the school's operation. Creating democratic structure and process within the school itself is one means of institutionalizing democratic experiences (Beane & Apple, 1995). According to the tenets of democratic schools, all of those involved in the school, including students, have a right to participate in the school's decision-making process. For this reason, proponents of democratic schools assert that schools should be characterized by widespread participation in issues of governance and policy making in

order to overcome the tendency of school officials to "engineer consent" toward a predetermined solution (Beane & Apple, 1995; Graebner, 1988).

Opponents of Democratic Schools

As indicated in the literature, advocates of democratic schools offer an array of arguments to justify their position. However, the literature also reveals that a counter argument, that is, a case against democratic schools, can be made. In fact, Beane and Apple (1995) make reference to several points that critics of the democratic school concept use. For example, many educators who prefer a more traditional approach to schooling adhere to the idea that democracy is a form of federal government and is not relevant to schools. Others believe that democracy is a right that should be the exclusive domain of adults. Yet another argument put forth by conventional school administrators is that democracy is simply not a feasible method of operation within public schools.

Barrow (1981) elaborates on this line of thought in arguing against the idea of democracy in schools. For Barrow, the salient question in the debate over democratic schools is, "Should students, by virtue of the fact that schools are designed primarily for their benefit, be allowed greater freedom in determining how schools operate?" Barrow states that even considering the fact that American society values democracy and presuming that a major goal of schools is to prepare students for a democratic society, it

is, nonetheless, fallacious to argue that our educational system should implement democracy within the schools: "It is a principle quite coherent to approve of democratic organizations in one context and not in another. . . ." (Barrow, p. 91). While democracy is viewed in our nation as the most morally acceptable form of political organization, it should not be assumed that in all conceivable circumstances democratic procedures would be best. Thus, endorsement of democracy in the state does not inevitably imply a commitment to democracy in regard to public schools. The concept of democratic schools should be examined within its own unique context. By so doing, Barrow concludes that the idea of decision making being the prerogative of all members of a school is implausible. The democratic principle that all individuals count equally and have interests deserving of equal respect does not apply when a distinction can be drawn between knowledge and ignorance, understanding and confusion. Based on this assumption, Barrow declares that, within the context of public schools, democracy should be a right reserved for adults. She notes that in the day-to-day administration of schools, many decisions rest on expertise acquired through experience and the study of educational issues. Students have comparatively little in the way of educational experience and no formal study of educational matters on which to base judgements regarding school-related issues. Barrow concedes that, given the opportunity to participate in school decisions, there are students who may become more responsible and hasten their development as

adults. However, the development of students' knowledge and understanding cannot be advanced by pretending that they know and have experience of what they do not know and have not experienced. Barrow agrees that students should be treated with a higher level of maturity than is currently being done, but it should not be assumed that they are adults when they cannot be.

Barrow (1981) also contests the progressive educational philosophy which makes democracy an overriding issue in the function of public schools. Assuming that schools should socialize and educate students (Presseisen, 1985), the implication is that there are certain values, behaviors, and subjects which are important to the individual as well as to society. In order to teach students these values, behaviors, and subjects, Barrow asserts that educators cannot consistently regard freedom and democracy as being of paramount importance. Accordingly, there is no reason to presume that a democratic school is inherently superior to a traditional school:

> It is not sufficiently clear what advantages are supposed to accrue to the [student] from the mere fact of participation in a democratic organization, nor is there sufficient evidence to show that any particular advantages do accrue better by these means than any other. (Barrow, p. 94)

However, if issues are examined on their individual merits, it is plausible that certain school matters would be amenable to the democratic principle of student involvement. To illustrate, particular social rules could be decided by a vote of students and staff when there is not

clear superiority of knowledge or expertise possessed by school administrators. Furthermore, even those favoring a more traditional approach to schooling caution that the conclusion that students do not have an inherent or educational right to be involved in school decisions should not necessitate a negative relationship between school administrators and students (Barrow, 1981).

As can be discerned from a review of the literature, there is significant support both for and against the increased democratization of schools. Without a doubt, the debate over democratic schools is grounded in opposing philosophies of education, but there are other factors which affect this debate and move it into the arena of educational realities. In this arena, the gap between school practices and democratic values is as wide as it has ever been, and those committed to democratic schools often find themselves in disagreement with the dominant traditions of America's public schools (Beane & Apple, 1995). Tye (1987) refers to these traditions as the "deep structure" of public schooling. This deep structure is shared among America's public schools and therefore, exists nationwide. According to Tye, it is this national connectedness that provides the deep structure with its power and persistence. One element of schooling which Tye labels as a deep structure is control orientation. The control orientation of schooling is based on the premise that students are certain to abuse democratic practices if given the opportunity. As a deep structure of schooling, the emphasis on controlling

student behavior is rooted in the values and assumptions shared throughout American society since colonial times. It has become part of the conventional wisdom and tradition of schooling, and as such, is accepted without question (Tye). To alter the control orientation of America's public schools and introduce a more democratic orientation would require a fundamental, second-order change in the governance of schools (Cuban, 1988). Certainly, such change would be contrary to the institutional requirement of maintaining order in accordance with detailed rules and regulations (Goodlad, 1983; Jackson, 1968; Ornstein & Levine, 1989). Moreover, a shift toward a more democratic school runs counter to the nondemocratic currents in educational policy and public opinion (Beane & Apple, 1995). The prescriptive approach to schooling is, at least in part, attributable to public pressure, which tends to favor the traditional, authoritarian style of school administration (Tanner & Tanner, 1987). Indeed, Jarolimek's (1981) research substantiates the belief that most Americas prefer that their schools maintain a disciplined, orderly environment and oppose administrative practices that encourage a high degree of permissiveness. As is evident from the research, most Americans tend to be essentialist in their attitudes toward schools (Jarolimek).

The debate over democratic schools also relates to what school officials view as the preferred student role. Research identifies three basis types of student roles: (a) the obedient pupil role, (b) the receptive learner role,

and (c) the active learner role (Kedar-Voivodas, 1983). The literature indicates that, despite educational rhetoric and the fact that many educational philosophers, including Dewey, favor the active learner role, most school authorities prefer the passive, obedient pupil role (Fiske, 1992; Kedar-Voivodas, 1983). Kedar-Voivodas concludes that many educators are "significantly more negative about [students] described as active, nonconforming, independent, and assertive, essentially active learner role attributes" (p. 428). Goodlad (1984) lends credence to this finding, noting that "the socialization process...simply discourages or ultimately suppresses deviation" (p. 266). In the final analysis, students are expected to adapt to authority (Jackson, 1968).

Inculcation or the Marketplace of Ideas

The different philosophical perspectives regarding the function of public schools, the debate over democratic schools, and the student's desired role in school all give rise to specific attempts to resolve these conflicts through legal means (Pai, 1990). The court cases themselves are evidence that our educational practices are filled with incongruities which are based on divergent perceptions of what schools are supposed to accomplish (Jarolimek, 1981; Pai, 1990). Herein lies the paradox of America's public schools, for when the larger society is ambiguous in regard to its values and priorities, these same uncertainties are reflected in the schools (Jarolimek).

According to Gutek (1983), schools have been the agencies charged with conserving and transmitting society's cultural heritage, while at the same time serving as a force for social change and renewal. This dichotomy, in turn, spawns a problematic situation in which schools must maintain the existing social order while simultaneously replacing it (Clabaugh & Rozycki, 1990). The outcome of attempting to accommodate both of these seemingly contradictory goals produces what Van Scotter et al. (1991) term the I/We dilemma—how to serve both the individual and the society, how to develop personal potential and at the same time promote social cohesiveness. In a similar vein, Jarolimek (1981) writes,

> There is no agreement—even among experts—regarding the relative importance of two central missions of the schools, namely socialization of the young on one hand and promoting social change on the other. This issue is not so much that the school should do one or the other; but rather, deciding what the main thrust should be. (p. 5)

The process of deciding what the main thrust of America's public schools should be is reflected in our legal system with the concepts of inculcation and the marketplace of ideas (Roe, 1991).

Inculcation

Inculcation refers to the school's authority to select and implement the curriculum by providing students with educational experiences that lead them to an understanding of the mores, traditions, and values of society and instill adherence to these values in their behavior (Saylor & Alex-

ander, 1966). In Goldstein's (1976) opinion, the deliberate inculcation of right societal values has been a historically accepted function of America's educational system. Goldstein (1970) further asserts that precollege education follows the inculcative, or prescriptive, model whereby information and accepted truths are conveyed to passive, absorbent students with no regard for creating new wisdom. There are those who view education as inherently inculcative because it disposes students to accept certain values and opinions and reject others. Consequently, school officials should be granted broad powers in order to structure educational programs for the purpose of inculcating community values (Stewart, 1989). The inculcative concept is premised on the belief that the school has the power and authority to control student learning (Roe, 1991).

Marketplace of Ideas

The marketplace of ideas, on the other hand, views schooling as a forum in which a broad spectrum of ideas is expressed and freely discussed (Roe, 1991). The marketplace approach to education dictates that public schools present students with a wide range of viewpoints so that they are encouraged to think critically in developing their own perspectives, free of government's prepossessing (Mitchell, 1987). By adhering to the marketplace model, school officials allow students to exercise their constitutional rights, a practice that necessarily restrains the state from imposing its dogma (Roe, 1991). The philosophical un-

derpinnings of the marketplace of ideas concept are based on the assumption that "the best test of the truth is the power of the thought to get itself accepted in the competition of the market" (Abrams v. United States, 1919).

A review of the literature reveals three theories that illustrate the nature of the controversy surrounding the inculcation and marketplace paradigms. The theory which incorporates the consensus model of society presupposes that inculcation is the primary function of America's public schools. The principle of free speech is of minimal importance. The overriding precept is that schools should function as transmitters of traditional values. Thus, the rights of the individual are subordinate to the interest of an orderly society. Downplaying individual differences, the consensus theory values the holistic view that schooling should encourage stability and maintain the existing social order. This theory stresses the notion that schools should, above all else, integrate individuals into society's social structure by harmonizing values and promoting consensus (Clabaugh & Rozycki, 1990). Akin to the consensus model of society is the functionalist-reproductive theory. As seen from the functionalist-reproductive standpoint, the role of public schools is to transmit accepted economic, political, and sociocultural norms so that students can become productive and contributing members of society. In this way, schools function as enabling institutions for the pepetuation of American society by reproducing its existing, established patterns (Pai, 1990).

Counter to the consensus model of society and the functionalist-reproductive theory is the maximum protection theory. Under this theory, free speech and open dialogue are preeminent values in American society. Maintaining the existing societal order is a secondary concern in the maximum protection point of view. Both society and schools should operate from the assumption that freedom of expression and exposure to a variety of ideas are essential to the development of critical thinking, which serves to counterbalance the government's inherent power in the arena of free speech. The maximum protection theory argues that speech should be restricted only when an identified harm results that cannot be mitigated, remedied, or prevented by more speech (Dorsen, 1988). Although this theory does not offer absolute protection to the content of all speech, it does place the burden on school administrators to permit the resolution of controversies to take place via discussion and debate as opposed to meeting dissenting voices by the imposition of enforced silence (Dorsen). Implicit in the maximum protection theory is the belief that free expression has a checking value on governmental actions. Those who favor this concept advocate the broad protection of commentary pertaining to actions taken by agencies of the state as a means of checking or inhibiting governmental abuse and excess (Dorsen, 1988; Hafen, 1987).

The ongoing debate between those who believe schools should be inculcative institutions and those who view schools as the marketplace of ideas is reflected in the

literature of law review articles. The legal articles note the innate paradox and tension between freedom and discipline in America's public schools. The tension is grounded in the students' constitutional right to freedom of expression and speech on one hand, and the authority of local school administrators to make decisions that are congruent with the values of the community on the other (Hafen, 1987; Salomone, 1992). According to Salomone,

> The conflict between individual student rights and communal values has its roots in the origin of the common school movement more than a century ago. Since that time, educators, and more recently courts, have been struggling to strike a balance between the interests of the individual and the interests of the state in the context of public schooling. (pp. 254-255)

The Common School
Source of First Amendment Conflict

Given the fact that ongoing legal disputes have their origin in the development of the common school, a brief review of the common school's history would enhance the understanding of court cases that stem from the inherent conflict between the authority of the state to instill the knowledge and values it deems important and the First Amendment interests of individual students (Roe, 1991).

Horace Mann is often referred to as the father of the common school movement, which took hold in the United States during the mid-19th century. It was Mann's contention that publicly supported common schools should play a major role in the civic education of the young in order to prepare them to take their places as responsible citizens

of the republic (Gutek, 1986). The common, or shared, program of civic education was also to serve the purpose of cultivating a sense of American loyalty and identity (Binder, 1974). The primary social purpose of the common school was to integrate children of diverse ethnic, social, and economic backgrounds into the broad American community (Ornstein & Levine, 1989). To achieve this goal, it would avoid those areas and subjects that could prove emotionally or intellectually divisive (Cremin, 1951). For Mann, a crucial function of public education and the common school was the preservation of republican institutions and the creation of a political community (Spring, 1982). In addition to its political role in the American republic, Mann envisioned the common school as the basic cultural agency of American society through which students would become acquainted with their heritage (Gutek, 1986). As such, the common school's major goals included providing moral training, facilitating cultural assimilation, and instilling a sense of patriotism and discipline in the younger generation (Kaestle, 1973). Mann saw the common school as an integrative agency that would serve as a unifying institution by inculcating essential moral values in its students, promoting a sense of ethical behavior, and cultivating shared basic knowledge (Gutek, 1986). However, the architects of the common school were wary of the innate danger in homogeneity. They cautioned against excessive governmental power that could encroach on individual liberties and rights (Salomone, 1992; Tyack, 1987). Therefore, even though

Mann's common school was conceived as a public institution responsible to the community (Gutek, 1986), the educators who implemented this idea attempted to establish a school environment that would also accommodate individuality (Cremin, 1951). There was also concern among the citizenry regarding who would determine the dominant ideology to be promoted in the public schools. To allay this concern, Mann and his cohorts decided that, instead of resting power in professional educators, there would be local authority over public schools via state legislatures and local boards of education. With this political configuration, the transmission of values and knowledge would be at the discretion of each community (Ornstein & Levine, 1989; Salomone, 1992; Spring, 1982).

Initially, the ideal of the common school faced little opposition and controversy because public schools adopted a moderate middle course. Thus, the character, discipline, and political values conveyed in curriculum and policy decisions seemed to be universally accepted, at least to the dominant population. The minority who disagreed with the schools' course of action chose to opt out of the public school system altogether rather than compromise their own beliefs and values (Salomone, 1992). However, as America's public school system continued to develop, the belief arose that schools should do more than reflect parochial values, but should, instead, introduce students to a much broader array of viewpoints and ideas (Goodlad, 1984). Indeed, Goodlad lists among the goals for schooling in the United

States citizenship participation as well as enculturation. He describes citizenship participation as "the democratic right to dissent in accordance with personal conscience" (p. 53). Enculturation means to "understand and adopt the norms, values, and traditions of the group of which one is a member" (p. 54). Given these goals, it appears that our public schools are charged with maintaining society's culture while also serving as a vehicle for criticism of this culture. In fact, school boards and other educational authorities often list both of these goals as social functions of public schools. By so doing, these very functions become problematic (Clabaugh & Rozycki, 1990).

This problematic situation is epitomized by the difference between educational theory and educational practice. In theory, it is generally agreed that the mission of public schools is to transmit a common core of values to students, including the constitutional values that are vital to democratic participation, such as freedom of expression and speech (Levin, 1986; Salomone, 1992). In practice, this ideology of schooling contains an inevitable conflict between individual rights and the societal good (Salomone). Public schools are charged with conveying to students the dominant values of the sponsoring community while simultaneously opening their intellect to new ideas and thoughts that go beyond those encountered in the home (Cremin, 1977). Throughout this century, these contradictory functions have been increasingly difficult to balance in light of the advent of compulsory education laws and the more

recent disintegration of the consensus of values (Salomone, 1992). At no other time since Horace Mann has there been such a direct challenge to the underlying premise of what Glenn (1988) calls the "myth of the common school," that is, the belief that the values and attitudes promoted through public schools are, in fact, "neutral, nonsectarian, and indeed obvious to any reasonable person" (Glenn, p. 12; Salomone, 1992).

Public Schools and Freedom of Expression

As America's student population becomes more segmented and local controversies pit the rights of individuals and minority groups within the community against the authority of school administrators responsible for making determinations that reflect the values of the majority, a salient legal issue regarding schools centers on the application of the First Amendment to compulsory public education—a concept that was not envisioned by the original framers of the Constitution (Salomone, 1992). Court cases pertaining to the decisions of public school administrators and their relationship to the First Amendment come about because education necessarily involves the imposition of restraints. As a result of the imposition of restraints in public schools, the degree of authority necessary to teach students and maintain an orderly school environment is, in a fundamental way, at odds with the antiauthoritarianism of the First Amendment tradition (Hafen, 1987). The literature suggests that, in the arena of public school law, two competing, di-

vergent lines of jurisprudence have developed: one which stresses the inculcative function of public education and another in which school authorities are cautioned against the official indoctrination of students (Ingber, 1990; Lavi, 1988). Accordingly, a survey of law review articles reveals two distinct models of public education—the conceptual development model (Roe, 1991) and the mediating institution model (Hafen, 1987)—which illustrate the pedological and legal debate surrounding the function of public schools and their relationship to the First Amendment in general and freedom of expression and speech in particular.

Conceptual Development Model

The conceptual development model is grounded in the belief that student expression, which is incorporated in freedom of speech, merits First Amendment protection because of its essential educational value (Roe, 1991). In an article for the California Law Review, Roe contends that the prevailing judicial perception of public education's purpose is based on the inculcative model of schooling. In this model, the primary function of public schools is to socialize students by transmitting prescribed knowledge and values. A corollary to the inculcation paradigm is granting school administrators the right to restrict student expression by claiming that such suppression has a rational relationship to a legitimate, pedagogical objective. Roe sees the rational-relationship standard as incomplete, arguing that recent advances in learning theory support the notion

that the work of schools is more accurately understood as conceptual development in which student expression plays a significant role in the growth of students' knowledge, intellect, and capacity for rational deliberation. He contends that student speech which does not interfere with or disrupt the school's work, but merely diverges from or contradicts the curricular message, contributes to cognitive progress in learning. Courts, therefore, should rethink their position on public schools and the First Amendment and begin to provide significantly more protection for student expression by adopting a First Amendment analysis that values student speech more and defers less to the decisions rendered by school administrators. Roe (1991) also sees the marketplace of ideas model as being inconsistent with the appropriate function of schools. He states that the marketplace model opens the school to a myriad of ideas or requires the school to offer ideas that compete with or provide alternatives to its prescribed curriculum. Given this scenario, educators who subscribe to the concept of school as the marketplace of ideas would necessarily be involved with the promotion of political choice or the advancement of truth.

Although Roe (1991) does take exception to public schools serving as the marketplace of ideas, his main point of contention focuses on the inculcation of values approach to education. When educators view the school's function in inculcative terms, the ultimate goal of the educative process is not adequately addressed. Specifically, Roe de-

clares that the consensus of educational theorists and researchers indicates that the primary objective of education is to facilitate the development of thinking skills, which is the most relevant issue in conceptual development. This interpretation of learning is distinct from, and contrary to, the inculcative perspective of the educative process.

Roe (1991) offers four reasons for arguing against the notion that education should be advanced primarily for the purpose of socializing students through inculcative means. First, the inculcation model is antithetical to the cognitive manner in which students actually learn. Second, inculcation makes it possible to compel adherence to government-prescribed values and ideas beyond the scope of legitimate governmental power. Lavi (1988) also makes reference to this possibility in discussing the prospect of value inculcation becoming value indoctrination. Value indoctrination is a possibility because, according to Roe, "Under inculcation students are not rewarded for expressing the ideas or values they think or believe but rather for reciting required material" (p. 1315). A third reason Roe cites in his argument against the inculcative model pertains to teaching methods. The inculcative method of teaching dictates that students memorize and recite rather than think and evaluate. Consequently, inculcation not only contradicts the democratic values schools profess to teach, but also discourages the development of an informed citizenry capable of arriving at its own conclusions. By following

the tenets of conceptual development, students are afforded the opportunity to assess the school's curricular messages in order to develop and practice democratic competence. A fourth and final argument against inculcative education is based on the belief that such education cannot compel students to adopt particular values and, therefore, it is not an effective means of instilling desired beliefs, attitudes, and dispositions in students. Roe claims that information alone is insufficient for students to make reasoned judgements. Rather, democratic participation requires advanced conceptual development, that is, the capacity to apply cognitive skills in analyzing given information. By permitting greater tolerance of student expression in furtherance of conceptual development, school administrators promote the democratic values and deliberative skills that are vital to democratic participation in our society.

Roe (1991) argues that the goal of encouraging a higher level of rational deliberation and conceptual development among students should not diminish the school's ability to deliver its curricular message. He points to three categories of student expression, or speech, which are relevant to a school's curricular message and the authority of school officials in restricting such expression or speech. The three main categories of student expression are (a) expression consistent with or supportive of the school's curricular message, (b) expression that disrupts or interferes with its message, and (c) expression that contradicts or diverges from this message. It is assumed

that school authorities will not suppress student expression or speech in the first category. However, the other two categories are more disputable.

Roe (1991) concludes that, with respect to the second category, school administrators properly have the power to restrict student expression that substantially and materially interrupts the work of schools or that involves substantial disruption or invasion of the rights of others. The way in which schools understand their function is crucial because the threshold of when student expression is impermissible is relative to the perceived function of the schools. As Roe notes, if a school's function is traditonal and prescriptive, the capacity of the school's administrators for tolerating divergent student expression or speech is relatively low. If, on the other hand, the function of a school is framed in terms of conceptual development, administrators are more likely to expect, and may even encourage, divergent student expression. Roe believes that under the conceptual development rubric, the increased tolerance for disparate viewpoints could extend to student expression that has both disruptive and educationally valuable qualities. Consequently, school administrators operating in accordance with the conceptual development model would, in effect, reclassify "disruptive" student expression as "divergent" expression.

However, it is the third category of student expression—speech that contradicts or diverges from the school's message—that is most questionable (Roe, 1991). This ambigu-

ity lies in the nature of the speech itself. It is neither consistent with the school's message nor does it substantially interfere with the school's work. It is expression that is not endorsed by the school, but neither is it disruptive of the school's work or harmful to individual students. Roe argues that under the conceptual development paradigm, tolerance of divergent, nondisruptive and nonharmful student expression does not constrain school officials from conveying their own curricular message. In fact, Buss (1989) asserts that schools can inculcate values necessary for democracy and also practice a commitment to freedom of expression by allowing differing points of view to be heard. The conceptual development model seeks to achieve a balance between student rights and the authority of school administrators by promoting freedom of expression for students while, at the same time, discouraging a relaxation of discipline and mitigating against rejection of school-sponsored values and ideas (Roe, 1991).

In the final analysis, however, the paradigm of conceptual development contradicts the inculcative model of schooling and favors the educational value of divergent speech, even if such speech is disapproved of by school authorities (Roe, 1991). Roe contends that the courts, nonetheless, acquiesce to the traditional inculcative model because of their avowed lack of experience in educational matters. Furthermore, the courts will probably be reluctant to hold that the conceptual development model of education is mandated by the First Amendment. Given this circum-

stance, Roe suggests that the fact that the law states that school administrators can legally act in a certain manner does not mean that they should. In other words, even if the courts do not come to understand the function of public schools in terms of conceptual development and fail to establish First Amendment protection for student expression consistent with this model, administrators should voluntarily abide by its standards and encourage education which fosters freedom of expression.

Mediating Institution Model

The foundation of Hafen's (1987) mediating institution model rests on the premise that public schools are not typical agencies of the state, but are, instead, unique mediating institutions which have historical and conceptual connections to both the public and private sectors. Because of this unique relationship to the state, Hafen proposes that the courts should presume the constitutional validity of school administrators' decisions that implicate curricular as well as extracurricular matters. By following this course of action, courts can encourage the development of student expression through institutional authority. Such authority is best understood when public schools are seen as mediating institutions between students and the state, instead of mere extensions of the state's power, whose limitation of student expression is presumptively chilling. Hafen argues that in this context, not only are students entitled to First Amendment protection, but educational in-

stitutions are also due certain forms of First Amendment protection as a means of developing among their students the values guaranteed by our system of freedom of expression. Once public schools are seen in the unique mediating role of developing and transmitting constitutionally protected values, many issues that appear to rise to the level of constitutional questions can be interpreted as issues that primarily pertain to educational policy.

According to Hafen (1987), confusion regarding the nature of educational policy and public schools arises when attempts are made to transfer civil liberties doctrines from the adult contexts in which they originated to schools dealing with children. In the public school setting, school authorities serve as agents of the state. However, these same authorities also act in loco parentis, that is, they stand in place of the parent for custodial purposes when a competent parent is absent. This duality illustrates the paradoxical and unique nature of public schools as legal entities. Hafen proposes the mediating institution model as a means of sustaining First Amendment values while simultaneously accommodating the ambivalent nature of public schools, which stand between the tradition of parental authority and the tradition of individual liberty. In the attempt to maintain a balance between individual and societal interests in our schools, Hafen declares that attitudes toward young people must be reexamined. Zimring (1982) asserts that the notion that those who are not completely independent should be considered completely depen-

dent has been the most troublesome aspect of legal theory pertaining to adolescence. However, it appears that the most troublesome aspect of more recent legal theory is the opposite, namely the idea that because young people are not completely dependent, they should be considered completely independent (Hafen, 1987). As Hafen notes, "Children are not the victims of permanent restrictions on their autonomy. If the restrictions are wisely applied, they both learn from them and quickly outgrow them" (p. 695). To guide students through this stage of learning requires teaching. Such teaching, particularly when done by school administrators and teachers, provides a bridge between childhood and adulthood; between the private world of home and the public world of society. Toward the accomplishment of this goal, public schools are de facto mediating institutions (Hafen, 1987). A mediating institution is "a conceptual rather than a technical, legal category of analysis" (Hafen, 1987, p. 696). Mediating institutions, such as families, churches, neighborhoods, and schools, stand between the individual and the megastructures, or governmental institutions, which can be impersonal and alienating. Mediating institutions operate in both private and public spheres (Hafen). Traditionally, these institutions have served to generate as well as to maintain values, have been major sources of social stability and continuity, and have provided protection against totalitarian tendencies (Nisbet, 1953). Given the historical purposes of mediating institutions and America's constitutional theory, these in-

stitutions are protected from excessive governmental intrusion unless the institutions cause serious harm to their members or their policies seriously conflict with overriding governmental policies (Hafen, 1987).

The law is reluctant to allow legal claims against mediating institutions because the state must justify such intervention by showing unusually compelling reasons for the interdiction. Nonetheless, the influence of mediating institutions has declined in recent years (Hafen, 1987). This loss of influence stems from the fact that legal and social attitudes have come to reflect a preference for individual rights over the interests of society. As a consequence, governmental regulation has increased as the scope of discretionary authority in mediating institutions has decreased. This situation, in turn, reduces the autonomy and influence of mediating institutions. Moreover, as the megastructure of government has grown, apprehension regarding the intrusive power of government has been transformed into fear of all institutional power, including power held by public schools. Public schools, however, are not simply governmental agencies, any more than they are simply extensions of the family (Hafen). Public schools are institutions in their own right, functioning in both the public domain of the government and the private domain of the family. They are not mere departments of state, but rather distinct agencies of education. Accordingly, schools should be accorded a greater degree of legal latitude than are other governmental entities (Skillen, 1987).

A Case for Judicial Deference

Given the unique status of public schools as mediating institutions, most judicial approaches to freedom of expression for students err in one of two ways: they either assume the speech rights of school children are plenary; or they arbitrarily discount the concept of free expression because students are involved. A more realistic approach is to understand the value of free expression for students by recognizing both their lack of maturity and their need to develop expressive powers, then determine how best to apply First Amendment principles toward the development of these expressive powers (Garvey, 1979). When viewed from this vantage point, the relationship between students' freedom of expression and the authority of school administrators becomes more an issue related to educational philosophy than a question of constitutional law (Hafen, 1987). Although this circumstance does not preclude First Amendment protection for students, it does mean that they are governed by a set of rules which differs from that of adults (Emerson, 1970). As Hafen points out,

> Children, to a greater or lesser degree depending on their age, lack the rational ability that is a prerequisite to a meaningful application of traditional free speech theories. For that reason, most standard theoretical justifications for free speech have only limited relevance in the public school environment. (p. 702)

As previously noted, one theory used to justify students' freedom of expression depicts schools as the marketplace of ideas. Given this construct, the paramount question centers on where the ultimate authority should reside

in determining educational policies pertaining to this marketplace. Hafen (1987) asserts that in a public school, the marketplace of ideas cannot be controlled by students as a matter of personal maturity, nor can it be controlled by judges as a matter of practicality. Hence, unless school administrators are granted the discretion to control the marketplace of ideas, it loses meaning as well as significance (Hafen).

In addition to the marketplace of ideas theory, the principle of popular sovereignty is used as a theoretical justification for greater freedom of expression in public schools. The fundamental premise of this principle promotes the idea that freedom of expression serves the dual purpose of protecting the individual's right of participation in self-government as well as protecting the right of a democratic society to retain ultimate authority in the people. By so doing, the government is held accountable by those from whom the state's authority is derived (Hafen, 1987). Hafen states that, in fact, public schools meet the standards set forth by the theory of popular sovereignty. Even though most students do not possess the constitutional right to vote, again due to their lack of rational maturity, public schools are accountable to the parents of their students. This form of accountability is manifested in the parents' right to elect members of the school board. Hafen contends that this view of First Amendment theory reinforces the notion that public schools do not function solely as agents of the state. Rather, they are true medi-

ating institutions whose authority is derived not only from the delegation of state power but also from the parents within their communities.

A third and final theoretical justification for greater freedom of expression in public schools is the general belief that self-expression reflects an aspect of personal autonomy (Hafen, 1987). According to Hafen, this concept differs from both the marketplace and popular sovereignty theories in that it stresses the individual's interest in expression apart from, and perhaps contrary to, the broader social interest. He argues that this theory rests on self-autonomy and therefore, does not usually apply to students, who require protection against their own immaturity. In addition, it is uncertain whether broad individual autonomy should, in fact, be protected by the First Amendment's interest in freedom of expression. As with opportunities to learn the skills necessary to participate in the marketplace of ideas and the practice of popular sovereignty, the development of self-expression opportunities should be determined through discretionary educational policy, not through judicial supervision (Hafen).

Hafen (1987) points to the distinction between formal law and customary law for additional support of his position that courts should, as a rule, defer to the judgement of school administrators where educational matters are concerned. Fuller (1969) and Unger (1976) lend credence to the idea that customary law supersedes formal law insofar as certain kinds of human interaction are involved. Embedded

in this idea is the belief that as interactions take on a more personal tone, the less-structured guidelines of customary law begin to take precedence (Unger). Whereas formal law can intrude excessively into personal associations, customary law regulates these associations via informal means, including role and function expectations that serve to stabilize the associations (Fuller, 1969). Consequently, formal law ought to stop at the threshold of mediating institutions, such as public schools. It need not intervene in developmental and intellectual processes because it cannot regulate such processes without endangering their very existence (Hafen, 1987).

Eventually, the authority exercised by public school administrators and the historical purpose of the First Amendment produce conflict. Because education by definition involves the imposition of restraints, the degree of authority necessary to teach students and to preserve an orderly school environment is in contradiction to the anti-authoritarian tradition of the First Amendment (Hafen, 1987). Those who favor a broad interpretation of First Amendment rights for students believe that the authority of school administrators should be limited to the same degree as is the authority of other agents of the state (Hafen). The proponents of students' First Amendment rights declare that limiting the schools' authority is required in order to protect students against state indoctrination (Yudof, 1979); to prevent the establishment of uniform political values (Kamenshine, 1979); to encourage the autonomous de-

velopment of student beliefs (van Geel, 1983); and to teach students the principles of democratic participation (Levin, 1986). Hafen counters that these arguments clarify the freedom side of the debate regarding individual rights and the interests of society. However, they fail to consider the risk that weakened authority among school officials could hinder students' educational development, which also sustains democratic values. Although there must be legal protection against the abuse of power by school administrators, it is important to mention that, to the extent that the uncritical transfer of adult free expression theory undermines the administrators' educational authority, the students' right to educational development is equally undermined (Hafen, 1987). In the final analysis, it is an educational rather than a constitutional problem to discern which policies and practices best achieve the objective of teaching democratic values and skills (Hafen), for "the law's capacity to undermine wise discretion is far greater than its capacity to improve it" (Hafen, p. 668).

It is evident from a review of the literature that conflicting views exist in regard to the function of public schools and how this function should be implemented. Some educators advocate that public schools function as the conduit for the transmission of traditional values and culture, while others take a more progressive stance and propose that schools adopt a democratic approach to education that encourages students to question the existing order. Because schools are both a private and a public concern,

affecting national as well as local community interests, perpetual disagreements exist in American society about the methods and goals, the means and ends of public education (Van Scotter et al., 1991). Attempts to resolve the disparate conceptions regarding the function of public schools have increasingly involved the courts (Ornstein & Levine, 1989; Pai, 1990). In general, "the specific issues are usually manifestations of . . . value disputes that have existed in American society for decades or even centuries" (Van Scotter et al., 1991, p. 96). In particular, much litigation pertaining to educational issues and policies has arisen in connection with the First Amendment as it pertains to student expression and speech (Ornstein & Levine, 1989).

CHAPTER 3

METHODOLOGY AND PROCEDURES

Introduction

The purpose of this study was to analyze court rulings which deal with the First Amendment and its effect on the decisions made by public school administrators. The rulings analyzed were drawn from the United States district court level and above. In particular, the study focuses on litigation pertaining to students' freedom of expression and speech. Based on a review of relevant cases, operational principles are discerned so that they can be utilized by practicing administrators in a public school setting. This chapter follows the format employed by Jeffers (1993). It contains the research questions; the research procedures; the process of searching for federal cases, including a list of identifiers and descriptors; the conceptual framework for analyzing court cases; the methodology of the court brief; and the procedures used to determine operational principles for school administrators.

Research Questions

The following questions guided this study:

1. How have courts at the United States district level and above interpreted cases concerning First Amendment freedom of expression and speech for students in public schools?

2. What is the nature of the issues encompassed by these First Amendment cases?

3. How did the issues regarding freedom of expression and speech for public school students arise?

4. If these issues have been resolved, how have they been resolved?

5. What issues are likely to be the focal points of future litigation for public school administrators?

6. What operational principles can be discerned from the federal courts' rulings on First Amendment cases examined in this study?

Research Procedures

The following procedures were utilized to collect data relevant to the research questions addressed in this study:

1. A search which used the Westlaw computerized research system was conducted to identify federal court cases at the district level and above involving the First Amendment as it pertains to students' freedom of expression and speech.

2. The case brief methodology outlined in Statsky & Wernet (1984) was used to analyze each case.

3. A set of operational principles was compiled for public school administrators to utilize when making decisions related to students' freedom of expression and speech

under the First Amendment. These principles were gleaned from case analysis of rulings made in federal district courts, federal appeals courts, and the United States Supreme Court.

This study utilized a research procedure based on the doctrine of precedent and reason by analogy. The study centered on the selection and review of a body of case law relevant to students' right to freedom of expression and speech as derived from the First Amendment. An examination of the case law led to the compilation of operational principles that may serve as guidelines for public school administrators when dealing with First Amendment issues pertaining to student expression and speech.

Search for Court Cases

In this study, cases were limited to those adjudicated in the United States Supreme Court, the United States Courts of Appeal, and the United States District Courts. Identifiers and descriptors found in the West's Key Number System on Westlaw (hereinafter referred to as Key Number System) were used in the search and are listed at the end of this section. The search for court cases was conducted through the standard legal resource of the Westlaw computerized research system. Terms, connectors, and natural language were also utilized. The primary identifiers and descriptors of the Key Number System used in this study were constitutional law 90.1(1.4), schools and colleges, regulations, and student publications.

Conceptual Framework

The conceptual framework of this study was grounded in the doctrine and reasoning that have been established in the case, or common, law system. The case law system has developed its precepts from the decisions rendered in actual legal controversies. These precepts are often built on the doctrine of precedent, an important concept of the case law system. The doctrine of precedent is often referred to by its Latin name, stare decisis, meaning "to stand by the decisions" (Pepe, 1976). In practical terms, "precedent, or stare decisis, means that a court must abide by or adhere to previously decided cases" (Rhode & Spaeth, 1976, p. 35). Rombauer (1973) also makes reference to the influence that the concept of stare decisis exerts in the arena of case law:

> Even though a case before a court is clearly governed by legislation [i.e., all forms of written law and policy], the court may nevertheless look to judicial precedents. Prior decisions may already have resolved questions about the meaning of the particular legislation or, if not, they may nevertheless furnish guidance in determining its meaning. (p. 5)

Carp and Stidham (1985) view the doctrine of precedent as a powerful factor in the judicial decision-making process, referring to the doctrine as "a cardinal principle of our common law tradition" (p. 136). They support this statement by calling attention to a study of an appeals court in the Second, Fifth, and District of Columbia Circuits, which concludes that

> Adherence to precedent remains the everyday, working rule of American law, enabling appellate judges to control the premises of decisions of subordinates who

> apply general rules to particular ones. The United States Supreme Court, while technically free to depart from its own precedents, does so very seldom. (Carp & Stidham, 1985, p. 136)

The adherence to precedent not only provides for the likelihood of equality of treatment for all who come before the courts, but also contributes to predictability in future disputes. The importance of the doctrine of precedent rests on the fact that a later court, in making its decisions, will pay particular attention to the principles established in previous decisions whenever the facts between the cases are analogous. Furthermore, the adherence to precedent makes previous decisions an "authority" for a particular principle (Pepe, 1976). According to Pepe, the authority of a decision is either binding or persuasive. Binding authorities refer to decisions made by higher courts of the same jurisdiction and may also refer to decisions of the same appellate court. Decisions of this nature are considered binding because the principle of the previous case must be applied in similar cases where the same principle is raised by the facts. Persuasive authority includes all other court decisions in the case-law world (Pepe).

Carter (1984) attributes the authority of precedents to the fact that they serve as examples for legal reasoning:

> Powerful traditions impel judges to solve problems by using solutions to similar problems reached by judges in the past. Thus a judge seeks to resolve conflicts by discovering a statement about the law in a prior case—his example—and then applying this statement or conclusions to the case before him. Professor Levi calls this a three-step process in which the case and one or more prior cases, announces the rule of law on which the earlier case or cases rested, and applies the rule to the case before him. (p. 34)

In a similar vein, Rombauer (1973) operationalizes the concept of precedent in terms of problem solving that involves three basic skills: analysis, evaluation, and synthesis.

Two major elements of the conceptual framework which buttress the doctrine of precedent focus on consistency and fairness. To illustrate, Spaeth (1972) addresses the value of consistency in the decisional method of case law and then asserts that "adherence to precedent is the means whereby today's judicial decisions are related to and connected with those of the past" (p. 56). Cardozo (1949) refers directly to the concepts of consistency and fairness and their relationship to judicial precedents when he writes,

> One of the most fundamental social interests is that law shall be uniform and impartial. Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. (p. 112)

Having discussed the importance of judicial precedent, it is nonetheless necessary to note that, even under the doctrine of precedent, a court may decline to follow its previous decisions if doing so does not create a conflict with precedents of a higher court and if substantial considerations dictate a different result. In fact, a court may go beyond merely refusing to adhere to a previous decision and may override a previous decision by indicating its intention not to follow it in a particular case and in future cases (Rombauer, 1973).

Having acknowledged this caveat, the conceptual framework of this study will incorporate an important corollary to be used in conjunction with the doctrine of precedent—analogy. Indeed, in their discussion of the doctrine of precedent, Rhode and Spaeth (1976) also cite reason by analogy as a significant concept in the judicial decision-making process, stating, "The other intersection-maintaining norm that governs judicial decision-making is the requirement that judges utilize legal reasoning and legal terminology in arriving at their decisions. The technique is basically that of analogy—reasoning by example" (p. 39). Cardozo (1949) also views analogy as an important guide when examining case law. In his discussion of analogy, Cardozo asserts, "I have put first among our principles of selection to guide our choice of paths, the rule of analogy or the method of philosophy" (p. 31). He adds, "We must know where logic and philosophy lead even though we may determine to abandon them for guides. The times will be many when we can do no better than follow where they point" (p. 38). "In law, as in every other branch of knowledge, the truths given by indication tend to form the premises of new deductions" (p. 47).

Accordingly, the conceptual framework that will guide this study will rest not only on the doctrine of precedent, but also on reason by analogy. Functioning as conceptual cornerstones, precedent provides the courts with a sense of historical development and a method of evolution, while analogy serves as the directive force of a principle which is exerted along the line of logical progression (Cardozo,

1949). Consistent with this idea, Rhode and Spaeth (1976) conclude, "Two norms govern the judicial decision: Adherence to precedent and legal reasoning" (p. 49).

In addition to these norms, the case law system is grounded in the precept that the judicial decision-making process can be interpreted as a "continuum of behaviors" (Schubert, 1974). A review of cases concerning students' rights and the First Amendment's stipulation of freedom of expression and speech will support the concept of judicial decision making as a continuum of behaviors. Specifically, "Courts, in the American governmental system, perform three activities: they administer laws; they resolve conflicts; and they make policy" (Rhode & Spaeth, 1976, p. 2). Baum (1986) accounts for the continuum of behaviors in the following manner:

> The courts work within a legal framework. In other words, the decisions of judges and juries involve the application of legal rules to the facts of specific cases. These rules are found in the federal and state constitutions, in the statutes adopted by legislatures, and in the past decisions of the courts. (p. 9)

The one behavior that is of overriding consequence centers on the federal courts and their work as judicial interpreters. "By far the larger function of the federal courts lies in the judicial interpretation of national statutes, administrative regulations and decisions, judicial regulations, and judicial decisions" (Schubert, 1974, p. 77).

Case Brief Methodology

The primary methodology of this study incorporates case analysis, which "refers to the techniques required to make predictions concerning the applicability of opinions" (Statsky & Wernet, 1984, p. 5). Specifically, this study makes use of a standard form of case analysis called a brief. According to Statsky and Wernet, to brief a case is to "identify its essential elements" (p. 89). The task of briefing "consists of carefully reading and analyzing the opinion, breaking down the information contained in the opinion into 'elements' or categories of information, and organizing these elements into a structured outline of the opinion" (Statsky & Wernet, p. 90). Phrased another way, briefing for the purpose of case analysis denotes "an analytical summary of what a particular opinion was all about" (Statsky & Wernet, p. 89). A modified briefing format suggested by Statsky and Wernet includes the following elements:

1. Citation—descriptive information about a legal document which enables one to find that document in a law library. It consists of three parts: (a) names of parties; (b) official cite, which includes the volume number of the report, abbreviation of the reporter, and page number in the reporter on which the opinion begins (Statsky & Wernet, 1984, pp. 28-29).

2. Facts—information describing a thing, occurrence, or event. Key facts are the essential facts upon which the

court's decision is based (Statsky & Wernet, 1984, pp. 122-123).

3. Issues—questions of whether or in what manner a particular rule of law applies to a particular set of facts. A legal issue in an opinion involves the interpretation of one or more rules of law (Statsky & Wernet, 1984, pp. 160-161).

4. Holding—the court's application of particular rule(s) of law to the particular facts of a dispute in litigation (Statsky & Wernet, 1984, pp. 4-5). A conclusion of law reached by a court in an opinion, it is binding on the parties to the litigation and can be used as precedent for similar disputes in future litigation (Statsky & Wernet, p. 122).

5. Reasoning—the explanation of why a court reached a particular answer or holding for a particular issue (Statsky & Wernet, 1984, p. 175). Every issue in an opinion has its own holding and reasoning. Courts explicitly or implicitly adhere to the following steps in order to resolve each individual issue in the opinion:

1. The court targets the rule of law to be interpreted and applied.

2. The court identifies what is unclear or debatable about the application of the rule(s) of law to the facts of the dispute.

3. The court provides the meaning of the rule(s) of law in question and explains how it arrived at this meaning. The meaning is then applied to the facts to

revolve the dispute (Statsky & Wernet, 1984, pp. 175-176).

6. Disposition—whatever must happen in the litigation as a result of the holdings which the court made in the opinion (Statsky & Wernet, 1984, p. 195).

Holdings from the analyzed cases serve as the basis from which operational principles for public school administrators are derived. The cases are categorized and analyzed in chronological order.

Compilation of Operational Principles

Following the analysis of cases in this study, conclusions are drawn regarding the First Amendment's application to the public school setting as it relates to students' freedom of expression and speech. Operational principles for school administrators are formulated based on these conclusions. In addition, the compilation of operational principles are facilitated by listing the holdings of the courts and classifying them into categories. The use of classification allows for efficient summarization of data, effective delineation of differences among categories, and increased understanding of the relationship between the courts' holdings and specific operational principles (Simon, 1978). The rationale for drawing particular conclusions is derived from Johnson and Canon (1984), who state that their "aim is not to study the aftermath of <u>every</u> judicial decision; instead; we want to make general statements about what has happened or may happen after <u>any</u> judicial decision" (p. 14).

The focal point of this study is on the implementing population of public school administrators. Johnson and Canon (1984) characterize such a population in this way:

> The implementing population usually performs a policing or servicing function in the political system—that is, implementators apply the system's rules to persons subject to their authority. Prominent examples of this population are police officers, prosecutors, university and public school officials, and welfare and social security workers. In many instances, the original policy and subsequent interpretations by lower courts are intended to set parameters on the behavior of the implementing population. (p. 17)

Application of the system's rules by implementators can, however, produce incongruencies in interpretation. As Johnson and Canon (1984) observe,

> One source of difficulty in the relationship between implementing groups and the judiciary is that a policy itself may be incomplete, unclear, or contradictory. Judicial policies stemming from a court decision are usually limited by the facts of the case and the applicable case law; rarely will a single decision completely outline a policy for implementing groups to follow. (p. 79)

In an effort to minimize difficulties in interpretation, the operational principles put forward in this study are organized and categorized in a manner consistent with the literature. Also, in order to discern a particular operational principle, this study subscribes to the tenets stipulated by Rombauer (1973):

> The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them. In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion as it does on inclusion. (p. 46)

More specifically, adhering to the model outlined by Jeffers (1993), the criteria for the inclusion of a principle in this study includes the following:

1. Each principle is supported by a holding in a case heard at the United States district court level or above.

2. When possible, a principle is derived from a case appealed to the United States Supreme Court, for as Schwartz (1972) notes, "The main source of American constitutional law is the case-law—especially the decisions of the Supreme Court" (p. 2). Of great significance is the fact that cases decided by the Supreme Court may be considered landmark decisions. According to Black (1990), landmark decisions are "decisions of the Supreme Court that significantly changes existing law" (p. 879).

3. Each principle is selected based on court holdings that provide the most lucid and most basic interpretation of the First Amendment as it pertains to students' freedom of expression and speech in America's public schools.

4. Each principle is chosen for presentation from the cited conclusions of law.

5. Each principle selected requires a particular response by a school administrator.

The compilation of operational principles for public school administrators is based on the holdings of the federal courts in cases selected for this study. The compilation of operational principles is limited to the analysis of cases selected from the United States Supreme Court, the

United States Courts of Appeals, and the United States District Courts.

CHAPTER 4

CASE BRIEFS

Introduction

This chapter provides a case analysis of selected federal court rulings pertaining to students' First Amendment rights of expression and speech in public schools, kindergarten through twelfth grade. The case analysis to be utilized in this study is a standard form of analysis referred to as a case brief (Statsky & Wernet, 1984). The format of each case brief is composed of the citation, the facts, the issues, the holding, the reasoning, and the disposition. In addition, the cases are categorized and presented in chronological order in accordance with the date of final resolution established by the appropriate federal court. The categories are listed in the subsequent manner and order: censorship; corporal punishment; distribution of religious material; graduation requirement of community service; homosexuality; loitering; nonschool publications; offensive speech, threats, hazing; performances, films, speakers; pledge of allegiance, national anthem, flag salute; prayer in school; religious expression; school emblems; school publications; sending information home via students; student dress and appearance; student protests; symbolic speech; and use of school facilities.

Censorship

Citation: Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976)

Facts: Five public high school students, through their parents as next friends, brought class action against the Strongsville City School District, members of board of education and the superintendent of the school district. (p.577)

The suit claimed violation of the First and Fourteenth Amendment rights in that the school board, disregarding the recommendation of the faculty, refused to approve Joseph Heller's Catch 22 and Kurt Vonnegut's God Bless You, Mr. Rosewater as texts or library books, ordered Vonnegut's Cat's Cradle and Heller's Catch 22 to be removed from the library, and issued resolutions which served to prohibit teacher and student discussion of these books in class or their use as supplemental reading. (p. 579)

Issues: The main issues in regard to the First Amendment are whether the school board places unconstitutional restraints on expression and violates the students' First Amendment right to receive information and ideas by removing certain books from a public school's library. (p. 578)

Holding: With respect to the First Amendment issues, the Court of Appeals for the Sixth Circuit held that, in the absence of any explanation of the board's action and in view of the evidence indicating that the school board removed books from the library because it found them distasteful, the action of the board in removing books from the library violated the students' First Amendment right to free speech (p. 577), specifically the right to receive information and ideas (p. 583).

Reasoning: A library is a storehouse of knowledge. When created for a public school, it is an important privilege created by the state for the benefit of the students in the school. That privilege is not subject to being withdrawn by succeeding school boards whose members might desire to "winnow" the library for books the content of which occasioned their displeasure or disapproval. Of course, a copy of a book may wear out. Some books may become obsolete. Shelf space alone may, at some point, require some selection of books to be retained and books to be disposed of. No such rationale is involved in this case, however. The sole explanation offered by this record is that the books were distasteful. (p. 581)

> In the absence of any explanation of the board's action, which is neutral in First Amendment terms, this court must conclude that the school board removed the books because it found them objectionable in content and because it felt that it had the power, unfettered by the First Amendment, to censor the school library for subject matter which the board members found distasteful. (p. 582)
>
> Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville High School or to choose any particular books. Once having created such a privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the social or political tastes of school board members. (p. 582)
>
> The removal of books from a school library is a much more serious burden upon freedom of classroom discussion than the action found unconstitutional in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. Further, this court does not think this burden is minimized by the availability of the disputed book in sources outside the school. Restraint on expression may not generally be justified by the fact that there may be other times, places, or circumstances available for such expression. A library is a mighty resource in the free marketplace of ideas. See Abrams v. United States. It is specially dedicated to broad dissemination of ideas. It is a forum for silent speech. (pp. 582-583)
>
> The court recognizes that it deals here with a somewhat more difficult concept than a direct restraint on speech. Here the court is concerned with the right of students to receive information which they and their teachers desire them to have. First Amendment protection of the right to know has frequently been recognized in the past. See Procunier v. Martinez, 94 S. Ct. 1800. The Supreme Court has referred to a First Amendment right to receive information and ideas, and that freedom of speech necessarily protects the right to receive. This court believes that the cases of Kleindienst v. Mandel, 92 S. Ct. 2576, and Procunier v. Martinez, 94 S. Ct. 1800, serve to establish firmly both the First Amendment right to know which is involved in our instant case and the standing of the student plaintiffs to raise the issue. (p. 583)

Disposition: Relevant to the First Amendment issue, the court of appeals vacated and reversed the decision of the District Court for the Northern District of Ohio. In particular, the appeals court ordered the district court to declare the school board's resolutions null

and void as violative of the First Amendment and to direct members of the Strongsville School Board to replace in the library the books with which these resolutions dealt by purchase, if necessary, out of the first sums available for library purposes. (p. 584)

Citation: Right to Read Defense Committee v. School Committee of the City of Chelsea, 454 F. Supp. 703 (D. Mass. 1978)

Facts: At issue is the decision by a majority of the Chelsea School Committee (Committee) to bar from the high school library an anthology of writings by adolescents entitled "Male and Female Under 18" (Male & Female). The Committee's action was prompted by a Chelsea parent's objection to the language in one selection, "The City to a Young Girl," (City), a poem written by a fifteen-year-old New York City high school student. (p. 704)

The plaintiffs commenced this action against the Committee and the school superintendent on August 3, 1977, under Title 42 U.S.C. Section 1983, seeking an order requiring the anthology returned to the library intact. The essence of the plaintiffs' position is that the Committee's action violated First Amendment rights of the high school's students, faculty and library staff. The Committee defends its decision principally on the ground that its action in ordering the anthology removed was well within its statutory authority to oversee the curriculum and support services of Chelsea High School. (p. 705)

Issues: The major issue with respect to the First Amendment is whether the act of a school committee in removing an anthology of writings by adolescents from a high school library constitutes an infringement on the free expression rights of students and faculty. (p. 704)

Holding: The District Court of Massachusetts held that the act of a school committee in removing an anthology of writings by adolescents from the high school library because it felt that the language and theme of a poem in the anthology might have a damaging impact on high school students did not serve a substantial governmental interest and constituted an infringement on the First Amendment free expression rights of students and faculty where, aside from ample evidence to support the assertion that the anthology was relevant to a number of courses taught at the high school, the committee did not contend that the book was obscene, improperly selected, or contributed to any shelf space problems. (p. 703)

Reasoning: The Supreme Court has commented that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." See Shelton v. Tucker, 81 S. Ct. 247, 251. The fundamental notion underlying the First Amendment is that citizens, free to speak and hear, will be able to form judgments concerning matters affecting their lives, independent of any governmental suasion or propaganda. Consistent with that noble purpose, a school should be a readily accessible warehouse of ideas. (p. 710)

Students have the right to express themselves in nondisruptive political protest, Tinker v. Des Moines School District, 89 S. Ct. 733, and the right not to be forced to express ideas with which they disagree, West Virginia Board of Education v. Barnette, 63 S. Ct. 1178. In short, the First Amendment is not merely a mantle which students and faculty must doff when they take their places in the classroom. (p. 710)

It is clear despite such intervention, however, that local authorities are, and must continue to be, the principal policy makers in the public schools. School committees require a flexible and comprehensive set of powers to discharge the challenging tasks that confront them. (pp. 710-711)

It is the tension between these necessary administrative powers and the First Amendment rights of those within the school system that underlies the conflict in this case. Clearly, a school committee can determine what books will go into a library and, indeed, if there will be a library at all. But the question presented here is whether a school committee has the same degree of discretion to order a book removed from a library. (p. 711)

The record leaves this court with no doubt that the reason the Committee banned Male & Female was that it considered the theme and language of City to be offensive. At the time the book was removed, and during their testimony at trial, the members consistently expressed their opinion that City was "filthy," "obscene," "disgusting." A number also objected to its theme, as they interpreted it. (p. 711)

The defendants contend that the Committee's reasons for banning Male & Female were formulated on the date of removal and were memorialized by a formal resolution of the Committee dated August 17, 1977. This resolution recited reasons in addition to the poem's language and theme for its removal. This court finds, however, that the August 17 resolution of the Committee was a self-serving document that rewrote history

in an effort to meet the issues of this litigation. In simple terms, it was a pretext. (pp. 711-712)

Of course, not every removal of a book from a school library implicates First Amendment values. But when, as here, a book is removed because its theme and language are offensive to a school committee, those aggrieved are entitled to seek court intervention. (p. 712)

The Committee was under no obligation to purchase Male & Female for the high school library, but it did. It is a familiar constitutional principle that a state, though having acted when not compelled, may consequentially create a constitutionally protected interest. (p. 712)

Tinker points the way to the applicable standard to be applied here. When First Amendment values are implicated, the local officials removing the book must demonstrate some substantial and legitimate government interest. Tinker does not require the Committee to demonstrate that the book's presence in the library was a threat to school discipline, but it does stand for the proposition that an interest comparable to school discipline must be at stake. (p. 713)

No substantial governmental interest was served by cutting off students' access to Male & Female in the library. The defendants acted because they felt City's language and theme might have a damaging impact on the high school students. But the great weight of expert testimony presented at trial left a clear picture that City is a work of at least some value that would have no harmful effect on the students. The defendants' case was premised on the assumption that language offensive to the Committee and some parents had no place in the Chelsea educational system. In Keefe v. Geanakos, 418 F.2d 359, 361-362, Judge Aldrich met a comparable contention handily:

> With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education. (p. 713)

City is not a polite poem. Its language is tough, but not obscene. Whether or not scholarly, the poem is challenging and thought provoking. It employs vivid street language, legitimately offensive to some, but certainly not to everyone. The author is writing about her perception of city life in rough but relevant language that gives credibility to the development of a sensitive theme. City's words may shock, but they communicate. (p. 714)

The Committee claims an absolute right to remove City from the shelves of the school library. It has no such right, and compelling policy considerations argue against any public authority having such an unreviewable power of censorship. There is more at issue here than the poem City. If this work may be removed by a committee hostile to its language and theme, then the precedent is set for removal of any other work. The prospect of successive school committees "sanitizing" the school library of views divergent from their own is alarming, whether they do it book by book or one page at a time. (p. 714)

What is at stake here is the right to read and be exposed to controversial thoughts and language—a valuable right subject to First Amendment protective. The Court has underscored the importance of that principle to our nation's schools:

> In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. See Tinker v. Des Moines School District, 89 S. Ct. at 739. (pp. 714-715)

The library is "a mighty resource in the marketplace of ideas." See Minarcini v. Strongsville City School District, 541 F.2d at 582. There a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum. The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger in such exposure. The danger is in mind control. (p. 715)

Disposition: The committee's ban on the anthology Male & Female was enjoined (p. 715). The district court ordered the anthology returned intact to the library and made available to students having the written permission of a parent or guardian. (p. 705)

Citation: Salvail v. Nashua Board of Education, 469 F. Supp. 1269 (D.N.H. 1979)

Facts: Plaintiff Rhonda Salvail is a sixteen-year-old eleventh-grade student at Nashua High School; plaintiff William Hodge teaches English at said high school; plaintiffs Suzanne Coletta and Albert Burrelle are adult residents and taxpayers in Nashua; and plaintiff David E. Cote is a 1978 graduate of Nashua High School who was present when the incidents which give rise to this litigation occurred. The defendants

are the Nashua Board of Education Board members. (p. 1270)

In March of 1977, the New Hampshire State Department of Education forwarded to each of the 186 school districts certain guidelines for the selection of instructional materials and for review of any challenges to same. These guidelines were advisory in nature, but they were designed to be applicable to challenges to the material made by the members of any school board. (pp. 1270-1271)

The Nashua Board of Education is composed of nine members elected at large by the voters of that city. The duties of school boards in New Hampshire include the purchase of textbooks and other supplies required for use in the public schools. (p. 1271)

Upon receipt of the suggested guidelines from the State Department of Education, the Nashua Board established a committee which in turn drafted certain interim "Guidelines For Selecting Instructional Materials," which interim guidelines were in effect at the time of the incidents which gave rise to this litigation. These guidelines provided a method for selection of materials whereby the board conceded its legal responsibility for all matters relating to the operation of the Nashua schools, but delegated the selection of instructional materials to the "professionally trained personnel employed by the school district." It was required by the guidelines that the materials be consistent with the general educational goals of the school district, meet high standards of quality in factual content and presentation, be appropriate for the subject area and for the age, maturation, ability level, and social development of the students, have aesthetic, literary, or social value, be designed to help the students gain an awareness and understanding of the contributions made by both sexes, and by religious, ethnic and cultural groups to American heritage; and that a selection of materials on controversial issues be directed toward maintaining a balanced collection representing various views. (p. 1271)

Board member Thomaier held strong religious and patriotic views as to the types of reading material that should be available to pupils in a senior high school. In late 1977 and early 1978, he expressed concern about MS magazine, which was carried in the school library and was available upon request to students in the senior high school. At a meeting of the board on March 13, 1978, he presented a formal resolution to withdraw the magazine from the school library. At the meeting of the board on March 27, 1978, Thomaier moved, seconded by member Stylianos, to have this res-

olution voted upon. Board members Sheer, Berman, and Chairman Ouellette suggested that the interim guidelines should be followed, and the procedure for review was explained by Superintendent Masse. Stylianos took the position that the board members were not bound by these interim guidelines and that "in some cases they should act instantaneously." By a five to three vote, the motion carried, and subsequently the subscription to MS magazine was canceled and all issues were removed from the school library. (p. 1271)

Thomaier's objection to the periodical focused largely on the fact that it contained advertisements for "vibrators," contraceptives, materials dealing with lesbianism and witchcraft, and gay material. He also objected to advertisements for what he described as a procommunist newspaper and advertisements suggesting trips to Cuba. In addition, he felt that the magazine encouraged students and teachers to send away for records made by known communist folk singers. Board member Stylianos, a former school teacher and principal, took the position that the proper test for material to be available for reading by high school students was whether it could be read aloud to his daughter in a classroom. (p. 1272)

Plaintiff Salvail testified that she found MS of value in her assigned high school courses, as it discussed important social issues from a feminist viewpoint. She further testified that sexual matters were openly discussed at the Nashua senior high school. Ann Hostage, an English teacher, testified that she had assigned research in the magazine to several of her pupils, and plaintiff Hodge, another English teacher, said that he often assigned writings to his students on topics to be chosen by them and that his students had found the magazine valuable as a research tool. (p. 1272)

Subsequent to the commencement of the litigation herein, the board met on March 27, 1979, having reviewed and scrutinized the issues of MS which had been removed from the library. At the meeting they voted to return the December 1977 and January 1978 issues of the magazine with classified ads excised. The board also approved at such meeting final revised guidelines for the selection of instructional material. (p. 1272)

Issues: The First Amendment issue before the court concerns the extent of the authority of the Nashua School Board to remove certain periodicals from the senior high school library. In specific, the issue focuses on whether using the political content of a magazine as the basis for removing the publication from the school's library is constitutionally permissible. (p. 1270)

Holding: The District Court of New Hampshire ruled that the school board failed to demonstrate a substantial and legitimate governmental interest sufficient to warrant removal of MS magazine from the high school library, thereby imposing an unconstitutional restraint on expression and violating the plaintiffs' First Amendment rights. (p. 1269)

Reasoning: It is clear that the board is required neither to provide a library for the Nashua senior high school nor to choose any particular books therefor, but, once having created such a privilege for the benefits of its students, it could not place conditions on the use of the library related solely to the social or political tastes of board members. See Minarcini v. Strongsville City School District, 541 F.2d 577, 582 (6th Cir. 1976). The duties of school boards must be exercised "consistently with federal constitutional requirements." See Morgan v. McDonough, 548 F.2d 28, 32 (1st Cir. 1977). It is a familiar constitutional principle that a state, having so acted when not compelled, may consequentially create a constitutionally protected interest. (pp. 1272-1273)

The evidence presented to this court makes it clear that these magazines "taken as a whole" do not lack "serious literary, artistic, political, or scientific value." See Miller v. California, 93 S. Ct. 2607, 2614. The First Amendment generally prohibits governments from "cleans[ing] public debate to the point where it is grammatically palatable to the most squeamish among us." See Cohen v. California, 91 S. Ct. 1780, 1788. The school board does not have an absolute right to remove from the library any books it regarded unfavorably without concern for the First Amendment. See Minarcini at 581. (p. 1273)

Ironically, the dislike of certain of the board members for articles and advertisements contained in MS magazine apparently does not extend to similar materials in other publications which are contained in the Nashua High School library. This court finds that despite protestations contained in the testimony of these parties, it is the "political" content of MS magazine more than its sexual overtones that led to its arbitrary displacement. Such a basis for removal of the publication is constitutionally impermissible. (p. 1274)

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. See Shelton v. Tucker, 81 S. Ct. 247. When First Amendment values are implicated, the local officials removing a publication must demonstrate some

substantial and legitimate government interests. (p. 1275)

The defendants' contention as to the limited impact of the removal of MS magazine to the high school population, members of which are free to purchase or to read the publication in a public library, is without merit. "Restraint on expression may not generally be justified by the fact that there may be other times, places, or circumstances available for such expression." See Minarcini at 582. A library is "a mighty resource in the free marketplace of ideas . . . specially dedicated to broad dissemination of ideas . . . a forum for silent speech." See Minarcini at 582, 583. (p. 1275)

This court finds and rules that the defendants herein have failed to demonstrate a substantial and legitimate government interest sufficient to warrant the removal of MS magazine from the Nashua High School library. Their action contravenes the plaintiffs' First Amendment rights, and as such it is plainly wrong. (p. 1275-1276)

Disposition: The Nashua Board of Education and the members thereof were enjoined from the continued withdrawal of MS magazine from the shelves of the Nashua High School library and were ordered to replace the issues they had caused to be removed and to resubscribe to MS magazine, such replacement and resubscription to be made, if necessary, by purchase out of the first sums available for library purposes. (p. 1276)

The Nashua Board of Education and members thereof were also enjoined and ordered to follow the current guideline relative to any complaint about publications in the Nashua High School library, whether said complaints were generated by a member of the board or by any other Nashua resident. (p. 1276)

Citation: Zykan v. Warsaw Community School Corporation, 631 F.2d 1300 (7th Cir. 1980)

Facts: Plaintiff Brooke Zykan, a Warsaw, Indiana, high school student suing by her parents and next friends, Anthony and Jacqueline Zykan, and plaintiff Blair Zykan, a former Warsaw high school student, filed this action under Section 1983 of the Civil Rights Act, alleging violations of their First and Fourteenth Amendment rights by defendants Warsaw Community School Corporation, the Warsaw School Board of Trustees, and six individual members of that board. In their initial complaint filed on March 21, 1979, the plaintiffs sought certification as a class to contest various curriculum-related decisions made by the board and

several of its present and former employees, including Charles Bragg, the Superintendent of Schools, William Goshert, former assistant superintendent, and C. J. Smith, former principal of Warsaw High School. The plaintiffs filed an amended complaint on April 6, 1979. On June 18, the defendants asked that the district court dismiss the amended complaint for failure to state a claim for relief or for lack of subject matter jurisdiction, or, in the alternative, that it abstain pending resolution of certain state law issues or grant summary judgment on their behalf. On December 3, 1979, the district court dismissed the amended complaint for lack of subject matter jurisdiction, and this appeal followed. (p. 1301)

This case arises from a series of decisions made in 1977 and 1978 by the defendant school board and its various members and employees primarily regarding the English curriculum at Warsaw High School, the use of certain books in that curriculum, and the rehiring of teachers for English courses. The amended complaint essentially concerns six incidents that, when viewed together, are said by the plaintiffs to amount to violations of their First and Fourteenth Amendment rights. The first four of these incidents involve the removal of books from certain courses and the school library. (p. 1302)

Plaintiffs allege that defendants took these actions because ". . . particular words in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value." They also assert that in each case the defendants acted in defiance of the "Croft Policy," which, they say, established the regular procedure for handling censorship decisions. (p. 1302)

The amended complaint also charges the defendants with eliminating seven courses from the high school curriculum "because the teaching methods and/or content of the courses offended their social, political and moral beliefs." The plaintiffs once again allege that the defendants took this action without compliance with the Croft Policy. The plaintiffs' factual allegations conclude with the assertions that plaintiff Blair Zykan's "right to know was directly violated by the defendants' actions, which capriciously and unreasonably infringed upon his right to read literary works in their entirety," that the plaintiff Brooke Zykan suffers directly from defendants' "capricious and arbitrary actions in censoring courses and books," and finally, that the defendants' actions have had and continue to have "a chilling effect on the free exchange of knowledge" in the Warsaw schools. (pp. 1302-1303)

Issues: The primary First Amendment issue implicated in this appeal is whether a school board may remove certain books from English courses and the high school's library as well as eliminate certain courses from the curriculum without violating students' freedom of expression and speech. (p. 1300)

Holding: The Court of Appeals for the Seventh Circuit held that the complaint did not state a cause of action for violation of First or Fourteenth Amendment rights, where it was not alleged that the defendants' actions were taken in the interest of imposing some religious or scientific orthodoxy or eliminating a particular kind of inquiry generally or that the plaintiffs were deprived of all contact with the material in question. (p. 1300)

Reasoning: The plaintiffs' complaint does not state a violation of constitutional rights and therefore is not cognizable in federal court under Civil Rights Act Section 1983 and Section 1343 of the Judicial Code. This conclusion stems from a careful consideration of the competing interests presented by a complaint charging infringement of students' academic freedom. It is now settled, of course, that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736. It is also clear that in line with such concepts as the "marketplace of ideas," the First Amendment guarantees are sufficiently broad to provide some protection for what has been called "academic freedom," which recognizes the importance to the scholarly and academic communities of being free from ideological coercion. See Healy v. James, 92 S. Ct. 2338, 2345-2346. Less clear are the precise contours of this constitutionally protected academic freedom, and particularly its appropriate role when the concern is not the rarified atmosphere of the college or university, but rather the heartier environment of the secondary school.

Secondary school students certainly retain an interest in some freedom of the classroom, if only through the qualified "freedom to hear" that has emerged as a constitutional concept. See Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 96 S. Ct. 1817. But two factors tend to limit the relevance of "academic freedom" at the secondary school level. First, the student's right to and need for such freedom is bounded by the level of his or her intellectual development. A high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those

better equipped by experience and reflection to make critical educational choices. Second, the importance of secondary schools in the development of intellectual faculties is only one part of a broad formative role encompassing the encouragement and nurturing of those fundamental social, political, and moral values that will permit a student to take his place in the community. See Ambach v. Norwick, 99 S. Ct. 1589, 1594-1595. As a result, the community has a legitimate, even a vital and compelling interest in "the choice [of] and adherence to a suitable curriculum for the benefit of our young citizens. . ." See Palmer v. Board of Education, 603 F.2d, 1271, 1274 (7th Cir. 1979), certiorari denied, 100 S. Ct. 689. (p. 1304)

The need for intellectual and moral guidance from a body capable of transmitting the mores of the community has led most state legislatures to lodge primary responsibility for secondary school education in local school boards, which generally have considerable authority to regulate the specifics of the classroom. (p. 1305)

To be sure, the discretion lodged in local school boards is not completely unfettered by constitutional considerations. Control of matters not immediately affecting classroom activities is subject to numerous qualifications. See Tinker v. Des Moines Independent School District, 89 S. Ct. 733; Thomas v. Board of Education, 607 F.2d 1043 (2d Cir. 1979), certiorari denied sub nom., Granville Central School District v. Thomas, 100 S. Ct. 1034. In the classroom, there are recognized limits on local control of educational matters. In the case of the students themselves, local school boards must respect certain strictures that for example bar them from insisting upon instruction in a religiously inspired dogma to the exclusion of all other points of view (Epperson v. Arkansas, 895 S. Ct. 266), or from placing a flat prohibition on the mention of certain relevant topics in the classroom, or from forbidding students to take an interest in subjects not directly covered by the regular curriculum. At the very least, academic freedom at the secondary school level precludes a local board from imposing "a pall of orthodoxy" on the offerings of the classroom (Keyishian v. Board of Regents, 87 S. Ct. 675, 683), which might either implicate the state in the propagation of an identifiable religious creed or otherwise impair permanently the student's ability to investigate matters that arise in the natural course of intellectual inquiry. (pp. 1305-1306)

From these principles derives the rule that complaints filed by secondary school students to contest the educational decision of local authorities are sometimes

cognizable but generally must cross a relatively high threshold before entering upon the field of a constitutional claim suitable for federal court litigation. Such a balance of legal interests means that panels such as the Warsaw School Board will be permitted to make even ill-advised and imprudent decisions without the risk of judicial interference. Nothing in these principles suggests that the courts should condone shortsighted board decision-making. But nothing in the Constitution permits the courts to interfere with local educational discretion until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute. A reading of the amended complaint confirms that these plaintiffs have failed to allege sufficient facts regarding such a flagrant abuse of discretion by the defendants to justify intervention by this court at this point. (p. 1306)

Our basic principles for handling academic freedom claims by secondary school students would seem to dispose as well of the claim regarding the removal of one book from the school library. The amended complaint does not allege that the book has been made completely unavailable to the plaintiffs, that students are prohibited from discussing its contents in school, or even that the removal was part of an action to cleanse the library of materials conflicting with the school board's orthodoxy. Nevertheless, at least three courts have held that once a book has been offered as part of the school library collection, school authorities may not remove it because they object to its content. See Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976); Salvail v. Nashua Board of Education, 469 F. Supp. 1269 (D.N.H. 1979); Right to Read Defense Committee of Chelsea v. School Committee of Chelsea, 454 F. Supp. 703 (D.Mass. 1978). However, there is substantial authority on the other side (Presidents Council, District 25 v. Community School Board, 457 F.2d 289 (2d Cir. 1972), certiorari denied, 409 U.S. 998, 93 S. Ct. 308, 34 L.Ed.2d 260; see also Bicknell v. Vergennes Union High School Board of Directors, 475 F. Supp. 615 (D.Vt. 1979); Pico v. Board of Education, 474 F. Supp. 387 (E.D.N.Y. 1979)), and this court joins with these courts in rejecting the suggestion that a particular book can gain a kind of tenure on the shelf merely because the administrators voice some objections to its contents.

To be sure, a library is a general resource the purpose of which is to foster intellectual curiosity and serve the intellectual needs of its users. See Minarcini v. Strongsville City School District, supra at 582; Bicknell v. Vergennes Union High School Board of

> Directors, supra at 619. But such sentiments should not obscure practical realities. School libraries are small auxiliary facilities often run on limited budgets. See Pico v. Board of Education, supra at 397. They must, despite their limitations, cater to the needs of an often diverse student body, primarily by providing materials that properly supplement the basic readings assigned through the standard curriculum. An administrator would be irresponsible if he or she failed to monitor closely the contents of the library and did not remove a book when an appraisal of its content fails to justify its continued use of valuable shelf space. See Presidents Council, District 25 v. Community School Board, supra at 291-293; Pico v. Board of Education, supra at 396. (p. 1308)
>
> This is not to say that an administrator may remove a book from the library as part of a purge of all material offensive to a single, exclusive perception of the way of the world, anymore than he or she may originally stock the library on this basis. Nor can school authorities prohibit students from buying or reading a particular book or, under most circumstances, from bringing it to school and discussing it there. But no such allegations appear in the plaintiffs' pleading. Accordingly, this court agrees with the district court that the amended complaint has failed in all its particulars as well as its overall tenor to allege a constitutional violation from which subject matter jurisdiction may be drawn. (p. 1308)
>
> Nevertheless, the articulation of the principles at issue here is sufficiently novel and important that the plaintiffs should be given leave to amend their complaint again, if they can, to allege the kind of interference with secondary school academic freedom that has been found to be cognizable as a constitutional claim. (pp. 1308-1309)

Disposition: The order of the District Court for the Northern District of Indiana was vacated and remanded with instructions to grant the plaintiffs leave to amend. Costs to the defendants. (pp. 1302,1309)

Citation: Bicknell v. Vergennes Union High School Board of Directors, 638 F.2d 438 (2nd Cir. 1980)

Facts: In response to an ongoing controversy concerning some of the books at the Vergennes Union High School library, the high school's Board of Directors established a written policy governing the selection and removal of books. That document, entitled the "School Library Bill of Rights for School Library Media Center Program," specifies the rights and responsibilities of the board, the professional staff, the parents, and

the students in this area. The "rights" of the board are: "To adopt policy and procedure, consistent with statute and regulation that they feel is in the best interests of students, parents, teachers and community." The "rights" of the professional staff are: "To freely select, in accordance with board policy, organize and administer the media collection to best serve teachers and students." The "rights" of the students are: "To freely exercise the right to read and to free access to library materials." After specifying some procedures and criteria for the selection of materials, the document then lists some general "Board Guidelines for the Selection of Library Materials." These include a procedure allowing parents to submit requests for reconsideration of a particular book. Upon receipt of such a request, the librarian is to meet with the parents to resolve the issue; any matters that remain unresolved are to be settled by a majority vote of the board. (p. 440)

Some months after this procedure was adopted, two complaints from parents reached the Board. The books involved were Dog Day Afternoon by Patrick Mann and The Wanderers by Richard Price; in both cases, the objection of the parents was to the vulgarity and indecency of language in the books. The board voted to remove The Wanderers from the library and to place Dog Day Afternoon on a restricted shelf. The complaint acknowledges that the board acted in both instances because of the books' vulgar and indecent language. The board also voted to prohibit the school librarian from purchasing any additional major works of fiction, and subsequently voted that any book purchases other than those in the category "Dorothy Canfield Fisher, science fiction and high interest-low vocabulary" must be reviewed by the school administration in consultation with the board. Following these actions, a group of students, their parents, library employees, and an unincorporated association known as the Right to Read Defense Fund brought suit to enjoin removal of the books and alteration of the school's library policy. (pp. 440-441)

Issues: The First Amendment issue facing the Court of Appeals for the Second Circuit in this case is whether removing two books from the school's library on the basis of vulgarity and indecency of language violates students' right to be free of the inhibiting effects on free expression. (p. 439)

Holding: There was no First Amendment violation in removing the books on the basis of vulgarity and indecency in language. (p. 439)

Reasoning: The appellants' claim that their First Amendment rights have been violated, primarily because the board's action was motivated solely by the "personal tastes and values" of the board members. The appellants also argue that the removal of the books infringes on First Amendment rights because it impairs the students' access to the removed volumes. Regarding the first claim, so long as the materials removed are permissibly considered to be vulgar or indecent, it is no cause for legal complaint that the board members applied their own standards of taste about vulgarity. Whatever the standards may be in the context of regulating a student's right of expression, such standards do not apply to a school board's decision concerning the availability of materials within a school facility. If the appellants are concerned that standards of taste permit the exercise of unfettered discretion, that concern warrants relief only in contexts in which the exercise of such discretion is used to penalize expression rather than to limit availability. With respect to the claim that removal of the books impairs students' access to the removed volumes, the attention of the board was first directed to the two books by complaints about their vulgar and indecent language. There is no suggestion that the books were complained about or removed because of their ideas, nor that the board members acted because of political motivation. In addition, there is no claim that the passages found objectionable were beyond the allowable scope accorded school authorities to regulate vulgarity and explicit sexual content. Accordingly, high school students have no constitutionally protected right to access on school property to material that, whatever its literary merits, is fairly characterized as vulgar and indecent in the school context. (p. 441)

Disposition: The decision by the District Court of Vermont to dismiss the complaint was affirmed. (p. 442)

Citation: Sheck v. Baileyville School Committee, 530 F. Supp. 679 (D.Me. 1982)

Facts: 365 Days by Ronald J. Glasser, a compilation of nonfictional Vietnam War accounts by American combat soldiers, was acquired by the Woodland High School library in 1971. During the ensuing decade the book was checked out of the library on thirty-two occasions before being banned by the Baileyville School committee on April 28, 1981. It was last checked out by the 15-year-old daughter of the defendant Mrs. Mary Davenport. (p. 681)

A friend informed Mrs. Davenport that her daughter had obtained the book from the library and that it contained objectionable language. Mr. and Mrs. Davenport

promptly secured the book from their daughter and, on April 23, 1981, showed some of its objectionable language to defendant Thomas Golden, Committee chairperson, demanding that the book be removed from the library. The Davenports then complained to the librarian and to defendant Raymond Freve, school superintendent. Freve photocopied Chapter 8 and advised the Davenports that their complaint would be considered at the next committee meeting on April 28. (p. 681)

At the April 28 meeting, the Davenports, who had scanned the book for objectionable language, urged that it be banned. Superintendent Freve presented the committee with a photocopy of the text and title of Chapter 8 in which "the word" and other objectionable language appears more prominently than in other chapters. Freve related excerpts from uniformly favorable book reviews made available by the librarian, who was invited but chose not to appear before the committee. The committee briefly discussed the book and the reviews, then voted 5 to 0 to remove 365 Days from the library. None of the principal participants in the process, including the Davenports, the superintendent and the committee members, read the book before it was banned. (p. 681)

Sometime after the April 28 meeting, plaintiff Michael Sheck, then a Woodland High School senior, having previously read the book and being strongly opposed to its removal, brought a copy of 365 Days to school as a means of protesting and promoting student discussion of the ban. The high school principal informed Sheck that possession of the book on school property would result in its confiscation. The high school principal and the superintendent testified that the committee ban constituted a prohibition against its possession anywhere on school property, including school buses. (pp. 681-682)

At the May 5 Committee meeting, Sheck and a fellow student presented views in opposition to the ban. No committee action was taken and the ban remained in effect. On May 14, the Woodland High School Student Council formally requested that the committee return the book to the library. On May 19, a motion to place 365 Days on a restricted shelf, enabling student access absent parental objection, failed to carry. On June 17, the Committee voted to place 365 Days on a restricted shelf pending development and adoption of a challenged material policy. (p. 682)

The Committee developed a challenged material policy during the summer. The "Baileyville School Department Challenged Material Policy" became effective immediately upon its adoption on August 17, 1981, by unani-

mous Committee vote. The immediately ensuing motion to submit 365 Days to the Baileyville School Department Challenged Material Policy failed. (pp. 682-683)

The August 17 Committee actions, adopting the Baileyville School Department Challenged Material Policy but declining to apply it to 365 Days, reinstated the total ban adopted April 28, presently in effect. (p. 683)

Three Committee members, the defendant Golden, who supported the ban, and White and Romero, who opposed it, read the book before the August 17 reinstatement of the April 28 ban. The Committee defendants McPhee and Neale, who supported the ban, were aware of some of its objectionable language. (p. 683)

Issues: The salient issues in this case are encompassed in two questions: 1) Are the information and ideas contained in a book placed in the school's library by proper authorities a form of speech entitled to First Amendment protection? and 2) If so, is the state interest sufficient enough to encroach on this First Amendment protection in order to ban the book from the school's library? (pp. 679-680)

Holding: The District Court of Maine held that the banning of an entire book for its "objectionable" language, as found by a school committee, two of whose members had not read the book at the time the ban was imposed, entitled students and parents of students to a preliminary injunction against the banning of the book. (p. 679)

Reasoning: The plaintiffs demand redress of their First Amendment "rights of freedom of speech [and] freedom of access." In order to prevail on the merits, the plaintiffs must demonstrate that their basic First Amendment rights have been "directly and sharply implicated" by the ban. See Epperson v. Arkansas, 89 S. Ct. 266, 270. Conversely, the defendants must show that encroachment upon First Amendment rights was warranted by a sufficient state interest. See Elrod v. Burns, 96 S. Ct. 2673, 2684. The existence of a sufficient state interest does not, however, end the matter. The burden of persuasion that there has been no unnecessary abridgement of First Amendment rights rests with the school committee. (p. 684)

The Supreme Court handed down its landmark decision in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, recognizing that secondary school students "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." See Tinker, 89 S. Ct. at 739. The Court

struck down a regulation prohibiting secondary students from wearing black armbands in school as a form of silent protest against the Vietnam War, on the ground that the regulation encroached impermissibly upon the students' First Amendment right of free expression absent a showing that the regulated conduct would materially disrupt classwork or substantially intrude upon the privacy of others. The First Amendment right of secondary students to be free from governmental restrictions upon nondisruptive, nonintrusive, silent expression in public schools was sustained by the Court in Tinker notwithstanding full awareness of the "comprehensive authority" traditionally accorded local officials in the governance of public schools. See Tinker, 89 S. Ct. at 736. (p. 685)

With but one exception, it does not appear that the banning of 365 Days deprived these plaintiffs of their First Amendment right to initiate expression. Book bans do not directly restrict the readers' right to initiate expression but rather their right to receive information and ideas, the indispensable reciprocal of any meaningful right of expression. See Procunier v. Martinez, 94 S. Ct. 1800, 1808. (p. 685)

Although its constitutional contours remain rudimentary, the right to receive information and ideas has been recognized by the United States Supreme Court in a variety of context. See Procunier v. Martinez, 94 S. Ct. 1800, 1808; Stanley v. Georgia, 89 S. Ct. 1243, 1247, 1249; Martin v. City of Struthers, 63 S. Ct. 862, 863, 866. (p. 686)

Courts, recognizing a constitutional right to receive information, emphasize the inherent societal importance of fostering the free dissemination of knowledge and ideas in a democratic society. See Kleindienst v. Mandel, 92 S. Ct. at 2581. The right to receive information does not depend on the existence of an attempted direct personal communication between the speaker and the recipient. See Virginia State Board of Pharmacy v. Virginia Citizens Council, 96 S. Ct. 1817, 1822, 1823. The full force of the reasoning in these cases is particularly apposite in the educational environment of the secondary school library. The public school remains a most important public resource in the training and development of youth for citizenship and individual fulfillment. (p. 686)

Public schools are major marketplaces of ideas, and First Amendment rights must be accorded all "persons" in the market for ideas, including secondary school students seeking redress of state action banning a book from the "warehouse of ideas." See Right to Read Defense Community v. School Community, 454 F. Supp.

703, 710 (D.Mass. 1978). The way would be open to pare the protections of the First Amendment to constitutional insignificance in our public schools were courts to accede to suggestions that the banning of a library book, the least obtrusive conventional communication resource available, does not at least presumptively implicate the reciprocal First Amendment right of secondary students to receive the information and ideas there written. (p. 687)

How anomalous and dangerous to presume that state action banning an entire book, where the social value of its content is roundly praised and stands unchallenged by the state, does not directly and sharply implicate First Amendment rights because the ban was not intended to suppress ideas. (p. 687)

The social value of the conceptual and emotive content of censored expression is not to be sacrificed to arbitrary official standards of vocabulary taste without constitutional recourse. See Cohen v. California, 91 S. Ct. 1780, 1788. [State may not "seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."] Secondary school libraries are "forums for silent speech," Minarcini v. Strongsville City School District, 541 F.2d 577, 583 (6th Cir. 1976). As long as words convey ideas, federal courts must remain on First Amendment alert in book-banning cases, even those ostensibly based strictly on vocabulary considerations. (pp. 687-688)

Disposition: The court ordered interim injunctive relief for the plaintiffs as required in Planned Parenthood League v. Bailed, 641 F.2d 1006, 1009 (1st Cir. 1981). (p. 693)

Citation: Board of Education, Island Trees Union Free School District No. 26 v. Pico, 102 S. Ct. 2799 (1982)

Facts: The petitioners are the Board of Education of the Island Trees Union Free School District No. 26, in New York, and Richard Ahrens, Frank Martin, Christina Fasulo, Patrick Hughes, Richard Melchers, Richard Michaels, and Louis Nessim. When this suit was brought, Ahrens was the President of the Board, Martin was the Vice President, and the remaining petitioners were board members. The board is a state agency charged with responsibility for the operation and administration of the public schools within the Island Trees School District, including the Island Trees High School and Island Trees Memorial Junior High School. The respondents are Steven Pico, Jacqueline Gold, Glenn Yarris, Russell Rieger, and Paul Sochinski. When this suit was brought, Pico, Gold, Yarris, and Rieger

were students at the high school, and Sochinski was a student at the junior high school. (p. 2802)

In September 1975, petitioners Ahrens, Martin, and Hughes attended a conference sponsored by Parents of New York United, a politically conservative organization of parents concerned about education legislation in the State of New York. At the conference, these petitioners obtained lists of books. It was later determined that the high school library contained nine of the listed books, and that another listed book was in the junior high school library. In February 1976, at a meeting with the superintendent of schools and the principals of the high school and junior high school, the board gave an "unofficial direction" that the listed books be removed from the library shelves and delivered to the board's offices, so that board members could read them. When this directive was carried out, it became publicized, and the board issued a press release justifying its action. It characterized the removed books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy," and concluded that "it is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers." (pp. 2802-2803)

A short time later, the board appointed a "Book Review Committee," consisting of four Island Trees parents and four members of the Island Trees schools staff, to read the listed books and to recommend to the board whether the books should be retained. In July, the Committee made its final report to the board, recommending that five of the listed books be retained and that two others be removed from the school libraries. As for the remaining four books, the committee could not agree on two, took no position on one, and recommended that the last book be made available to students only with parental approval. The board substantially rejected the committee's report later that month, deciding that only one book should be returned to the high school library without restriction, that another should be made available subject to parental approval, but that the remaining nine books should "be removed from elementary and secondary libraries and [from] use in the curriculum." The board gave no reasons for rejecting the recommendations of the committee that it had appointed. (p. 2803)

The respondents reacted to the board's decision by bringing the present action under Title 42 U.S.C. Section 1983 in the United States District Court for the Eastern District of New York. The respondents claimed that the board's actions denied them their rights under the First Amendment. They asked the court for a

declaration that the board's actions were unconstitutional, and for preliminary and permanent injunctive relief ordering the board to return the nine books to the school libraries and to refrain from interfering with the use of those books in the schools' curricula. (p. 2804)

The district court granted summary judgment in favor of the petitioners. (p. 2804)

A three-judge panel of the United States Court of Appeals for the Second Circuit reversed the judgment of the district court, and remanded the action for a trial on the respondents' allegations. The Supreme Court granted certiorari. (p. 2804)

Issues: The salient issues before the Supreme Court focus on whether local school boards may remove books from school libraries because they disapprove of the ideas contained in these books and whether the school board, in this case, exceeds constitutional limitations in exercising its discretion to remove the books from the schools' libraries. (p. 2799)

Holding: The Supreme Court ruled that local school boards may not remove books from school library shelves because they simply 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 (p. 2799). Also, the school board, in this case, did exceed constitutional limitations in exercising its discretion to remove books from the schools' libraries in light of the possibility that removal procedures were highly irregular and ad hoc. (p. 2801)

Reasoning: The Court agrees with the petitioners that local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values and that there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political (p. 2806). At the same time, however, the Court necessarily recognizes that the discretion of the States and the local school boards must be exercised in a manner that comports with the imperatives of the First Amendment (pp. 2806-2807). In short, "First Amendment rights, applied in the light of the special characteristics of the school environment, are available . . . to students." See Tinker v. Des Moines School District, 89 S. Ct. at 736 (p. 2807). The Court has held that in a variety of contexts "the Constitution protects the right to receive any ideas." See Stanley v. Georgia, 89 S. Ct. 1243, 1247. This right is an inherent corollary of the

rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows from the sender's First Amendment right to send them. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." See LaMont v. Postmaster General, 85 S. Ct. 1493, 1497. More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom (p. 2808). In sum, just as access makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members. (pp. 2808-2809)

Of course, all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment." See Tinker v. Des Moines School District, 89 S. Ct. at 736. But the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students. (p. 2809)

The evidence plainly does not foreclose the possibility that the petitioners' decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books, or upon a desire on petitioners' part to impose upon the students of the Island Trees High School and Junior High School a political orthodoxy to which the petitioners and their constituents adhered. (p. 2812)

Nothing in this decision affects in any way the discretion of a local school board to choose books to add to the libraries of their schools. Because the concern in this case deals with the suppression of ideas, the holding affects only the discretion to remove books. In brief, the Court holds that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." See West Virginia Board of Education v. Barnette, 63 S. Ct. at 1187. (p. 2810)

Disposition: The ruling of the United States Court of Appeals for the Second Circuit was affirmed.

Citation: Roberts v. Madigan, 702 F. Supp. 1505 (D.Colo. 1989)

Facts: Plaintiff Kenneth Roberts, a fifth grade teacher, is joined by parents of several children in his school in seeking injunctive and declaratory relief against officials of School District No. 50. The plaintiffs challenge the defendants' removal of a Bible from the Berkeley Gardens Elementary School library and their removal of two religiously oriented books in Roberts' classroom library. The plaintiffs seek further relief from the defendants' directive that Roberts keep his Bible out of sight, and refrain from silently reading it during classroom hours. (p. 1508)

The plaintiffs assert that the defendants have abridged their First Amendment rights of free speech, academic freedom, and access to information. The plaintiffs further allege that the defendants have violated the Establishment Clause of the First Amendment. (p. 1508)

Issues: Two First Amendment issues are addressed in this case. First, may the Establishment Clause limit the rights of individuals to speak on religious topics in a public school setting? Second, in public education, may the individual's right to free speech be limited if the exercise of that right materially and substantially interferes with the rights of others? (p. 1506)

Holding: The District Court of Colorado held that while the Free Speech Clause clearly protects the rights of individuals to speak on religious topics, those rights may be limited by the Establishment Clause. Also, the court ruled that in public education, the individual's right to free speech is not absolute, but may be limited if the exercise of that right materially and substantially interferes with the rights of others. Applying these tenets to the facts in this case, the court held that: (1) school officials could not require the removal of the Bible from the library; (2) school officials could require the removal of religiously oriented books from a classroom library; and (3) school officials could require a teacher to keep the Bible out of sight and refrain from silently reading it during classroom hours. (p. 1506)

Reasoning: Roberts does not bring his action under the Free Exercise Clause, but rather, bases it upon the Free Speech Clause. This court considers Roberts' cause of action under both clauses. Under the facts of this case, Roberts' choice of clauses does not alter the results of an Establishment Clause analysis. The Supreme Court has stated that the various clauses of the First Amendment are unified and interwoven together by

the individual's right to freedom of conscience. Both the Free Speech and Free Exercise Clauses protect the freedom to express religious views, yet both are subject to the strictures of the Establishment Clause. (p. 1512)

In public education, an individual's right to free speech is not absolute. It may be limited if exercise of that right materially and substantially interferes with the rights of others. See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 740. When such interference occurs, a constitutional conflict of the highest order is presented. (p. 1512)

Roberts asserts that his First Amendment rights to freedom of speech and academic freedom were violated when he was ordered to remove the two religious books and refrain from reading the Bible in his classroom. It is beyond question that teachers are entitled to First Amendment freedoms in the public schools. See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736. However, these rights do not "require the government to open the use of its facilities as a public forum to anyone desiring to use them." Id. (pp. 1517-1518)

Roberts' argument graphically illustrates the tension that exists between the Establishment Clause and the Free Speech Clause of the First Amendment. A court's inquiry does not end with a conclusion that an individual has asserted a valid free speech right. The court must also decide whether the exercise of that free speech right invades the rights of others. (p. 1518)

In the instant case, this court must balance Roberts' right to free speech against his students' right to be free of religious influence or indoctrination in the classroom. This court finds that the balance lies in the students' favor. Notwithstanding Roberts' arguments to the contrary, fifth-grade students are vulnerable to the examples set by their teachers. As Justice Felix Frankfurter stated,

> That a child is offered an alternative may reduce the constraint, [but] it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. (p. 1518)

See McCollum v. Board of Education, 68 S. Ct. 461. (p. 1518)

It is unrealistic to think that bright, energetic students are oblivious to what their teacher reads. In this case, the right of students and their parents to be free of religious influence in the classroom outweighs Robert' right to free speech/academic freedom. Roberts cannot circumvent his own violation of constitutional limits by a misplaced claim of a violation of the right to free speech/academic freedom. (pp. 1512, 1518-1519)

Disposition: The plaintiff's request for injunctive relief was denied. The defendants were ordered to replace the missing Bible in the school's library and were enjoined from removing the Bible from the library in the future. (p. 1519)

Citation: Virgil v. School Board of Columbia County, Florida, 862 F.2d 1517 (11th Cir., 1989)

Facts: Since about 1975, the educational curriculum at Columbia High School has included a course entitled "Humanities to 1500" offered as part of a two-semester survey of Western thought, art, and literature. In 1985 the school designed the course for eleventh-and twelfth-grade students and prescribed as a textbook Volume I of The Humanities: Cultural Roots and Continuities. This book contained both required and optional readings for the course. (pp. 1518-1519)

In response to this parental complaint, the school board on April 8, 1986, adopted a Policy on Challenged State Adopted Textbooks to address any complaints regarding books in use in the curriculum. Pursuant to the new policy, the school board appointed an advisory committee to review Volume I of Humanities. Upon examination, the committee recommended that the textbook be retained in the curriculum, but that Lysistrata and The Miller's Tale not be assigned as required reading. (p. 1519)

At its April 22, 1986, meeting the school board considered the advisory committee's report. The Superintendent of the Columbia County School System offered his disagreement with the committee's conclusion, and recommended that the two disputed selections be deleted from Volume I or that use of the book in the curriculum be terminated. Adopting the latter proposal, the school board voted to discontinue any future use of Volume I in the curriculum. (p. 1519)

Pursuant to the board decision, Volume I of Humanities was placed in locked storage and has been kept there ever since. Volume II was used as the course textbook for the rest of the second semester of the 1985-86 academic year, as well as for both semesters of the

"Humanities" course during the 1986-87 term. Since the board's removal decision, both Volumes I and II have been available in the school library for student use, along with other adaptations and translations of Lysistrata and The Miller's Tale. (p. 1519)

On November 24, 1986, parents of students at Columbia High School filed an action against the school board and the superintendent seeking an injunction against the textbook removal and a declaration that such action violated their First Amendment rights. Cross-motions for summary judgment were filed by defendants-appellees, on June 22, 1987, and by plaintiffs-appellants, on July 27, 1987. On August 24, 1987, the defendants-appellees filed a response to plaintiffs-appellants' motion. Hearings were held in the district court on September 10 and December 16, 1987. On January 29, 1988, the district court denied the plaintiffs-appellants' motion and granted the defendants-appellees' motion for summary judgment. (pp. 1519-1520)

On February 19, 1988, plaintiffs-appellants filed notice of appeal. (p. 1519)

Issues: This case presents the question of whether students' First Amendment rights to free speech and expression prevents a school board from removing a previously approved textbook from an elective high school class because of objections to the material's vulgarity and sexual explicitness. (p. 1518)

Holding: The school board's action in removing material from the curriculum did not violate the students' First Amendment rights to free speech and expression because the removal is reasonably related to legitimate pedagogical concerns. (pp. 1517-1518)

Reasoning: In matters pertaining to curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity. Still, the courts that have addressed the issue have failed to achieve a consensus on the degree of discretion to be accorded school boards to restrict access to curriculum materials. The most direct guidance from the Supreme Court is found in the case of Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562. Hazelwood established a relatively lenient test for regulation of expression which "may be fairly characterized as part of the school curriculum." Such regulation is permissible so long as it is "reasonably related to legitimate pedagogical concerns." See Hazelwood, 108 S. Ct. at 570-571. In applying that test, the Supreme Court identified one such legitimate concern which is relevant to this case: "a school must be able to take

into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics ... [e.g.] the particulars of teenage sexual activity." See Hazelwood at 570. See also Bethel School District v. Fraser, 106 S. Ct. 3159, 3165. (p. 1520)

In applying the Hazelwood standard to this case, two considerations are particularly significant. First, this court concludes that the board decisions at issue were curricular decisions. The materials removed were part of the textbook used in a regularly scheduled course of study in the school. The plaintiffs argue that this particular course was an elective course, and not a required one. However, common sense indicates that the overall curriculum offered by a school includes not only required courses, but also such additional, elective courses of study that school officials design and offer. One factor identified in Hazelwood as relevant to the determination of whether an activity could fairly be characterized as part of the curriculum is whether "the public might reasonably perceive [the activity] to bear the imprimatur of the school." See 108 S. Ct. at 569. It is clear that elective courses designed and offered by the school would be so perceived. The plaintiffs further point out that the materials removed in this case not only were part of an elective course, but were also optional, not required readings. For the reasons mentioned, this court concludes that the optional readings removed in this case were part of the school's curriculum. Just as elective courses are designed by school to supplement required courses, optional readings in a particular class are carefully selected by the teacher as relevant and appropriate to supplement required readings in order to further the educational goals of the course. In this circumstance, where the optional readings were included within the text itself, such materials would obviously carry the imprimatur of school approval. (p. 1522)

The second consideration that is significant in applying the Hazelwood standard to this case is the fact the motivation for the board's removal of the readings has been stipulated to be related to explicit sexuality and excessively vulgar language in the selections. It is clear from Hazelwood and other cases that this is a legitimate concern. Because the stipulated motivation of the school board relates to legitimate concerns, the court need only determine whether the board's action was reasonably related thereto. (pp. 1522-1523)

It is true, as the plaintiffs forcefully point out, that Lysistrata and The Miller's Tale are widely ac-

claimed masterpieces of Western literature. However, after careful consideration, this court cannot conclude that the school board's actions were not reasonably related to its legitimate concerns regarding the appropriateness of the sexuality and vulgarity in these works. In assessing the reasonableness of the board's action, the court also takes into consideration the fact that most of the high school students involved ranged in age from fifteen to just over eighteen, and a substantial number had not yet reached the age of majority. In addition, the disputed materials have not been banned from school. They are available in the school's library. No student or teacher is prohibited from assigning or reading these works or discussing their themes in class or on school property. Under all the circumstances of this case, this court cannot conclude that the board's action was not reasonably related to the stated legitimate concern. Of course, this panel does not endorse the board's decision. As does the district court, this court seriously questions how young persons just below majority age can be harmed by these masterpieces of Western literature. However, having concluded that there is no constitutional violation of students' freedom of speech and expression, our role is not to second guess the wisdom of the board's action. (pp. 1523-1525)

Disposition: The judgement of the district court was affirmed. The school board's action stands. (p. 1525)

Citation: Campbell v. St. Tammany Parish School Board, 64 F.3d 184 (5th Cir. 1995)

Facts: Parents brought suit against a school board that removed all copies of a book from parish school libraries. The United States District Court for the Eastern District of Louisiana, 865 F. Supp. 350, entered summary judgment in favor of the parents and directed that the book be returned to the libraries. The school board appealed. (p. 184)

The instant case centers on the decision of the St. Tammany Parish School Board (School Board) to remove the book Voodoo & Hoodoo (Book), by Jim Haskins, from the public school libraries of the parish. Facially serious and scholarly, the Book traces the development of African tribal religion, its transfer to and evolution in the New World after slaves were brought from West Africa, and its survival in the United States through the current practice of two variations of the original African religion, voodoo and hoodoo. (p. 185)

Early in 1992, Kathy Bonds, the parent of a seventh-grade girl enrolled in a St. Tammany Parish junior high school, discovered a copy of the Book in her

daughter's possession. This copy of the Book came from the library of her daughter's school. After looking through the Book, Bonds telephoned the assistant principal at the daughter's school and objected to the Book's contents. Bonds also contacted a friend who was a member of the Louisiana Christian Coalition and gave that copy of the Book to her. (p. 185)

Pursuant to the School Board's written policies and procedures regarding challenged library materials, Bonds filed a formal complaint with the school principal. The crux of her complaint was that the Book heightened children's infatuation with the supernatural and incited students to try the explicit "spells," which she believed to be potentially dangerous. In response to Bond's complaint, the principal organized a school-level committee to review the matter. (p. 186)

After considering Bond's complaint, the school-level committee unanimously recommended retaining Voodoo & Hoodoo in the school's library, albeit on a specially designated "reserve" shelf available only to eighth-grade students who had obtained written permission from their parents to check out the Book. This school-level committee found that the Book was educationally suitable and stated that it "fulfill[s] the purpose for which it was selected, that is, to offer supplemental information/explanation to a topic included in the approved 8th grade Social Studies curriculum." (p. 186)

Clearly not satisfied with the school-level committee's recommendation, Bonds filed an appeal. The superintendent of the St. Tammany Parish public school system, pursuant to the School Board's procedures, appointed seven persons to a parish-wide committee (Appeals Committee) to review the school-level committee's decision. The Appeals Committee agreed with the school-level committee's recommendation that the Book should be retained, but with restricted access. (p. 186)

Still undaunted, Bonds appealed that decision to the St. Tammany Parish School Board. The School Board voted to remove Voodoo& Hoodoo from all parish school libraries. In voting to remove the Book from the shelves altogether, the School Board did not express any opinion on the merits of the recommendations from the two committees that had reviewed the Bonds' complaint previously. Neither did the School Board state the reason for its removal action. (pp. 186-187)

The plaintiffs, parents of children enrolled in St. Tammany Parish schools (Parents), filed a lawsuit

against the School Board, alleging that the School Board's removal of Voodoo & Hoodoo from the public school libraries in St. Tammany Parish violated their children's First Amendment rights. The parents filed a motion for summary judgment, which the court denied. After a trial date had been set, the parents filed a second motion for summary judgment. (p. 187)

The district court granted the parents second summary judgment motion, ruling that there was no genuine issue of material fact in dispute. In so doing, the court stated that, by removing Voodoo & Hoodoo from all public school libraries in St. Tammany Parish, the School Board "intended to deny students access to the objectionable ideas contained in the book, particularly the descriptions of voodoo practices and religious beliefs." In addition to granting the parents' motion for summary judgment, the court also ordered the School Board to replace all copies of Voodoo & Hoodoo that had been removed from the public school libraries. The School Board timely appealed the district court's ruling. (p. 187)

Issues: Does a school board's decision to remove from school libraries a book that is not part of the regular curriculum violate students' First Amendment rights of expression and speech? (p. 184)

Holding: The Court of Appeals for the Fifth Circuit held that the material issues of fact as to the motivation for the school board's action precluded summary judgment in the parent's favor. The court also declared that the school board's decision to remove from school libraries a book that was not part of the regular curriculum was required to withstand greater constitutional scrutiny within the context of the First Amendment than would a decision involving a curricular matter. (p. 184)

Reasoning: This court's de novo review starts with an acknowledgment that public school officials have broad discretion in the management of school affairs and that the courts should not lightly interfere with the "daily operation of school systems." School officials' legitimate exercise of control over pedagogical matters must be balanced, however, with the recognition that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (pp. 187-188)

The Supreme Court has repeatedly recognized that the broad authority of school officials over educational matters must be exercised in a manner that comports with fundamental constitutional safeguards. Applying this concept in a case similar to this one, the court

in Board of Education v. Pico considered the issue whether school officials acted properly in removing nine books from libraries in the public school district. A plurality of the Supreme Court in Pico first outlined the nature of the students' First Amendment rights and subsequently concluded that, based on the evidentiary materials in the record, a genuine issue of fact existed as to whether the school officials had exceeded First Amendment limitations on their discretion to remove library books from the schools. The Pico plurality stressed the "unique role of the school library" as a place where students could engage in voluntary inquiry. It also observed that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding" and that the school library served as "the principal locus of such freedom." (p. 188)

The Pico plurality recognized that the high degree of deference accorded to educators' decisions regarding curricular matters diminishes when the challenged decision involves a noncurricular matter. Emphasizing the voluntary nature of public school library use, the plurality in Pico observed that school officials' decisions regarding public school library materials are properly viewed as decisions that do not involve the school curriculum and that are therefore subject to certain constitutional limitations. (p. 188)

In rejecting the school officials' claim of absolute discretion to remove books from their school libraries, the Pico plurality recognized that students have a First Amendment right to receive information and that school officials are prohibited from exercising their discretion to remove books from school library shelves "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.'" The Pico plurality observed that if school officials intended by their removal decision to deny students access to ideas with which the school officials disagreed, and this intent was the decisive factor in the removal decision, then the school officials had "exercised their discretion in violation of the Constitution." The court, in its plurality opinion, implicitly recognized, however, that an unconstitutional motivation would not be demonstrated if the school officials removed the books from the public school libraries based on a belief that the books were "pervasively vulgar" or on grounds of "educational suitability." (pp. 188-189)

This court's careful consideration of the School Board members' statements as contained in the record leaves

the court unable to declare, as a matter of law, that the School Board's vote to remove Voodoo & Hoodoo from all of the parish public school libraries was substantially based on an unconstitutional motivation. At this stage, this court simply does not have a full picture of the reasons the School Board members constituting the majority voted to remove the Book. (p. 190)

A trial, requiring testimony from all of the School Board members and permitting cross-examination probing their justifications for removing the Book, will enable the finder of fact to determine the genuine issue of material fact that is at the heart of this First Amendment case—the true, decisive motivation behind the School Board's decision. This court, therefore, holds that summary judgment for the Parents was inappropriate, as the evidence did not, when viewed in the light most favorable to the School Board, foreclose the possibility that the School Board exercised its discretion within the confines of the First Amendment. (p. 190)

Although our examination of the summary judgment evidence ultimately leads us to remand the instant case for further development of the record, this court is moved to observe that, in light of the special role of the school library as a place where students may freely and voluntarily explore diverse topics, the School Board's noncurricular decision to remove a book well after it had been placed in the public school libraries evokes the question whether that action might not be an unconstitutional attempt to "strangle the free mind at its source." That possibility is reinforced by the summary judgment evidence indicating that many of the School Board members had not even read the book, or had read less than its entirety, before voting as they did; many had done nothing more than browse through the book, while others had read only the several excerpts selected and furnished by a representative of the Louisiana Christian Coalition. Moreover, this court notes that the School Board's failure to consider, much less adopt, the recommendation of the two previous committees to restrict the Book's accessibility to eighth-graders with written parental permission but to leave the Book on the library shelf—in apparent disregard of its own outlined procedures—has the appearance of "the antithesis of those procedures that might tend to allay suspicions regarding [the School Board's] motivation." (pp. 190-191)

The circumstances surrounding the School Board's vote to remove the Book cannot help but raise questions regarding the constitutional validity of its decision.

> Nevertheless, as this court is unable at this juncture to identify, as a matter of law, the single decisive motivation behind the School Board's removal decision, this court has no sound basis on which to test that decision for compliance with the requirements of the First Amendment. In the absence of an undisputed statement by the School Board as a single voting body, this court is faced with diverse, conflicting and frequently ambivalent statements of twelve individuals, which statements need to be further developed at trial. (p. 191)

Disposition: The Court of Appeals for the Fifth Circuit reversed the district court's grant of summary judgment in favor of the parents and its judgment declaring that the school board's removal of Voodoo & Hoodoo from all of the St. Tammany Parish public school libraries was unconstitutional. The court of appeals remanded the case to the district court for further proceedings consistent with this opinion. (p. 191)

Citation: Case v. Unified School District No. 233, 908 F. Supp. 864 (D.Kan. 1995)

Facts: Former and current students of the junior and senior high schools, and their parents, brought suit against the school board and the superintendent, seeking injunction to compel reinstatement on school library shelves of a novel depicting a fictional romantic relationship between two teenage girls. (p. 864)

> This case involves the plaintiffs' challenge of the decision of the Board of Education of Unified School District No. 223 of Johnson County, Kansas, and its superintendent to remove a book entitled Annie on My Mind from the school libraries. The plaintiffs' claims, brought pursuant to Title 42 U.S.C. Section 1983, allege that the defendants violated the plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution. The plaintiffs seek injunctive and declaratory relief. (p. 865)

Issues: With respect to the First Amendment, the relevant issue is whether the free expression rights of students are violated by ordering the removal from school library shelves of a novel which depicts a fictional romantic relationship between two teenage girls. (p. 864)

Holding: Concerning the First Amendment issue, the District Court of Kansas ruled that the school district and the superintendent had violated the free expression rights of current students by denying them access to a book based upon their personal disapproval of its ideas, without regard to policy for reviewing objectionable

material, and with no discussion of less restrictive limitations on access. (p. 864)

Reasoning: Although local school boards have broad discretion in the management of school affairs, they must act within fundamental constitutional limits. See Board of Education v. Pico, 102 S. Ct. 2799, 2806-2807 and Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 737. In Pico, the United States Supreme Court addressed the very issue that confronts the court in the present case: Does the First Amendment impose any limitations upon the discretion of school officials to remove library books from high school and junior high libraries? In a plurality opinion, the court concluded there are limits. Id. 102 S. C. at 2810. (p. 874)

In the present case, the court must determine the "actual motivation" of the school board members in their removal decision. If the decisive factor behind the removal of Annie on My Mind was the school board members' personal disapproval of the ideas contained in the book, then under Pico the removal was unconstitutional. (p. 875)

The board of education, which voted in favor of the removal of Annie on My Mind, stated that they believed the book was "educationally unsuitable." The court is required to assess the "credibility of [school officials'] justifications for their decision." See Pico, 102 S. Ct. at 2812. (p. 875)

There is no basis in the record to believe that these board members meant by "educational suitability" anything other than their own disagreement with the ideas expressed in the book. Here, the invocation of "educational suitability" does nothing to counterbalance the overwhelming evidence of viewpoint discrimination. (p. 875)

Accordingly, the court concludes that the defendants removed Annie on My Mind because they disagreed with ideas expressed in the book and that this factor was the substantial motivation in their removal decision. Through their removal of the book, the defendants intended to deny students in the Olathe School District access to those ideas. The defendants unconstitutionally sought to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." See Pico, 102 S. Ct. at 2810; West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178, 1187. (pp. 875-876)

In addition, the defendants did not consider or discuss less restrictive alternatives to complete removal

of the book. This is also persuasive evidence of improper motivation. (p. 876)

The defendants have argued that they have broad discretion to transmit community values, and that they may remove library books based upon their personal social, political, and moral views. The Supreme Court in Pico expressly rejected this argument, noting that "petitioners' reliance upon that duty [to transmit community values through curriculum] is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there hold sway." See Pico, 102 S. Ct. at 2809. (p. 876)

The defendants also have argued that the plaintiffs have not been denied access to the book because it is available from sources outside of the school library. The availability of Annie of my Mind from other sources does not cure the defendants' improper motivation for removing the book. "Restraint on expression may not generally be justified by the fact that there may be other times, places, or circumstances available for such expression." See Minarcini v. Strongsville City School District, 541 F.2d 577, 582 (6th Cir. 1976) (removal of books because school board found them distasteful was unconstitutional). (p. 876)

Disposition: The court ordered the defendants to return the copies of the book to the libraries in the school district. The plaintiffs were awarded attorneys' fees, costs, and expenses associated with the prosecution of this case. The plaintiffs' request for injunctive and declaratory relief was granted. (p. 877)

Corporal Punishment

Citation: Sims v. Board of Education of Independent School District No. 22, 329 F. Supp. 678 (D.N.M. 1971)

Facts: Plaintiff Sims brings this action individually and as a class action for declaratory injunctive relief against the policy and practice of corporal punishment in the schools of Independent School District 22 in the County of San Juan, State of New Mexico. (p. 680)

The complaint alleges that the defendant board has approved the use of corporal punishment of students by the faculty. The complaint alleges that "each and every student is subjected to this mode of punishment"; and "no more than five strokes are given at any one session of paddling"; and that other boards of educa-

tion in the State of New Mexico have adopted policies substantially identical to the policy of the defendant district. It alleges that on December 4, 1970, plaintiff Sims had in his possession a template which had been taken from a crafts class in violation of district school rules for which the defendant's crafts teacher inflicted three blows on Sims' posterior, with the principal of the school as a witness. (p. 680)

The complaint alleges that "corporal punishment serves no legitimate educational purpose" and "tends to inhibit learning, retard social growth and force acceptance of an inferior class position upon the plaintiff and other similarly situated members of his class"; "subjects him to further humiliation because of the public or semi-public character of the act as it is practiced"; and that "the psychological harm done plaintiff and other members of class by the infliction of corporal punishment is substantial and lasting." (pp. 680-681)

One cause of action alleges that corporal punishment "is violative of the rights of plaintiff and his class to freedom of speech and due process of law" in that "(a) the policy statement is vague and overbroad in its wording; (b) the policy statement's uncertainty of meaning has a chilling effect upon the free exercise of expression by the plaintiff and his class" in violation of the First Amendment and made applicable to the states by the Due Process Clause of the Fourteenth Amendment and Title 42 U.S.C. Sections 1981 and 1983. See Tinker v. Des Moines School District (1969), 89 S. Ct. 733. (p. 681)

Issues: Although this case centered on issues related to the Eighth and Fourteenth Amendments, a First Amendment issue is also addressed by the court: Is a school regulation authorizing corporal punishment so vague and overbroad as to have a chilling effect upon the free exercise of expression by students? (p. 679)

Holding: The District Court of New Mexico decided that school officials had the power to promulgate and enforce reasonable regulations governing students, with the power to impose responsible, nondiscriminatory corporal punishment for breaches thereof, without violating any federally protected constitutional rights of students. (p. 678)

Reasoning: The plaintiffs allege that the regulation is "vague and overbroad in its wording" and therefore "has a chilling effect upon the free exercise of expression by plaintiff and his class" in violation of free speech guaranty of the First Amendment, made applicable to the states by the Fourteenth Amendment. Among

other cases, in support of their allegation they rely upon Tinker v. Des Moines School District (1969), 89 S. Ct. 733. This court finds the case inapplicable. Tinker involved three public school pupils, ages 13, 15 and 16 respectively, who had been suspended for wearing black armbands, in violation of a school regulation, to protest the government's policy in Vietnam. The students had not been disruptive. A divided court held that, in those circumstances, a prohibition against such expression of opinion, without evidence that the regulation was necessary to avoid substantial interference with school discipline, is not permissible under the free speech guaranty of the First Amendment. (pp. 688-689)

This court has read the cases, with divergent holdings, involving school regulations respecting dress, hair length, etc., and the cases involving punishment of prisoners in penal institutions and finds them not relevant to the case at bar. (p. 689)

The court finds that the regulation and the acts taken conformably thereto in the case at hand do not exceed the limits of what is permissible and holds that the plaintiffs are not deprived of any right in violation of the First Amendment, made applicable to the states by the Fourteenth Amendment. (p. 689)

Disposition: The plaintiffs had not been deprived, under color or state law, of any federal rights, constitutional or statutory. Their complaint was dismissed. (p. 690)

Distribution of Religious Material

Citation: Thompson v. Waynesboro Area School District, 673 F. Supp. 1379 (M.D.Pa. 1987)

Facts: At the time of the events which form the basis of this action, the plaintiffs Bryan Thompson, Marc Shunk, and Christopher Eakle were students at Antietam Junior High School. Antietam is a secondary, public school within the defendant Waynesboro Area School District. On the morning of April 28, 1986, Thompson and Shunk distributed copies of a newspaper entitled Issues and Answers in the hallway of Antietam Junior High School before classes began. Issues and Answers is published in Illinois by a group known as "Student Action for Christ," and the paper contains articles and cartoons which advocate religious tenets such as a personal relationship with God and an adherence to the principles of the Bible. Thompson's motivation for distributing Issues and Answers to his fellow students

was ". . . to lead people to the Lord." Shunk's motivation for distributing the paper was to communicate the "Christian viewpoint" to other students. (p. 1380)

One of the recipients of Issues and Answers on April 28, 1986, was a teacher at the school who subsequently gave his copy of the paper to the school principal, Robert Mesaros. Mesaros then consulted with Dr. Shelton, the school district superintendent, regarding the paper. Mesaros also had discussions regarding the paper with Bryan Thompson and Thompson's father on April 28, 1986. In his discussion with Thompson's father, Mesaros expressed some reservation as to Bryan Thompson's distribution of Issues and Answers. Mesaros claimed that there was a school policy which prohibited the distribution of literature until it had been previewed. (p. 1380)

On the following day, Mesaros wrote a memorandum to the Thompsons outlining certain restrictions which would be imposed on further distributions of Issues and Answers. The memorandum indicated that Bryan would be permitted only to distribute Issues and Answers prior to 7:50 a.m. outside the school building, on the sidewalk, and parking lot. According to the memorandum, the basis for these restrictions was a policy of the defendant whereby prior approval was necessary before materials could be displayed, posted, or distributed on school property and the authority of school officials to ". . . set forth the time and place of distribution so that distribution does not materially or substantially interfere with the educational process, threatens [sic] immediate harm to the welfare of the school or community, encourages [sic] unlawful activity or interferes [sic] with another individual's rights." In the past, the defendant generally has prohibited nonstudent groups from distributing in its schools literature which is not sponsored by the schools. (p. 1380)

On May 8, 1986, Bryan Thompson, Marc Shunk, and Christopher Eakle again distributed Issues and Answers in a hallway of Antietam Junior High School prior to the commencement of classes. Later that day, Mesaros advised the boys that they would no longer be permitted to distribute Issues and Answers at any time if they continued to disregard the time and place restrictions that the defendant had placed on the distribution of the paper. (pp. 1380-1381)

Nevertheless, Marc Shunk and Bryan Thompson again distributed Issues and Answers on May 12, 1986, in a hallway of Antietam Junior High School prior to the commencement of classes. The boys were placed on in-school suspension for the entire school day. Mesaros

wrote to the parents of both boys and informed them that the reason for the suspensions was the boys'" willful disregard for school district policy and direct disobedience of [Mesaros'] directive." Since May 12, 1986, no further distributions of Issues and Answers by the plaintiffs have occurred. None of the three distributions resulted in any form of disturbance. (p. 1381)

Issues: Does a school district infringe upon students' freedom of speech in violation of the First Amendment by restricting the students' distribution of religious material to an area outside of the school building? (p. 1379)

Holding: The District Court for the Middle District of Pennsylvania determined that the school district violated the students' freedom of speech by restricting the student's distribution of religious newspapers to an area outside the school. In addition, the court ruled that: (1) the students' distribution of religious newspapers in the hallways of the junior high school during noninstructional time was not a "meeting" under the Equal Access Act and was not protected by the Act, and (2) the school district did not violate the students' First Amendment right to free exercise of religion by requiring them to distribute religious newspapers outside the school building. (p. 1379)

Reasoning: The Equal Access Act provides, in part:

> 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. 20 U.S.C. Section 4071. (p. 1382)

It also limits the right of students to equal access with the qualification that the school is not deprived by the Act of its authority "to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." 20 U.S.C. Section 4071(f). (p. 1382)

In the case at bar, the parties disagree as to whether distributing Issues and Answers in the hallways of Antietam is the type of conduct which Congress sought to protect in enacting the Equal Access Act. On its face, the Act obviously guarantees students of public, secondary schools that they will have the opportunity

to conduct meetings in school as long as certain conditions are met. The term "meeting" is defined specifically in the Act to include those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." 20 U.S.C. Section 4072(3). Further understanding of the term "meeting" is provided by the report of the Senate Judiciary Committee regarding the Act. The Committee contemplated that the Act would guarantee to students the following opportunity:

> There would be no "religious teacher" supplied by the school. Instead, the students themselves would be able to initiate and direct meetings that include religious expression. Such meetings would be voluntary in the truest sense of the word. (pp. 1382-1383)

From this portion of the Senate report, it appears that a major characteristic of the meetings for which the Equal Access Act guarantees an opportunity is the voluntariness of the meetings. The voluntariness of the meetings would be protected by the fact that the meetings would be entirely student initiated. Voluntariness would also be assured by the fact that a place would be set aside where it would be necessary for the student to go in order to attend the meeting. Equally, the voluntariness of a student's choice of an activity in which he wished to participate would be protected in that he could reject any other activity by simply not going to the place designated as that activity's meeting place. (p. 1383)

In the case at bar, it appears that the access which the plaintiffs seek is the opportunity to gather in the hallways of Antietam Junior High School in order to distribute Issues and Answers. Rather than attempting to obtain for themselves a meeting place where they might gather with other like-minded students for discussion or religious-oriented activity, the plaintiffs have chosen for the purpose of propagating the principles set forth in Issues and Answers to place themselves in an area through which many students are likely to proceed. (p. 1383)

The court concludes that the distribution of Issues and Answers in the hallways of the school is not a "meeting" under the definition in 20 U.S.C. Section 4072(3) or under the meaning of that term as it is contemplated in the report of the Senate Judiciary Committee. (p. 1383)

In addition to falling outside the definition of "meeting" in 20 U.S. C. Section 4072(3), the gathering of the plaintiffs to distribute Issues and Answers in the

school's hallways does not possess the characteristics of a meeting as described in the Senate report on the Equal Access Act. To the extent that the activity in which the plaintiffs engaged went beyond the actual gathering of two or three students in the hallway to include the confrontation, albeit peaceful, of other students through the offer to those students of literature, the "meeting" conducted by the plaintiffs was not "voluntary in the truest sense of the word." (p. 1384)

The First Amendment to the United States Constitution provides in part that "Congress shall make no law abridging the freedom of speech." The analysis of a claim alleging the violation of the First Amendment right of free speech involves three steps. First, the court must determine whether the activity in which the claimant was involved is speech protected by the First Amendment. If the activity does constitute protected speech, the court must then identify the nature of the forum in order to determine the extent of the government's authority to limit access to the forum. Finally, the court must decide whether the restriction imposed by the government satisfies the appropriate standard. See Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 105 S. Ct. 439, 3446-47. (p. 1384)

For good reason, the defendant does not argue that the distribution by plaintiffs of Issues and Answers is not speech protected by the First Amendment. The Supreme Court has clearly held that the right of free speech includes the right to distribute literature. See Martin v. Struthers, 63 S. Ct. 862. Therefore, the court concludes that the activity in which the plaintiffs engaged is a form of protected speech. (p. 1384)

Before assessing the nature of the forum to which the plaintiffs seek access, it is necessary to define the dimensions of that forum. In Cornelius, the Supreme Court held that the forum should be defined by focusing on the access sought by the speaker. (105 S. Ct. at 3449) Although the plaintiffs in the case at bar have limited their distribution of Issues and Answers to the hallways of Antietam Junior High School, the parties apparently have rested their arguments concerning the nature of the forum on the assumption that the plaintiffs seek general access to the school. Therefore, the court will focus its forum analysis on Antietam Junior High School as a whole rather than focusing specifically on the area where the plaintiffs have distributed their newspapers. (p. 1384)

The Supreme Court summarized the different types of forums which exist on government property. See Perry

Education Association v. Perry Local Educators' Association, 103 S. Ct. 948. The "quintessential," or traditional, public forum is a place such as a street or park which has been traditionally held open to the public for purposes of assembly, communication of thoughts, and discussion of public issues. The second type of forum is "public property which the state has opened for use by the public as a place for expressive activity." The court recognized that the created public forum may be limited for use by certain groups and that if the public forum is a limited one. "The constitutional right of access would in any event extend only to other entities of similar character." Finally, the third type of forum is the nonpublic forum, property "which is not by tradition or designation a forum for public communication." (p. 1385)

In the case at bar, the plaintiffs assert, and the defendant does not dispute, that the defendant "has adopted a policy of allowing students at [Antietam Junior High School] to engage in various noncurriculum related activities. Included among these, students are allowed to choose from 29 various student clubs which meet twice each week during noninstructional time at the end of the school day." There is nothing in the record which indicates that access to the facilities at Antietam has ever been denied to a student group wanting to meet during the time set aside for student activities. There is no evidence which shows that permission to meet is not granted to student groups as a matter of course. On the other hand, the defendant has enforced a policy which prohibits parties who are not students from distributing literature in the school which is not school-sponsored. (pp. 1386-1387)

In the instant case, this court finds that the defendant has created a limited public forum at Antietam Junior High School. The forum is limited in that access thereto is restricted to student groups. (p. 1387)

Although permission may be required for use of the facilities by student groups during the time set aside for student activities, the fact is that there is no indication that permission is not granted as a matter of course. (p. 1387)

In Tinker, 89 S. Ct. 733, the court stated that "in the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." (89 S. Ct. at 739) A constitutionally valid reason for the regulation of speech would exist if the forbidden speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of oth-

ers." (89 S. Ct. at 740) On the other hand, fear that expression of an unpopular viewpoint may cause a disturbance or create discomfort is not a constitutionally valid reason for regulating speech. (p. 1387)

In freedom of speech cases following Tinker, the court determined what standard should be applied to a school's restriction of expression according to the type of forum involved. If the school has created a public forum and has restricted protected speech on the basis of the content of the speech, the school "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." See Widmar, 102 S. Ct. at 274. Even when the created public forum is a limited one, the school must still satisfy the "compelling state interest" test if the restrictions it has imposed are not necessitated by the nature and purpose of the forum. On the other hand, "the State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." See Perry, 103 S. Ct. at 955. (p. 1387)

The court concludes primarily on the basis of Mesaros' deposition that the restrictions placed on the distribution of Issues and Answers were at least to some extent content-based and were not merely content-neutral time, place, and manner restrictions. Therefore, to pass constitutional muster the restrictions must be narrowly drawn to a compelling state interest. The defendant concedes this point but argues that the defendant's desire to avoid violating the Establishment Clause of the First Amendment is a compelling state interest which justifies the restrictions. (p. 1388)

This court concludes that the defendant would not be violating the Establishment Clause of the First Amendment by permitting the distribution of Issues and Answers in Antietam Junior High School according to reasonable time, place, and manner restrictions as those restrictions are enforced with respect to the other activities which take place in the school's limited open forum. (p. 1389)

Disposition: The defendant school district was enjoined from refusing to allow the plaintiff students to distribute Issues and Answers inside the junior high school. The school district could, however, impose content-neutral time, place, and manner restrictions on the students' distribution of the paper inside the school. (p. 1394)

Citation: Rivera v. East Otero School District R-1, 721 F. Supp. 1189 (D.Colo. 1989)

Facts: This is an action by parents and students at La Junta High School (LJHS) operated by East Otero School District R-1 (the "District"), seeking relief from past and prospective application of an official policy concerning the distribution of literature in the district. The controversy arises from the efforts of the high school students to distribute to other students a free nonstudent newspaper called Issues and Answers published by Student Action for Christ, Inc., also known as The Caleb Campaign. Ricardo Chavira and Jeffrey Taylor were suspended for distributing that paper in violation of the subject policy. The complaint alleges that they and Dawn Lagergren desire to distribute the paper but are in apprehension of sanctions for violation of the policy. (pp. 1190-1191)

The plaintiffs' claims include the contention that they are entitled to relief under Title 42 U.S.C. Section 1983 because the defendant's policy violates the students' freedom of speech contrary to the constitutional limitations in the First Amendment to the United States Constitution. (p. 1191)

Issues: The two major questions at hand are: (1) Is the school district's ban on material which proselytizes particular religious or political beliefs violative of the students' First Amendment guarantee of free speech? (2) Do material facts exist which indicate that the students distributed a religious newspaper in a disruptive manner? (pp. 1189-1190)

Holding: The District Court of Colorado held that (1) the ban on material that proselytizes particular religious or political beliefs was unconstitutional under the First Amendment, and (2) substantial issues of material fact existed as to whether the religious newspaper was distributed in a disruptive manner, precluding summary judgment on a claim based upon past actions. (p. 1189)

Reasoning: The defendant contends that the plaintiffs' First Amendment claim must be dismissed because LJHS is not a public forum. Accordingly, the restrictions of the policy do not involve any fundamental right and the court's inquiry is limited to whether the restrictions are reasonable. The analysis is fundamentally flawed because it ignores the holding in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 73, and it misreads Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, and Bethel School District v. Fraser, 106 S. Ct. 3159. (p. 1192)

In the clearest possible language, the Supreme Court in Tinker recognized that students are protected by the Constitution in the school environment and that prohibitions of pure speech can be supported only when they are necessary to protect the work of the schools or the rights of other students. (p. 1192)

The holding in Tinker did not depend upon a finding that the school was a public forum. The court did say that "when [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions." (89 S. Ct. at 740) Thus, whether or not a school campus is available as a public forum to others, it is clear that the students, who of course are required to be in school, have the protection of the First Amendment while they are lawfully in attendance. (p. 1193)

This case is different from Tinker in that it involves distribution of printed matter rather than oral communication, but writing is pure speech. Peaceful distribution of literature is protected speech. See United States v. Grace, 103 S. Ct. 1702, 1706; Martin v. City of Struthers, 63 S. Ct. 862, 863, (free speech includes right to distribute literature). (p. 1193)

In Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, the Court approved the authority of a public school principal in limiting the content of a newspaper written and published as a part of the course work of a journalism class. The court held that the newspaper was not a public forum because it was part of the educational curriculum and a regular classroom activity. (p. 1193)

That same distinction makes this case different from Bethel School District v. Fraser, 106 S. Ct. 3159, in which the Court ruled that a student was appropriately disciplined by the school authorities for the offensive tone of a nominating speech at a school assembly. (p. 1193)

Political speech is protected by the First Amendment, as is religious speech. Advocacy and persuasive speech are included within the First Amendment guarantee if the speech is otherwise protected. When a law infringes on protected speech, the proponent of the validity of the statute "bears the burden of establishing its constitutionality." See Wilson v. Stocker, 819 F.2d 943, 949 (10th Cir. 1987), quoting ACORN v. Municipality of Golden, 744 F.2d 739, 746 (10th Cir. 1984). The government must show a compelling state interest to infringe protected speech and any infringement must be narrowly tailored to meet the compelling interest. (p. 1194)

The defendant argues that freedom for students to communicate with other students outside the classroom on religious and political subjects is incompatible with the mission of the school. That argument is patently frivolous. The district cannot completely muzzle the students to save itself the difficulty of determining which speech it may constitutionally proscribe. Most importantly, the mission of public education is preparation for citizenship. High school students, who at LJHS include persons of voting age, must develop their own sets of values and beliefs. A school policy completely preventing students from engaging other students in open discourse on issues they deem important cripples them as contributing citizens. Such restrictions do not advance any legitimate governmental interest. The defendant's argument is perilously close to a claim that suppression of lawful speech is legitimate when it is convenient. This defense is categorically rejected. (pp. 1194-1195)

Because students have a right to engage in political and religious speech, and because the district has no compelling interest in restricting that speech, the ban on "material that proselytizes a particular religious or political belief" is unlawful. That portion of Policy KJA is therefore void on its face. In theory, religious or political speech could be substantially disruptive or obscene, but obscene materials and material promoting disorder and other unprotected speech are prohibited by other parts of Policy KJA. The sole purpose of this prohibition is to ban protected speech. (p. 1197)

This restriction is also facially invalid because it gives school officials unfettered discretion to apply it to whatever speech they choose, while failing to give students fair warning of what is prohibited. The Constitution requires a high degree of specificity when imposing restraints on speech. This principle has been most strictly applied in the area of prior restraints. See Shuttlesworth v. City of Birmingham, 89 S. Ct. 935, 938-39. A "regulation imposing prior restraint must be much more precise than a regulation imposing post-publication sanctions." See Baughman v. Freienmuth, 478 F.2d 1345, 1349 (4th Cir. 1973) (high school case). (p. 1197)

Additionally, this prohibition is overbroad and void on that ground. Courts routinely strike down school prohibitions on speech when there is no express requirement that the speech be disruptive, and hence unprotected under Tinker. (p. 1197)

Some courts have held that prior restraints on student distribution of literature are per se unconstitu-

tional. See Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988). Others have found prior restraint policies, if accompanied by specific standards and procedural safeguards, to be constitutional. See Bystrom v. Fridley High School, 822 F.2d 747 (8th Cir. 1987). Assuming without deciding that prior restraints are not per se unconstitutional in high schools, this prior restraint system is facially invalid. (p. 1198)

The regulation incorporates one of the central evils of prior restraints: it gives the government the power to suppress speech in advance while imposing no time limits or other procedural obligations on school officials that would ensure that speech is suppressed to the minimum extent possible, or that the speech is suppressed for good and expressed reasons, rather than at the whim of school officials. This policy gives school authorities the power to extinguish the right of students to speak through inaction and delay. Further, contrary to the constitutional presumption that speech is protected, the burden of proving that the speech is lawful is placed on the would-be speaker, rather than the censor. (p. 1198)

Disposition: The district court ordered that: (1) the motion for summary judgment by the defendant East Otero School District be denied; (2) the motion for summary judgment by the plaintiff students be granted in part; (3) the part of the district's policy which prohibits "material that proselytizes religious or political belief" be declared unconstitutional; and (4) to the extent that district policy and regulation require prior approval for "material that proselytizes a particular religious or political belief," the policy and regulation be declared unconstitutional. (p. 1198)

Citation: Hemry by Hemry v. School Board of Colorado Springs, 760 F. Supp. 856 (D.Colo. 1991)

Facts: The minor plaintiffs identify themselves as "Christian students" at Wasson High School, who believe it is part of their religious duty to distribute the newspaper published by the Caleb Campaign, in Herrin, Illinois, entitled Issues and Answers, to their fellow students. The minor plaintiffs have engaged in distribution of the newspaper outside the school building for the last several months. In October of 1989, the minor plaintiffs (and others including the youth pastor of the Mesa Hills Bible Church, Joel Barber) initially met with the principal of their high school, Mr. Houston, regarding the minor plaintiffs' desire to distribute the newspaper. From this initial meeting with Mr. Houston, the minor plaintiffs, also with the assistance of Pastor Barber, sought to expand the dissemination of the newspaper at Wasson High. (p. 858)

> The dispute arises from the application of the policy to limit the distribution made by the minor plaintiffs to the area outside the school building, and to prohibit the minor plaintiffs from distributing their newspaper in the hallways of Wasson High. The plaintiffs contend that the prohibition of distribution in the hallways of the school is a violation of their free speech rights secured by the First Amendment to the United States Constitution. (pp. 858-859)

Issues: The primary First Amendment issue is whether the school district, through the high school principal, is acting appropriately, under applicable standards for the regulation of a nonpublic forum, in implementing a policy to prevent students from distributing religious newspapers in the school hallways. (p. 857)

Holding: The District Court of Colorado ruled that the restrictions on the distribution of a religious newspaper were appropriate in light of the nature and purpose of a nonpublic forum. (p. 856)

Reasoning: The plaintiffs argued in their motion for preliminary injunction that the policy amounts to a content-based prohibition. The plaintiffs asserted that the present case is indistinguishable from the facts and ruling dictated by Rivera v. East Otero School District, R-1, 721 F. Supp. 1189 (D.Colo. 1989). In Rivera, the court held unconstitutional a school policy which specifically banned religious or political materials from distribution on school premises; in his opinion, Judge Matsch considered whether the distribution of Issues and Answers in a nondisruptive manner fell with the confines of protected speech and whether the school's policy of restricting distribution is in contravention of that constitutional limitation on governmental authority. See Rivera, 721 F. Supp. at 1191. There is no such articulated ban on distribution of religious or political materials in the policy under consideration. The fact that the materials which the plaintiffs wish to distribute in the school hallways is of a religious and political nature does not cause a restriction on the distribution of such materials to be content-based. It is clear from the testimony of the minor plaintiffs and defendant Houston, the principal of Wasson High, that the plaintiffs are not being denied access to other means of distribution. These were clearly available to them, as they were to other groups or individuals who desired to distribute information to Wasson High School students. (pp. 859-860)

Rivera also reiterated the principle of Tinker, that "[the school] 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." See Rivera, 721 F. Supp. at 1194, citing Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 738. In this case, it is abundantly clear that there has been no attempt to regulate the content of the plaintiffs' speech based on an unclearly articulated "fear of disruption." If the plaintiffs are allowed to distribute in the hallways, so must other organizations be allowed the same privilege. The effect of such a decision on the school environment would be devastating to those who strive to maintain some order in the classrooms and hallways. (p. 860)

The testimony of Mr. Houston has illustrated that the prohibition on distribution of the plaintiffs' materials is based not on any desire to avoid the unpleasantness that accompanies an unpopular viewpoint, but rather the desire to maintain some space for the orderly presentation of the school curriculum. If the plaintiffs, as well as the other persons or organizations which have requested permission to distribute at Wasson High, were allowed to distribute their materials in the hallways of the high school, it would hardly result in a theoretical suggestion of disruption. Common sense dictates that the hallways would resemble a three-ring circus. (p. 861)

Because the hallways of Wasson High School are neither a public forum (traditional or otherwise) nor a limited public forum (opened for the purpose of public discourse), the court now turns its analysis to the nonpublic forum. The only applicable regulation in this case is a time, place, and manner regulation which has been applied equally to those seeking non-school related distribution within Wasson High School. This fact is not in dispute. There was no evidence submitted by the plaintiffs which would indicate that the regulation by the school, in the form of its policy and as implemented by Mr. Houston, was unreasonable or an attempt to suppress expression. Accordingly, the school district, through the principal of Wasson High School, acted appropriately under the applicable standards for regulation of a nonpublic forum. (p. 863)

Disposition: The plaintiffs' motion for injunctive relief was denied. (p. 864)

Citation: Slotterback v. Interboro School District, 766 F. Supp. 280 (E.D.Pa. 1991)

Facts: In this case, the plaintiff student seeks declaratory and injunctive relief grounded on the First and

Fourteenth Amendments, as well as on Title 42 U.S.C. Section 1983. (p. 283)

Plaintiff Scott Slotterback is a 16-year-old eleventh grade student at Interboro Senior High School (ISHS) in Prospect Park, Pennsylvania. Defendant Interboro School District is a public school district with administrative offices in Prospect Park. (p. 283)

Encouraged by his church to bear witness to his Christian faith, the plaintiff began to distribute religious tracts at ISHS during the autumn of his sophomore year, 1989-90. He was joined by a friend, Keith Ferry, who is a grade below the plaintiff at ISHS. Designed like comic strips, the tracts depicted a twentieth-century man's death and resurrection. Under each frame was a quotation from the Bible. (p. 284)

According to the plaintiff, he distributed tracts to students in the hallways and cafeteria area of ISHS approximately 44 times between November 1989 and May 1990. Only once did he distribute in a classroom. Ferry testified at his deposition that he began distributing in the hallways and cafeteria area of the school in September and October 1989, and that he distributed in a classroom twice during that period. Between October 1989 and May 1990, Ferry distributed tracts over a dozen times in the hallways and cafeteria area, in addition to leaving tracts on the school's bathroom sink, on the bathroom toilets, and at a bus stop. (p. 284)

Several teachers testified that the distributions affected activities at ISHS. One teacher testified that the plaintiff, and between four and nineteen other students, caused a blockage in the school's hallways when they distributed tracts between class periods to passing students. The teacher stated that, when she told the students to go to their classes, the plaintiff became belligerent and used obscenities. The teacher then took the plaintiff to Principal Nicholas Cianci's office. (pp. 284-285)

When the plaintiff arrived at Cianci's office, Cianci ordered him to cease his hallway distributions or risk suspension. Subsequently, Cianci consulted the school district's solicitor about the plaintiff's conduct. Meanwhile, the plaintiff continued his distributions. (p. 285)

Cianci then met again with the plaintiff and handed him a handwritten note setting forth the permissible time, place, and manner of future distributions. Such distributions would be permitted only twice during the remainder of the school year; would be restricted to

the area around the exit doors of ISHS; and would have to occur after school hours, without "argument[s], fights, or litter." Cianci was to be notified in advance of the distribution dates chosen. (p. 285)

The plaintiff filed this action on April 13, 1990.

Between April and July 1990, Interboro School District developed an official "Procedure for Distribution of Non-School Written Materials" (the new policy). Designed to regulate the distribution of written material that is not "part of the curricular or extracurricular programs of the Interboro School District," the new policy sets forth procedures for the distribution of such nonschool material within the district's schools. (p. 285)

In recent years, students belonging to extracurricular groups at ISHS—most of which have faculty advisors—have been permitted to distribute literature at the school. For example, Students Against Drunk Driving (SADD), which has a faculty advisor, has been allowed to distribute group literature at least two times each school year, during lunchtime, at tables outside the school cafeteria. In addition, several community groups have used ISHS facilities in recent years. (p. 286)

During the 1990-91 school year, the plaintiff and Ferry have continued to distribute tracts throughout ISHS. There is no evidence in the record that any of those distributions has resulted in disruption. (p. 286)

The parties have filed cross-motions for summary judgment, and the plaintiff has twice amended his complaint for declaratory and injunctive relief. Oral argument was held on March 12, 1991. (p. 286)

Issues: The major First Amendment issues in this case are: (1) Does freedom of speech protect both political and religious speech in public schools and encompass the right to distribute peacefully written expression? (2) Is a public high school a limited public forum in which the school district's content-based regulations of student speech are subject to the strict scrutiny standard of review to determine whether the regulations are narrowly tailored to a compelling governmental interest and do not grant school officials unbridled discretion? (3) Is there adequate reason for school officials to anticipate that substantial interference with the work of the school will recur if students are permitted to continue distributing religious tracts? (pp. 281-283)

Holding: The District Court for the Eastern District of Pennsylvania held that: (1) the guarantee of freedom of speech protects both political and religious speech and encompasses the right to distribute peacefully written expression; (2) governmental intent to create public secondary schools as limited public fora, during school hours, for the First Amendment personal speech of the students is intrinsic to the dedication of those schools; (3) the school district's content-based ban on materials that proselytize a particular religious or political belief was not narrowly tailored to a compelling governmental interest in providing an educational environment at high school or avoiding Establishment Clause problems; (4) the regulations were invalid insofar as they gave school officials unbridled discretion to suppress protected speech in advance and imposed no time limits or other procedural obligations, and insofar as they restricted distributions to exit doors at the end of the school day; and (5) there was genuine issue of material fact, precluding summary judgment, as to whether school officials had reason to anticipate that substantial interference with the work of the school would recur if students were permitted to continue their distribution. (pp. 280-281)

Reasoning: The plaintiff contends that his distribution of religious tract is First Amendment protected speech and that, as a consequence, the school district's new policy should be analyzed in the light of Supreme Court opinions undertaking a public forum analysis. (p. 286)

According to the plaintiff, the school district, by opening ISHS for use by community groups and for distributions by community organizations and student groups such as SADD, has created a "limited public forum." As a result, the court's strict scrutiny should be applied to the school district's content-based exclusion of "material that proselytizes a particular religious or political belief." Because that exclusion is not narrowly tailored to a compelling interest and because it is unconstitutionally vague, it should, the plaintiff argues, be declared invalid on its face and as applied to him. (p. 286)

Moreover, the plaintiff argues that the time, place, and manner regulations in the new policy fail the test of narrow tailoring to which content-neutral regulations in a limited public forum are subject. The plaintiff points specifically to SADD's distributions in hallways near the school's cafeteria and to the absence of any distribution-related disturbances during the current school year. He argues that distribution of nonschool materials should be permitted, at

the very least, near exit doors before and after school and in hallways adjacent to the cafeteria at lunchtime. (p. 286)

Finally, the plaintiff contends that the portions of the regulations granting building principal's discretion to approve or disapprove distributions and to impose sanctions, as well as the requirement of advance notice and submission, operate as unconstitutional prior restraints. To justify such prior restraints in the school context, the plaintiff asserts that the school district must show "substantial facts" that "reasonably support" a forecast of likely disruption from a proposed distribution. In this case, the plaintiff argues, his distribution of religious tracts in 1989-90 caused only a few five-minute interruptions of classroom instruction and one student's tardy arrival to class—hardly a substantial basis upon which to forecast disruption from future distributions. Hence, according to the plaintiff, the prior restraint provisions must be declared facially invalid. (pp. 286-287)

Although it concedes that the plaintiff's distributions are protected speech, the school district counters that ISHS hallways are a nonpublic forum in which no student or community group—not even SADD—has been permitted to distribute. As a conse-quence, the school district contends, each provision of the new policy, whether content-based or not, need only reasonably relate to the educational purposes that ISHS serves. No provision of the policy fails to satisfy that reasonable relationship test, according to the school district. Even assuming that the hallways are a limited public forum, the school district submits, the content-based exclusion is narrowly tailored to serve two of the district's compelling interests: first, the need to preserve an educational environment at ISHS, which the record reveals has been jeopardized by the plaintiff's and Ferry's distributions; and second, the need to avoid creating an impression that the school district endorses religion, which the Establishment Clause prohibits. (p. 287)

Lastly, the school district argues that its content-neutral time, place, and manner regulations are narrowly tailored to serve the significant ISHS interest in preserving the school's educational environment. (p. 287)

It is axiomatic that written expression is pure speech. See Texas v. Johnson, 108 S. Ct. 2533, 2544. It is equally well-settled that the guarantee of freedom of speech that is enshrined in the First Amendment encompasses the right to distribute peacefully. See

United States v. Grace, 103 S. Ct. 1702, 1706. In addition, the First Amendment protects both political speech, see, e.g., Bigelow v. Virginia, 95 S. Ct. 2222, 2232-33, and religious speech. See Widmar v. Vincent, 102 S. Ct. 269, 274. (p. 288)

Students do not shed their right to freedom of expression at the school house gate. See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736, 379. Nonetheless, the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings. See Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159, 3163. (p. 288)

In determining the scope of students' constitutional rights, courts must weigh the special characteristics inherent in a school environment. See Tinker, 89 S. Ct. at 736. Courts and commentators are divided, however, over whether judicial "forum analysis" should apply to regulations limiting students' personal, protected speech that occurs on school property during school hours (p. 288). Nevertheless, the question remains: If a forum analysis is required and if the court performs such an analysis, is strict scrutiny of content-based regulations the appropriate standard of review? (p. 291)

Under judicial forum analysis, limitations that the government lawfully may impose on protected speech vary with the nature of the relevant forum. (p. 291)

"Traditional public fora" are defined as places such as streets or parks that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." See Gregoire v. Centennial School District, 907 F.2d 1366, 1370 (3d Cir. 1990) Speakers can be excluded from a traditional public forum only when the exclusion is necessary to serve a compelling state interest, and the exclusion is narrowly drawn to achieve that interest. See Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 105 S. Ct. 3439, 3448. (p. 291)

A designated public forum is created when the state intentionally opens public property for use by the public at large for assembly and speech, for use by certain speakers or for the discussion of certain subjects. See Cornelius, 105 S. Ct. at 3449. A state is not required to maintain the open character of the forum. While the forum is open, however, content-based regulation of speech is subject to the same strict

scrutiny analysis applied in a traditional public forum. See Gregoire, 907 F.2d at 1370. (p. 291)

A third forum category is the nonpublic forum. Nonpublic fora exist when the state does not designate public property for indiscriminate expression by the public at large, by certain speakers, or on certain subjects. Although nonpublic fora can exist even when public property has been dedicated to use for communicative purposes, the nature of the dedication must be such that the contemplated communication (1) is not indiscriminate on any topic or for any group, or (2) requires some measure of state endorsement or action. Absent one of those two limitations, the forum is a designated public forum. Content-based regulation in a nonpublic forum is examined under the "reasonable nexus" standard. "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." See Cornelius, 105 S. Ct. at 3451. (p. 291)

Public high schools are not quintessential public fora. At issue, then, is whether ISHS (if it must be analyzed as a forum) fits under the designated public forum category or the nonpublic forum category. (p. 291)

The court assumes that limited public fora fall within the designated public forum category. This court concludes that government intent to create public secondary schools as limited public fora, during school hours, for the First Amendment personal speech of the students who attend those schools, is intrinsic to the dedication of those schools. Only when the schools cease operating is that intent negated. (pp. 292-293)

Thus, a public forum analysis leads the court back to the strict scrutiny standard of review. Accordingly, the court will examine the defendant school district's content-based regulations of student speech to determine whether the regulations are narrowly tailored to a compelling governmental interest. (p. 293)

The school district argues that its concededly content-based ban on "material(s) that proselytizes a particular religious or political belief" is narrowly tailored to compelling governmental interest in (1) providing an educational environment at ISHS and (2) in avoiding Establishment Clause problems. The school district fails to carry its burden on this argument. (p. 293)

Notwithstanding the school district's first asserted interest, a public secondary school environment is not

fully "educational" where students' personal intercommunication is restricted to particular issues. Such restrictions stunt the growth of budding citizens and budding minds and are invalid absent a legitimate constitutional justification. See Tinker, 89 S. Ct. at 740 (students' intercommunication is important part of educational process). (pp. 293-294)

The school district's primary argument is, then, that a content-neutral policy would require the district to endorse religion in contravention of the Establishment Clause. Balancing the free speech interest of the plaintiff and other ISHS students against the Establishment Clause interest of the school district, the court concludes that the latter interest is not compelling and does not justify content-based discrimination. (p. 294)

Applying to the states through the Fourteenth Amendment, the Establishment Clause is part of an affirmative defense against a free speech claim, rather than "a limitation on the definition of that right." See Bender v. Williamsport Area School District, 741 F.2d 535, 558 n. 27 (3d Cir. 1984). The appropriate inquiry for this court is: If the school district were to permit nondiscriminatory distribution of nonschool written materials, including materials that proselytize a particular religion, would there be an establishment of religion? (p. 294)

The court concludes that if Interboro School District were passively to permit nondiscriminatory distribution of nonschool written materials at ISHS during noninstructional time, the school's students would be mature enough to understand that such a policy would not endorse—but would, rather, be neutral toward—religious literature distributed at the school. The primary effect of such a policy would be one that would neither advance nor inhibit religion. (p. 296)

The plaintiff also challenges as content-based and subject to strict scrutiny the absolute prohibition of "material that invades the rights of others or inhibits the functioning of the school, or advocates interference with the rights of any individual or with the normal operation of the school." (p. 297)

Plainly, Tinker permits school officials to punish students for distributing the material that these provisions ban. To be sure, even in a limited public forum, public school officials have a compelling interest in preventing material disruptions of classwork, substantial disorder, and invasion of the rights of others. (p. 297)

At issue, then, is whether the prohibitions validly can be applied to the plaintiff and other students. This court concludes that there is sufficient evidence for a reasonable fact finder to find that the plaintiff and other students "substantially" interfered with the work of the school, and that ISHS officials have "reason to anticipate" that such substantial interference will recur if the students are permitted to continue their distribution. Given the presence of that genuine issue, the case will proceed to trial—a trial limited to the question whether ISHS officials have reason to anticipate substantial interference with work at ISHS. (pp. 297-298)

The court now turns to examine the challenged content-neutral regulations in the new policy. (p. 298)

Parts A and B of the new policy provide: in paragraph A.1, that a party desiring to distribute nonschool written materials must present a sample to the building principal three days before the day of proposed distribution; in paragraphs A.2 and A.3, that the building principal or his nominee is then to review the material and approve it in writing unless subject to the ban in Schedule A; and in paragraph B.1, that once the distribution is approved, the party must advise the principal of the days of distribution. (p. 298)

To be sure, these paragraphs form a system of prior restraint on students' protected, personal First Amendment speech. (p. 298)

Supreme Court cases addressing prior restraints have identified two evils that will not be tolerated in prior restraint regulations. (p. 298)

First, a regulation that places "unbridled discretion" in the hands of a government official constitutes a prior restraint and may result in censorship. Second, a prior restraint that fails to place limits on the time within which the official must decide whether proposed speech will be allowed is impermissible. (p. 298)

Parts A and B incorporate both of the evils that doom prior restraints under the First Amendment. Not only do those sections of the policy give school officials unbridled discretion to suppress protected speech in advance, but also they impose no time limits or other procedural obligations on school officials to ensure that speech is suppressed only briefly and for significant reasons, rather than arbitrarily. (p. 299)

Disposition: The motion of the plaintiff student for summary judgment was granted in part and denied in part. The motion of the defendant school district was granted in part and denied in part. The court ordered that the case proceed to trial on the question of whether ISHS officials had reason to anticipate substantial interference with work at the high school should distribution of religious tracts continue at the exit doors before and after school and in the cafeteria area at lunchtime. (p. 302)

Citation: Duran by and through Duran v. Nitsche, 780 F. Supp. 1048 (E.D.Pa. 1991)

Facts: Plaintiff Diana Duran was a fifth-grade student at East Coventry Elementary School of the Owen J. Roberts School District during the 1989-1990 academic year. East Coventry Elementary is a public school in Pottstown, Pennsylvania. The plaintiff, through her parents as guardians, brings this action against one of her fifth-grade teachers, her fifth-grade principal and various school district officials. (p. 1049)

The plaintiff was a student in the school's Academically Talented Program ("ATP"). The ATP class met once each week. Defendant Linda Nitsche was the teacher of the plaintiff's ATP class. (p. 1049)

Sometime in March of 1990, defendant Nitsche gave the ATP class an "independent study" assignment. Students were to work on the independent study project during the remainder of the school year. The assignment required each student to choose a topic for research. Defendant Nitsche and the individual student's parents were to approve the topic. The plaintiff chose as her topic "The Power of God." The topic was approved by defendant Nitsche and by the plaintiff's parents. (pp. 1049-1050)

As part of the assignment, students were required to bring their research materials to ATP class each week so that their progress on their project could be monitored by defendant Nitsche during class time. Contrary to assignment instructions, the plaintiff never brought any research materials to class. (pp. 1049-1050)

Sometime before her oral report was to be presented, the plaintiff submitted a handwritten list of proposed survey questions to defendant Nitsche for review. Defendant Nitsche typed the survey form for the plaintiff, but told the plaintiff that the survey form needed more work. At no time did defendant Nitsche grant the plaintiff permission to distribute her survey form. The plaintiff photocopied the survey form on

school premises, despite the fact that defendant Nitsche did not grant the plaintiff permission to do so. Faculty permission is generally a prerequisite to student use of school photocopying facilities. (p. 1050)

The survey forms contained five "multiple choice" type questions. After asking for a student's gender, age, and class, the survey asked:

> 4. Do you believe in God?
> Yes
> No
> If your answer is no, please hand in your survey now.
> 5. I believe in God's power to
> control my life
> control life and death
> forgive sin
> other (p. 1050)

There was nothing on the form other than these questions and some simple instructions. Accordingly, there was nothing on the form to indicate whether the survey had been prepared by a school official or by a student. (p. 1050)

On the morning of the day on which ATP students were scheduled to give their oral presentation, the plaintiff asked one of her teachers, identified by the parties only as "Mr. Latshaw," if he would distribute survey forms to five student volunteers from Mr. Latshaw's class. After reviewing the plaintiff's survey form, Mr. Latshaw refrained from distributing it to students; instead, he brought the survey form to the attention of the principal of the school, defendant Kenneth Swart. (p. 1051)

Defendant Swart informed Mr. Latshaw that he should not distribute the survey forms. Defendant Swart told the plaintiff, however, that he would instruct defendant Nitsche that the plaintiff's failure to include these surveys in her oral report should not warrant a deduction in the plaintiff's grade for the assignment. At no time did defendant Swart tell the plaintiff that she was not permitted to use the results of the surveys that she had distributed herself, nor did he tell her that she was precluded form distributing more survey forms without teacher assistance. (p. 1050)

The plaintiff's unpreparedness kept defendant Nitsche from knowing the precise nature of the plaintiff's proposed report. Without such information, defendant Nitsche was concerned as to whether the report was appropriate for the fifth-grade classroom setting. Based on this concern, defendant Nitsche decided to keep the

> plaintiff from presenting her oral report to the rest of the class. Instead, defendant Nitsche required the plaintiff to present her report to defendant Nitsche in the school library, without the presence of other students. (p. 1050)
>
> At all times relevant to these occurrences, the school district had no stated policy specifically governing religion in school district schools. Policy No. 6144, however, governing "Controversial Issues and the School Program," was in place at the time of the incidents now in question. Since these incidents, the school district has adopted a policy specifically relating to religion in the classroom. (pp. 1050-1051)
>
> The plaintiff claims violations of her constitutional right to free speech guaranteed by the First Amendment of the United States Constitution. The plaintiff claims these violations occurred by virtue of: 1) defendant Swart's decision to preclude distribution of the survey form, and 2) the defendant Nitsche's decision to require the plaintiff to give her oral presentation in the library, rather than in the classroom. The plaintiff seeks a declaration of the existence of an unwarranted First Amendment violation, and an injunction prohibiting the school district form acting similarly in the future. The defendants claim that no free speech violation occurred, and that even if one did, that the First Amendment's Establishment Clause justifies any free speech intrusion under these circumstances. (p. 1052)

Issues: Three major First Amendment questions arise from this case. First, does a public school create a public forum for the purpose of distributing student survey forms by teachers during class periods, where a school does not intend to open a forum for such a purpose? Second, does a public school teacher create a public forum when she permits students to give oral presentations on their report topics in the classroom, where the teacher does not intend to allow use of the class period as a forum for open discussion? Third, does the principal's decision to preclude the teacher's distribution of a student's survey asking questions about God violate the student's right to free speech? (p. 1049)

Holding: The District Court for the Eastern District of Pennsylvania held that: (1) the school district did not create a public forum for the purpose of distributing student survey forms by teachers during class periods; (2) the teacher did not create a public forum when she permitted students to give oral presentations on their report topics in her classroom; and (3) the principal's decision to preclude the

teacher's distribution of a student's survey asking students about their views on God, which was part of the student's independent study project, and the teacher's decision to require the student to give her oral presentation on her project only before the teacher, rather than in the classroom, were reasonably related to legitimate pedagogical concerns and therefore, did not violate the student's right to free speech. (p. 1048)

Reasoning: It has become an axiom of First Amendment law that students do not shed their right to freedom of expression at the schoolhouse gate. See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736, 739. At the same time, however, the rights of students to express their views are not coextensive with the rights of adults in other settings. See Bethel School District No. 403 v. Fraser, 1036 S. Ct. 3159. (p. 1052)

In analyzing the Constitution's Free Expression Clause in the public school context, the court must first determine whether the school has designated a public forum for discourse under the particular circumstances of a given case. Several factors are relevant in determining whether the state has created a designated public forum. First, the court must look to governmental intent by evaluating "the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." See Cornelius, 105 S. Ct. at 3449. Second, the court must analyze the use to which the forum has been put by examining whether the forum "has been limited by well-defined standards tied to the nature and function of the forum." See Gregoire, 907 F.2d at 1371, citing Perry Education Association v. Perry Local Educators' Association, 103, S. Ct. 948, 955-956. Third, a court may also look to the "permission procedure" related to such speech, and to whether similar speech has been permitted or disallowed in the past. (pp. 1052-1053)

Under these standards, this court has little difficulty determining that no public forum was established by the school with respect to either the distribution of the survey forms or the oral presentation. First, there has been absolutely no evidence presented that could support a conclusion that a public forum was created for the purpose of distributing survey forms by teachers during class periods. Certainly, there is no evidence of governmental "intent" with respect to opening a forum for such a purpose in this case, and the "well-defined standards" to which teachers are typically held do not require the use of the classroom for such purposes. There is no evidence of a "permis-

sion procedure" that was in place for such a purpose. Second, defendant Nitsche did not create a "public forum" when she permitted students to give oral presentations on their report topics in her classroom. There is no evidence of her intent to allow the use of the ATP class period as a forum for open discussion. The primary purpose of the independent study assignment was to engage the students in an introduction to research skills. The independent study was not designed to operate as a vehicle for student expression and debate. (p. 1053)

The "permission procedure" analysis, as contemplated by Cornelius, further supports the conclusion that defendant Nitsche did not establish an open forum. Before topics were assigned, they were approved by defendant Nitsche and then by the students' parents. At no time were students given the impression that they would be permitted to pick any topic of their choice. The procedure by which defendant Nitsche solicited and approved of topic choices undoubtedly falls far short of permitting the type of unrestricted, uninhibited discourse necessary to support the existence of a designated public forum. (pp. 1053-1054)

Having concluded that no public forum existed, the court turns to whether the restrictions at issue were "reasonably related to legitimate pedagogical concerns." Because the restrictions are rational regulations of activities that are school-sponsored and/or curriculum related, the court concludes that the restrictions are, in fact, constitutionally permissible. (p. 1054)

As the Supreme Court has recognized, the right of school officials to regulate student expression expands when the speech at issue is made in connection with school-sponsored activity. In addition to the fact that the speech at issue in this case arises in the context of school sponsorship, three considerations mentioned in Hazelwood support the constitutionality of the restrictions now at issue. The Hazelwood court permitted educators to exercise greater control when, inter alia: 1) students would be exposed to material that is inappropriate for their particular maturity level; 2) students would be subjected to expression that could be "erroneously attributed to the school," and 3) the proposed speech is "ungrammatical, poorly written, inadequately researched, [or] biased or prejudiced." See Hazelwood, 108 S. Ct. at 570. (pp. 1054-1055)

Each of the three Hazelwood concerns combined to form the basis for the decisions made by defendants Nitsche and Swart. Both school officials were obviously trou-

bled by the impact of teacher involvement with religious subject matter on students of relatively tender years. To use the language of Hazelwood, both defendants Nitsche and Swart felt that the material was "inappropriate for [the students'] level of maturity," because of the substantial risk that "the views of the individual speaker [would be] erroneously attributed to the school." See Hazelwood, 108 S. Ct. at 570. Moreover, defendant Nitsche had additional justification for her decision to hear the report in the library because the plaintiff's independent study project was "inadequately researched." Id. (pp. 1055-1056)

In light of the court's conclusion that no free speech violation has occurred, the court need not address the defendants' alternative argument relating to a compelling state interest arising out of the constitution's Establishment Clause. (p. 1056)

Disposition: The plaintiff was not entitled to either declaratory or injunctive relief. (p. 1057)

Citation: Clark v. Dallas Independent School District, 806 F. Supp. 116 (N.D. Tex. 1992)

Facts: High school students sued the school district alleging violation of constitutional rights and Equal Access Act with respect to religious activities on high school campus. Motion was filed by the defendants for summary judgment and by the plaintiffs for partial summary judgment. (p. 116)

The plaintiffs attended Skyline High School during the school year beginning in September 1984 and ending in May 1985. Skyline is a part of the Dallas Independent School District (DISD). The plaintiffs allege that a DISD policy violated their First and Fourteenth Amendment rights to free speech, freedom of assembly, freedom of association, free exercise of religion, and equal protection. (p. 118)

The DISD policy in question provides that "student groups shall not be permitted to meet on campus immediately before or after school for religious purposes." Pursuant to this policy, the defendants prohibited the plaintiffs from engaging in religious discussions and meetings and from distributing religious materials on DISD property before and during school. The plaintiffs complain about the enforcement of the policy during the 1984-85 school year. The plaintiffs allege that their "constitutionally protected right of free speech while on the Skyline High School campus and their right to distribution of written religious materials (commonly referred to as 'tracts') was infringed by the [DISD] beginning in September, 1984."

At the time in question, Frank Guzick was the principal of Skyline and Linus Wright was the superintendent of the DISD. Jerry Holley, Philip Ray Jones, and William Dwayne Dawson were assistant principals of Skyline. (p. 118)

In September 1984, the plaintiffs and other students began to meet periodically before school outside Skyline's cafeteria. The plaintiffs engaged in audible prayer and reading of the Bible together. It is undisputed that these meetings were religious in nature. After being informed that a religious meeting was taking place, Guzick, Jones, and Holley broke up the meeting, dispersed the students, and told the participants that the meeting was prohibited by DISD policy. Plaintiff Clark was escorted to the principal's office. (p. 118)

Later in the 1984-85 school year, the plaintiff and other students distributed religious tracts in front of the school building as students exited from the school buses. The defendants prohibited further distribution of the tracts. The plaintiffs contend that there was no disruption or coercion involved in the distribution of the tracts, and that the tracts were only distributed to students who wanted them. (p. 118)

Issues: If several students object to other students distributing religious tracts on the high school campus, does this circumstance give rise to material and substantial disruption of the operation of the school to the extent that the school district may prohibit the distribution of the tracts without violating the students' First Amendment right of free speech? (pp. 116-117)

Holding: The District Court for the Northern District of Texas, Dallas Division, determined that the defendants failed to establish sufficient justification for prohibiting the plaintiffs from distributing religious tracts on campus. Therefore, the defendants' restriction of this activity amounted to a violation of the plaintiffs' constitutional right to freedom of speech. (pp. 121-122)

Reasoning: The First Amendment protects religious speech. See Widmar v. Vincent, 102 S. Ct. 269, 274. It is well settled that written expression is pure speech. See Texas v. Johnson, 109 S. Ct. 2533, 2540. It is equally true that the guarantee of free speech encompasses the right to distribute written materials peacefully. See United States v. Grace, 103, S. Ct. 1702, 1706. (p. 119)

While secondary-school students do not shed their right to free speech at the schoolhouse door, Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736, they do not enjoy the same rights as adults in other settings. See Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159, 3164. However, "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." See Tinker, 89 S. Ct. at 739. (p. 119)

The defendants argue that the restrictions at issue are proper because a public school is not, by tradition, an open forum. However, each of the cases relied upon by the defendants in support of this argument is easily distinguished from the case at hand. The cases relied upon by the defendants involved restriction of activities that were in some way sponsored by the school. E.g., Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, (upholding high school principal's deletion of objectionable articles from the school-sponsored student newspaper); Bethel School District v. Fraser, 106 S. Ct. 3159, (upholding school district's decision to suspend a high school student for giving a sexually suggestive speech at a high school assembly). (pp. 119-120)

The Hazelwood court noted the important distinction between toleration of a particular student's speech and promotion of a student's speech in a school-sponsored publication:

> 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 of whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addressed educators' ability to silence a student's personal expression that happens to occur on school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. (p. 120)

Hazelwood, 108 S. Ct. at 570. (p. 120)

This case involves suppression of a student's personal expression that happens to occur on school premises. In this case, neither school officials nor school-sponsored activities were involved in the restricted conduct. The conduct at issue was voluntary, student

-initiated, and free from the imprimatur of school involvement. Tinker provides the standard for restricting student free speech on campus that is not part of a school-sponsored program: "Where there is no finding and showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained." See Tinker, 89 S. Ct. at 738. The defendants have the burden of establishing that the restriction of the plaintiffs' activity and expression was necessary to avoid material and substantial interference with the operation of Skyline. Id. 89 S. Ct. at 739. (p. 120)

The defendants have failed to establish that the plaintiffs' distribution of the religious tracts gave rise to a material and substantial disruption of the operation of Skyline. The only evidence in this regard is that several students objected to the distribution of the tracts. If school officials were permitted to prohibit expression to which other students objected, absent any further justification, the officials would have a license to prohibit virtually every type of expression. The court's decision on this issue is supported by Rivera v. East Otero School District R-1, 721 F. Supp. 1189 (D.Colo. 1989) and Slotterback v. Interboro School District, 766 F. Supp. 280 (E.D.Pa. 1991). (p. 120)

Defendant DISD has deprived the plaintiffs of their right to free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution. Therefore, the plaintiffs are entitled to recover damages for that deprivation. (p. 120)

The court is of the opinion that the plaintiffs attempts to distribute religious tracts do not fall within the scope of conduct protected by the Equal Access Act. The plaintiffs were not attempting to hold a "meeting" within the scope of 20 U.S.C. Section 4071(a). Therefore, the plaintiffs' claims for violation of the Equal Access Act, insofar as they relate to the defendants' prohibition of the distribution of the tracts, are dismissed. (p. 121)

A blanket prohibition on high school students' expression of religious views, and even proselytizing on campus, is unconstitutional and contrary to the purpose of secondary schools. However, the defendants have submitted sufficient evidence of disruption to prelude summary judgment in the plaintiffs' favor on this issue. The defendants have submitted testimony as to the following consequences of the plaintiffs' activity: (1) the plaintiffs consistently drew large

crowds to hear the religious proselytizing; (2) the plaintiffs used bullhorns to deliver their message; and (3) the plaintiffs' religious activities interfered with other students going to class. There is also evidence that the plaintiffs would continue to speak and proselytize after the school bell rang signaling students that it was time to return to class. (p. 121)

The court is of the opinion that a question of fact exists as to whether the plaintiffs' oral proselytizing and religious meetings constituted a material and substantial disruption of the operation of Skyline High School. This fact question precludes summary judgment for the plaintiffs on (1) their constitutional claims, insofar as they relate to oral activities, and (2) their Equal Access Act claims relating to the conduct of meetings. (p. 121)

The defendants argue that allowing the type of activity in which the plaintiffs were engaged would place the defendants in violation of the Establishment Clause. The court disagrees. "The Establishment Clause is a limitation on the power of governments: it is not a restriction on the rights of individuals acting in their private lives." See Rivera v. East Otero School District R-1, 721 F. Supp. 1189, 1195 (D.Colo. 1989). The defendants' Establishment Clause argument was rejected by the Supreme Court in Board of Education of Westside Community School v. Mergens, 110 S. Ct. 2356. The defendants' Establishment Clause defense is dismissed. (p. 121)

Disposition: The defendants' motion for summary judgment was denied. The plaintiffs' motion for partial summary judgment was granted in part. (p. 122)

Citation: Berger v. Rensselaer Central School Corporation, 982 F.2d 1160 (7th Cir. 1993)

Facts: In Rensselaer, Indiana, representatives of Gideon International have distributed Bibles in the public schools—usually in classrooms—for so many years that no one can seem to remember when the practice began. Moriah H. Berger and her brother Joshua are students in schools operated by the Rensselaer Central School Corporation ("Corporation"). The father of these children, Allen H. Berger, brought this suit on their behalf seeking to have the Corporation's practice declared an unconstitutional violation of the First Amendment's directive that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The district court threw out the Bergers' suit on summary judgment. (p. 1162)

> The Rensselaer Central School Corporation has a written policy allowing the superintendent of schools and the principal of a given institution to grant permission to members of the community who wish to distribute literature or other publications to students. This policy appears to give a principal, in conjunction with the superintendent, total discretion to grant or deny access to school property. Yet the policy offers the principal and superintendent no guidance on how to exercise this discretion other than the general reminder to act in students' best interests. It does not tell school officials whether they may favor certain speakers because some messages are more appropriate for children than others. Nor does the policy tell the superintendent or principal whether presentations and distributions by nonschool personnel may be made during times ordinarily reserved for instruction. (pp. 1162-1163)

> There were no disputes under the policy until Mr. Berger protested to the Corporation that he did not think it appropriate for his children and other students to receive religious material in the public schools. On October 27, 1989, he sent a letter to Superintendent Roberta Dinsmore requesting an end to the practice. Mr. Berger said that the relationship between public schools and the Gideons "is in clear violation of constitutional principles mandating a separation of church and state." The letter was discussed at a meeting of the school board on December 19, 1989. The president of that body, in raising the issue for the first time, also pronounced its resolution by declaring that the board had decided not to alter its policy regarding the Gideons. (p. 1163)

> Though Mr. Berger's letter did not sway the school board, it did scare off the Gideons. According to a representative of the organization, its policy is to sidestep litigation by avoiding schools where it meets strong opposition. Thus the Gideons withdrew their offer to supply Bibles during the 1989-1990 school year, at least temporarily ending a practice that extended back 35 years or more. As a result, neither Joshua nor Moriah Berger actually received a Bible from the Gideons. (p. 1164)

> When the Gideons did distribute Bibles, they sent two representatives who came once a year after clearing a date with the principal. There was no set method of distribution. However, the men usually went to each of five classrooms of fifth graders, always during regular school hours. They spoke for a minute or two about their organization and offered up a painful pun that the books, the covers of which were red, were meant to be read. We take this to mean that the Gideons made at

least some statements to students encouraging them to read the Bible. (p. 1164)

The teachers, though present, did not participate in handing out the Bibles. At times the principal also attended. The students were frequently told to take the publications home to their mothers and fathers and to return the books to their teachers if their parents objected. (p. 1164)

The Gideons were not the only group to take advantage of the Corporation's open-door policy. According to the defendant, the Boy Scouts, Tri-Kappa Sorority, the 4-H Club, and other unnamed groups have at various times addressed students in Rensselaer schools. In addition, these groups and others circulated parental permission forms for participation in their extracurricular activities, and the Jesus' Love Foundation handed out a religious publication titled Young People of the Bible in addition to the nondenominational My Favorite Book, which Joshua Berger received in the first grade. The record contains but one example of school officials exercising their discretion to deny access to outsiders. The superintendent rejected for unspecified reasons a poster that was to be pinned on a bulletin board. Asked the sorts of presentations that would not be permitted in her schools, the superintendent said that she would exclude promoters of "satanism" because "we are responsible for protecting the moral being of the kids." The superintendent seemed to leave room for rejecting other groups as well. (p. 1165)

Issues: Although the primary First Amendment issue concerns the Establishment Clause, a secondary issue of free speech is addressed. Specifically, does the Gideon organization have First Amendment free speech rights to pass out Bibles to public school students? (p. 1161)

Holding: In addition to holding that the classroom distribution of Gideon Bibles to fifth-grade public school students violated the Establishment Clause, the Court of Appeals for the Eleventh Circuit also determined that the Gideon organization did not have free speech rights to distribute Bibles to public school students. (p. 1161)

Reasoning: Attempting a definitional coup, the defendant tells us that this is not, after all, a case about the Establishment Clause but a case about free speech. The issue is said to be the right of Gideons to freely express themselves by handing out Bibles to school-children. Specifically, the Corporation suggests that Rensselaer schools created a designated public forum under Perry Education Association v. Perry Local Edu-

cators' Association, 103 S. Ct. 948, 954-957, by issuing an open invitation to speakers in the community to address schoolchildren. Having opened otherwise nonpublic property to expressive activity, the government is supposedly obliged to treat all speakers equally. To exclude the Gideons, then, would be to discriminate based on the content of their message. Under this analysis, we need not even consider whether the government has established a preference for one religion over another, or for religion in general, by overseeing the distribution of Gideon Bibles in classrooms for nonpedagogical purposes. (p. 1165)

This approach suffers from two failings: it distorts the facts and misconstrues the law. It is factually wrong on two counts. First, the free speech argument presumes that the Corporation did not participate in the Bible distribution. In essence, this is an argument that the distribution of Gideon Bibles lacked state action. Under this view, the Corporation was merely a conduit or neutral nonparticipant through whose doors ideas could pass without changing or being changed by the schools' participation. Several key facts belie the schools' noninvolvement. The Bibles were distributed by Gideons—it is true—but in public schools, to young children, in classrooms, during instructional time, each year for several decades, in the presence of the teacher and often the principal, with instructions to return unwanted books not to the Gideons but to teachers. It would be naive in the extreme to draw any conclusion in these circumstances other than that the Corporation was intimately involved, if not downright interested, in seeing that each student left at the end of the day with a Gideon Bible in his or her pocket. (pp. 1165-1166)

The free speech argument also errs factually by depicting the Rensselaer schools as truly open for a for community speech. After combing the history of Rensselaer schools for examples of such speech, the defendants could find just a few isolated, irregular talks by groups such as the Boy Scouts, the 4-H Club and a sorority. Moreover, the record is barren of addresses or literary distributions by political groups or religious organizations other than the Gideons. The only exceptions were books titled My Favorite Book and Young People of the Bible printed by the Jesus' Love Foundation and a few local merchants. The salient point here is that Rensselaer school classrooms were not, in fact, open and active fora for competing ideas, contrary to assertions by the Corporation. (p. 1166)

One other factual point is worth noting. The defendant contends that as a neutral arbiter of a neutral pol-

> icy, it could not exclude the Gideons without engaging in content discrimination. Yet by the superintendent's own admission, she did exercise discretion to exclude at least one publication and had every intention of excluding other groups she found objectionable, including "satanists" and other unnamed organizations offensive to the "moral being" of children. School officials cannot retain discretion over content on the one hand and on the other pretend to be manacled by the dictates of content neutrality. (p. 1166)
>
> The defendant is also wrong as a matter of law that the First Amendment interest in free expression automatically trumps the First Amendment prohibition on state-sponsored religious activity. The reverse is true in the coercive context of public schools. The conflict between free speech and Establishment Clause interests arises because most religious activity necessarily involves expressive activity, and this expression may be stifled in the government's vigilance to remain neutral toward religion. See Abington, 83 S. Ct. at 1571. More to the point, the First Amendment is intended to restrict religious activity not by individuals but by the government. It is only where individuals seek to observe their religion in ways that unduly involve the government that their expressive rights may be circumscribed. In sum, the defendant's attempt to wrench this case out of Establishment Clause jurisprudence must fail. A public school cannot sanitize an endorsement of religion forbidden under the Establishment Clause by also sponsoring nonreligious speech. (p. 1168)

Disposition: The decision of the District Court for the Northern District of Indiana was reversed. (p. 1171)

Citation: Johnston-Loehner v. O'Brien, 859 F. Supp. 575 (M.D.Fla. 1994).

Facts: Amber Johnston-Loehner was an elementary school student residing in Polk County, Florida. In 1992, she attended the Lime Street Elementary School, a public school in Polk County. The School Administration and Regulation, Chapter Eight, Section 6, included a policy on the distribution of noncourse materials in schools, which was adopted by the Polk County School Board on March 10, 1982, and readopted on April 28, 1987. The policy stated that noncourse religious and secular materials distribution shall be left to the discretion of the superintendent of schools. In addition, the following distribution guidelines shall be in effect:

A. *Superintendent's permission:* All groups desiring the distribution of literature shall have the permission of the superintendent.

B. *Placement*: A place shall be designated within a school facility for the placement of religious and secular literature which may be supplied by outside groups or organizations for free distribution to students.

C. *Designated locations:* Literature is to be made available to students at the designated location only.

D. *Distribution:* No distribution of literature shall be undertaken through the classroom, homerooms, assemblies or on any portion of school property by staff, students, or outsiders.

E. *Announcement:* An announcement shall be made that literature is available at the designated place.

F. *Employee influence:* No school employee may comment upon the decision of any group to make available or not make available literature or in any way influence others concerning literature or concerning the taking or reading of the literature. (p. 577)

In October, 1992, the plaintiff sought to distribute written materials directly to other students during non-class time. The materials were a religious pamphlet and a flyer inviting students to attend a church party as an alternative to Halloween trick-or-treating. The plaintiff consulted her teacher, who took the materials from the plaintiff and gave them to the principal. At the end of the school day, the plaintiff went to the principal's office to retrieve her materials. The principal told her that he would not permit distribution of religious material at the school, and that he had discarded her materials. (pp. 577-578)

The following school year, subsequent to bringing this suit, the plaintiff enrolled in a private school. She is still of public school age and resides in Polk County, but does not at present have definite plans to re-enroll in Polk County public schools. (p. 578)

Issues: The issues in this case are threefold: 1) Is the case moot because the student withdrew from her public school and enrolled in a private school after the suit was filed? 2) Is the prior restraint on the student's speech permissible? and 3) Is the student entitled to attorneys' fees? (p. 575)

Holding: The District Court for the Middle District of Florida held that: 1) the case was not moot even though the student left her school to attend private school after filing the suit; 2) the restriction was an impermissible content-based prior restraint on speech; and 3) the student was entitled to attorneys' fees. (p. 575)

Reasoning: Under Article III of the Constitution, the Court may adjudicate only actual, ongoing controversies, which remain alive throughout the pendency of the proceeding. However, if the immediate controversy is resolved by circumstances, the Court retains jurisdiction "if there is a reasonable likelihood that [plaintiff] will again suffer the deprivation of rights that give rise to their suit." See Hong v. Doe, 108 S. Ct. at 601. In this case, although the plaintiff no longer attends a Polk County public school, she remains a resident of the state and of the school district, and remains entitled to a free state education. Following Hong, there is reasonable expectation that she might again be subjected to the school conduct of which she complains. Therefore, the question of whether the school's policy is constitutionally sound remains justiciable. (p. 578)

The Supreme Court has consistently held that students enjoy First Amendment rights, but that those rights are limited by the special characteristics of the classroom, which demand that school authorities exercise control and discipline over student activities. See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. (p. 579)

Following Tinker, a school seeking to impose a content-based prior restriction on student speech must show that the restricted speech would materially and substantially interfere with school operations or with the rights of other students. Further, the sweep of speech restriction under the policy is so broad that it cannot be supported under the law. The defendants contend that permitting student distribution of religious material would violate the Establishment Clause by putting the school in the position of advancing religion. However, the Establishment Clause forbids government to inhibit as well as to advance religion. It follows that regardless of an avowed purpose to the contrary, the Polk County policy, as applied, violates the Establishment Clause. Moreover, the scope of this school policy encompasses all speech, not merely religious speech. The defendants imply that they do not apply the policy as broadly as it is written, but rather apply it only to speech that, in their view, might be controversial. An overly broad restrictive regulation of speech is not saved by the fact that

those in power choose to apply it sparingly. It is well settled that the First Amendment right of free speech is equally offended by the threat of abridgement as by the act of abridgement. (p. 580)

Regarding the question of damages, the court determines that the plaintiff is not entitled to compensatory damages because she offered no evidence to prove actual injury as a result of the defendants' violation of her First Amendment rights. However, the plaintiff has provided the First Amendment violation itself, and therefore, is entitled to nominal damages of one dollar. (p. 581)

Disposition: The district court declared that the school policy requiring prior approval of student written speech violated the First Amendment, as applied to the plaintiff and on its face. The plaintiff is entitled to permanent injunction against enforcement of the policy. A finding that the disputed policy was unconstitutional adequately justified an award of reasonable attorneys' fees for the plaintiff. (p. 581)

Citation: Peck v. Upshur County Board of Education, 941 F. Supp. 1465 (N.D.W.Va. 1996)

Facts: This is a civil rights case, brought pursuant to Title 42 U.S.C. Section 1983. The issue at the heart of the case concerns a policy adopted by the defendant Upshur County Board of Education ("the Board" or "Upshur County Board") which operates the public schools in Upshur County, that permits nonstudents to disseminate Bibles and other religious materials in the public schools during school hours. The plaintiffs include a teacher and several parents of children who attend Upshur County public schools. Despite the Board's contention that it has created a limited forum which is open to the distribution of religious and secular materials, these plaintiffs claim that no such access has been granted to other individuals and groups also wishing to distribute literature. Consequently, they allege that the Board's policy establishes and supports religion and further discriminates on the basis of the content of the materials whose distribution is sought, all in violation of their rights under the First and Fourteenth Amendments to the United States Constitution, Title 42 U.S.C. Section 1983, and the West Virginia Constitution. The plaintiffs seek a permanent injunction prohibiting the defendants from granting access to the public schools to any individual or group desiring to distribute Bibles or other religious materials during school hours. (pp. 1467-1468)

In early August 1994, Lynn E. Westfall, Superintendent of Schools in Upshur County, received requests from several citizens in Upshur County, including two state senators and a high school teacher named Eddie McDaniel, who is also a minister, that the Upshur County Board allow members of the community to make Bibles available in schools so that students could take one for their personal use if they wanted. According to Westfall, these individuals are part of a group of citizens who want the students in the public schools of the county to have access to Bibles. (p. 1468)

In the past, the Upshur County public schools have allowed outside organizations, such as Little League, 4-H, Boy Scouts, and the Women's Christian Temperance Union ("WCTU"), to distribute informational announcements and pamphlets in the schools. Until approximately five years ago, when the Board developed the policy at issue here that prohibited the "distribution" of religious and political materials, the Gideons also were permitted to pass out Bibles in the schools. Outside organizations must secure permission from school authorities before gaining access, and no evidence in the record suggests that securing this permission is a mere formality. Normally, these organizations contact a person in charge of school activities who reviews the materials before they are made available to students. (p. 1468)

On December 6, 1994, over 500 citizens who supported the request attended a regularly scheduled meeting of the Board. The Board decided that permitting religious materials, including the Bibles, to be "made available" in Upshur County schools during the school day did not violate the Board's policy prohibiting the "distribution" of religious and political material to students, and instructed superintendent Westfall to meet with Eddie McDaniel to work out the details of making the Bibles available in the schools. (p. 1468)

Thereafter, on December 14, 1994, Superintendent Westfall met with Mr. McDaniel and another Upshur County resident, Don Parsons, and agreed that on Monday, February 27, 1995, a group of citizens would be allowed to make Bibles available during school hours so that students who wanted to might take one for their personal use. According to the procedure agreed to, the Board would provide a table in each school building on which boxes of Bibles could be placed. Each table was to be located in an area of the school building, such as the library or a corridor, where students normally congregate and would not feel they were being watched or pressured into taking a Bible. Only representatives of the sponsoring citizens' group would place the Bibles on the table, but they would not be allowed to

remain in the building to monitor whether any students took one. (pp. 1468-1469)

Superintendent Westfall agreed that a sign stating "Please feel free to take one" would be placed on each table to inform students that the Bibles were free and available to them. No announcement of the location of the table or the fact that Bibles would be available to interested students would be made over a school's public address system. (p. 1469)

Following development of this procedure, Superintendent Westfall instructed principals from the affected schools in the county to monitor the tables throughout the day to ensure adherence to these guidelines. Principals were instructed that the Board was supervising access to the schools, and not sponsoring or promoting the dissemination of Bibles. (p. 1469)

Issues: Although the court's ruling focuses on the First Amendment's Establishment Clause, two First Amendment issues involving expression and free speech are also germane to this case. The first issue with respect to free expression and speech is whether the distribution of Bibles and other religious material by private citizens constitutes protected expression under the First Amendment. The second issue concerns whether private religious speech, including religious proselytizing, is as fully protected under the Free Speech Clause as secular private expression. A related issue is whether the school board, through policy and practice, created a public forum in its schools. (p. 1466)

Holding: The District Court for the Northern District of West Virginia held that 1) distribution of Bibles and other religious material by private citizens constituted protected expression under the First Amendment (p. 1466); 2) private religious speech, including religious proselytizing, was as fully protected under the Free Speech Clause as secular private expression (p. 1466); 3) the Board had not created a public forum in its schools (p. 1465); and 4) the free expression of private religious speech in a nonpublic forum that had been opened for limited purposes consistent with the teaching mission of the Upshur County schools did not violate the Establishment Clause. (p. 1478)

Reasoning: The distribution of Bibles and other religious materials by private citizens constitutes protected expression under the First Amendment. The First Amendment, which the Fourteenth Amendment makes applicable to the states, declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech" The distribution of religious lit-

erature, in particular, has been recognized by the Supreme Court as a form of protected speech. Moreover, private religious speech, including religious proselytizing, is as fully protected under the Free Speech Clause as secular private expression. See Capitol Square Review and Advisory Board v. Pinette, 115 S. Ct. 2440, 2446; Lamb's Chapel v. Center Moriches Union Free School District, 113 S. Ct. 2141. (pp. 1469-1470)

Although the plaintiffs argue that this case involves government speech on religious subjects, the Board's policy addresses access to the public schools by private individuals or groups wishing to distribute religious literature. "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." See Pinette, 115 S. Ct. at 2448 (citing Board of Education of Westside Community Schools (District 66) v. Mergens, 110 S. Ct. 2356, 2371-2372). Nonetheless, the closer in proximity government and private speech come, the more difficult it may be to ignore even an erroneous conclusion that the state is endorsing a particular religion or favoring religion over nonreligion. (p. 1470)

In Pinette, Justice O'Connor asserted that "an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism." Id. at 115 S. Ct. at 2452. By her analysis, the endorsement test offers an appropriate benchmark by which the courts may evaluate the constitutionality of private religious expression on public property. Id. (p. 1470)

This court, therefore, must address whether the Upshur County Board has a constitutional obligation under the Free Speech and Establishment Clauses to restrict the distribution of religious material in the public schools during the school day. Before the court can analyze whether the Board's policy, in fact, violates the Establishment Clause, however, it must first consider the extent to which a forum has been made accessible to other private speakers. (p. 1470)

"The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses." See Pinette, 115 S. Ct. at 2446 (citing Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 105 S. Ct. 3439, 3448-3450). (p. 1470)

Traditional public fora consist of places, such as streets and parks, that "by long tradition or by gov-

ernment fiat have been devoted to assembly and debate." See Cornelius, 105 S. Ct. at 3449 (quoting Perry Education Association v. Perry Local Educators' Association, 103 S. Ct. 948, 954-955). Designated or limited public fora, traditionally not open to the general public, may be created by the government for public use for expressive activity by certain groups, or for the discussion of certain subjects. See Perry, 103 S. Ct. at 954-956. (p. 1470)

In both traditional and designated public fora, reasonable content-neutral time, place, and manner regulations are permissible, but expressive content may be restricted only if the distinction is narrowly drawn and necessary to effectuate a compelling state interest. See Pinette, 115 S. Ct. at 2446 (citing Perry, 460 U.S. at 45, 103 S. Ct. at 954-955). On the other hand, there can be no doubt that states and local school boards are afforded considerable discretion in operating public schools. See Edwards v. Aguillard, 107 S. Ct. 2573, 2577. (pp. 1470-1471)

After considering the history of the forum, the practice and policy of the Board, and the nature of the property, this court finds that the Upshur County Board did not create a public forum. First, the Board's history of allowing outside groups or individuals to distribute material in the public schools during school hours does not indicate that a public forum has been opened. Like the school district in Perry, the Upshur County public schools have allowed outside organizations, such as Little League, 4-H, Boy Scouts, and the WCTU, to distribute informational announcements and pamphlets in the schools. This type of "selective access," however, does not create a public forum. Id. In fact, the Board's practice and policy belie any claim that the Board intended to designate the county schools as a public forum for use by the public. Outside organizations must secure permission from school authorities before gaining access, and, as noted earlier, no evidence in the record suggests that securing this permission is a mere formality. Id. (p. 1471)

Finally, the nature of public school property as a place to educate children, as opposed to a place opened to the general public for expressive activity, strengthens the conclusion that the Board did not create a public forum. Nonpublic fora consist of government properties that are not by tradition or designation fora for public communication and which the government may preserve for intended uses. See Perry, 103 S. Ct. at 955. "The First Amendment does not guarantee access to property simply because it is owned or controlled by the government." Id. (p. 1471)

> The parties disagree as to what type of forum the Upshur County Board actually had in place or created. The plaintiffs assert that the schools are nonpublic while the defendants argue that the Board created a limited public forum. In light of the public schools' continued control over access to the forum and the educational mission of teaching children, it is the court's opinion that the Board, through policy and practice, created a nonpublic or "limited purpose" forum to which selective access is permitted for the purpose of enhancing the educational mission of the public schools. (p. 1472)
>
> The Board has concluded that making Bibles available to students who wish to have them is consistent with the purpose of the forum. Solely upon the belief that allowing Bibles to be distributed was a violation of the Establishment Clause, the Board previously had adopted the policy prohibiting the distribution of religious material. Only after the citizens' group involved in this case asserted that no law restricted the availability of Bibles in schools did the Board reconsider its policy. By doing so, and allowing a group of citizens to make Bibles available to any student wanting one, the Board recognized that although the public schools were precluded from distributing such material, the Constitution does not prohibit private groups or individuals from doing the same. Moreover, by permitting the distribution of Bibles and other religious material similar in character to material already permitted, the Board was not exhibiting any favoritism. (p. 1472)
>
> Essentially, the plaintiffs demand that the court enforce an impermissible viewpoint discrimination against religious material that the Board has concluded is consistent with the purpose of the forum. This the court cannot do. In Lamb's Chapel, a school district that had established a nonpublic forum for "social, civic, and recreational purposes" could not exclude a film presenting a religious perspective on childbearing. (113 S. Ct. at 2147) In Good News/Good Sports Club, a religious club sufficiently demonstrated that its organization contributed to the "moral and character development of the students." (28 F.3d at 1506) In each case the speech was consistent with the purpose of the forum and exclusion because of religious viewpoint was ruled impermissible. (pp. 1472-1473)
>
> The court finds that the Upshur County Board of Education's policy permitting private citizens to enter its schools to make Bibles available to students is consistent with the purpose of the limited forum created by the Board, and does not constitute impermissible government endorsement of religion. Consequently, the

Board's policy does not offend the Establishment Clause of the First Amendment to the United States Constitution. (p. 1478)

Disposition: The district court vacated the preliminary injunction it had previously granted and denied the plaintiffs' request for a permanent injunction. (p. 1478)

Citation: Muller by Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996)

Facts: Andrew Muller attends Jefferson Lighthouse elementary School, one of 23 elementary schools in the Racine Unified School District in Racine, Wisconsin. On January 19, 1995, Andrew, then in fourth grade, asked his teachers for permission to hand out invitations to a meeting of a group called AWANA ("Approved Workmen Are Not Ashamed") being held at his church. AWANA members meet throughout the country for small group Bible studies and Christian fellowship. Andrew sought only to distribute the invitations during noninstructional times. But the record indicates Andrew's teacher and principal may have thought (initially at least) that Andrew wanted permission to hand out the fliers during class. (p. 1532)

Andrew's teachers sent him to the principal's office to obtain permission. According to the Mullers, the principal, defendant Steven Miley, told Andrew he could not distribute the invitations because they were religious. The defendants deny this. They maintain Miley told Andrew he could not distribute the AWANA fliers to his class because they were neither school-supported nor directly related to school programs. According to the defendants, the next morning at 8:00 a.m.; Miley received a telephone call from a representative of a group in Florida called "Liberty Counsel" (now the Mullers' attorneys) inquiring about the school and the district's policies regarding distribution of religious material. Miley referred the caller to Frank Osimitz, Director of School Operations at the district's central office, and to Frank Johnson, the district's legal counsel. Miley received a similar call from Liberty Counsel on February 3, 1995. (pp. 1532-1533)

The Mullers claim that Ann Muller, Andrew's mother, contacted Miley to clarify whether her son could distribute the invitations. According to the defendants, Miley told Mrs. Muller that if the material was not related to a school program, a student could not hand the information out to his class. Miley said Andrew could give fliers to several of his friends but that he could not distribute them to his entire class.

Miley also informed Mrs. Muller that she could pursue the matter further with Osimitz or Frank Johnson (district counsel) at the district office. The defendants claim that on February 9 or 10, 1995, Mrs. Muller left a telephone message on Miley's answering machine requesting his policy on distributing materials and a written response to Andrew's request. In a letter dated February 10, 1995, Miley responded, stating it was his "policy that materials distributed at Jefferson Lighthouse School would relate to Jefferson Lighthouse School projects and programs," but also granting permission for Andrew to distribute information to "specific friends." (p. 1533)

The Mullers tell a somewhat different story. They claim that at his office on February 6, 1995, Miley said he would like to allow Andrew to distribute his invitation but could not because he would be forced to allow distribution of materials from other churches, which he did not want. Mrs. Muller asked Miley why, in that case, parents were allowed to receive information from the YMCA, Boy Scouts, Skatetown, and other sources. Miley said those distributions had been approved by the district's central office and again referred Mrs. Muller to Frank Osimitz. Miley said he did not want to allow distribution of the invitation but that it would ultimately be up to Osimitz. Osimitz asked Mrs. Muller for a copy of the invitation to give to Johnson for review. Osimitz said Johnson would contact her within a week or two, but the Mullers claim he never did. Two days later, Mrs. Muller again visited Miley seeking permission. According to the Mullers, Miley told her it was his position that Andrew's invitation did not deal with Jefferson Lighthouse School and thus required permission from Osimitz. (pp. 1533-1534)

On February 20, 1995, Mrs. Muller sent a letter to principal Miley, which was also addressed to Osimitz and Johnson, restating her version of the events and formally objecting to the provisions of the school board's policy concerning nonschool-sponsored publications. The Mullers did not file an official complaint with the district appealing the principal's decision. A formal Complaint Form is included with the Code of Student Responsibilities and Rights (the district policy governing, among other things, distribution of handbills) for appeals to the district from the decisions of principals. Instead, on April 25, 1995, the Mullers filed a complaint in federal district court against Jefferson Lighthouse School, Steven Miley as principal, and the Racine Unified School District seeking a declaratory judgment and preliminary and permanent injunctive relief. The complaint alleged that Sections 6144.11 and 6144.12 of the Racine Uni-

fied School District Code of Student Responsibilities and Rights (1994-1995) on their face and as applied by Principal Miley violated Andrew's "Free Speech, Free Exercise of Religion and Equal Protection rights guaranteed under the First and Fourteenth Amendments to the United States Constitution and the Religious Freedom Restoration Act of 1993 and constitute a violation of the First Amendment's Establishment Clause." (pp. 1534-1535)

Characterizing the school as a nonpublic forum, the district court applied a reasonableness standard and upheld the facial validity of all the challenged Code provisions except the requirement that a handout contain a statement disclaiming school endorsement. The court found this to be an unreasonable "regulation of the content of pure speech." The court did not resolve the discrepancies between the parties' versions of the facts. Instead the court held that whichever rendition was correct, Miley violated the First Amendment either by not adhering to the school district's own policy or by prohibiting Andrew's fliers solely because they were religious. The court issued an injunction precluding school officials from preventing Andrew from distributing the AWANA materials on those grounds. Both parties appeal. Neither party contested the court's as-applied ruling. (pp. 1532-1535)

Issues: There are six major questions relevant to the First Amendment embodied in this appeal: 1) Is a public elementary school a public forum? 2) Do public school district rules requiring prior approval of nonschool materials to be distributed constitute unconstitutional prior restraints in violation of students' free speech rights? 3) Is a public school district code's requirement that nonschool materials be screened for offensive messages an unconstitutional content-based restriction under the First Amendment? 4) Are a public school district's time and place restrictions for the distribution of nonschool materials violative of the First Amendment? 5) Does a public school district's requirement of prior approval implicate the Establishment Clause? 6) Is a public school district's regulation directing that nonschool publications contain a disclaimer an unreasonable regulation of content under the Free Speech Clause? (pp. 1530-1532)

Holding: The Court of Appeals for the Seventh Circuit held that: 1) a public elementary school was a nonpublic forum; 2) rules requiring prior approval of nonschool materials to be distributed were reasonable and contained adequate procedural safeguards; 3) a rule requiring that nonschool materials be screened for offensive messages was not a constitutionally invalid restriction on content; 4) the public school dis-

trict's time and place restrictions were valid under the First Amendment; 5) a public school district's rule requiring prior approval did not implicate the Establishment Clause; and 6) a requirement that non-school materials contain a disclaimer stating that materials were not endorsed by the school did not violate the Free Speech Clause. (p. 1530)

Reasoning: The first general question to explore is what speech rights elementary school children possess. To put this case in perspective, a brief historical review of the Supreme Court's approach to student speech rights is helpful. (p. 1535)

The Supreme Court's case law addressing the First Amendment rights of high school students draws from two important but, at times, conflicting educational concepts. The first is the traditional view which holds that children are in the temporary custody of the state as "schoolmaster." See Vernonia School District 47J v. Acton, 115 S. Ct. 2386, 2391. The public school is seen as an institution of nurturing authority created to inculcate learning and social and political habits and mores, thereby preparing children for meaningful lives, citizenship, and the full exercise of their constitutional rights. See Board of Education, Island Trees Union Free School District No. 26 v. Pico, 102 S. Ct. 2799, 2806. The school's teaching authority is important in the traditional view. The student is not yet "possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 741. Under the traditional approach, the school's authority can exceed a student's free speech rights. Cf. Settle v. Dickson County School Board, 53 F.3d 152, 156 (6th Cir. 1995). The educational emphasis is less on present expression than on equipping the child with the tools of expression. Cf. Zykan v. Warsaw Community School Corporation, 631 F.2d 1300, 1304 (7th Cir. 1980) ("A high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices"). (p. 1535)

In the second concept, school children are autonomous individuals, treated as adults, entitled to free speech rights during school hours. The emphasis is on schools as expressive forums. Free speech and the "marketplace of ideas" it fosters are said to promote a wide and not entirely structured exposure to new ideas and robust debate. See Keyishian v. Board of Regents, 87 S. Ct. 675, 683. "According to this view, education

is a participatory process with maximum interaction and independent thought." See Rosemary C. Salomone, Free Speech and School Governance in the Wake of Hazelwood, 26 Ga. L. Rev. 253, 258 (1992). The concern is that school authority not "strangle the free mind at its source." See West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178, 1185. (p. 1535)

At common law, school teachers and administrators stood in loco parentis over the children entrusted to them. See Acton, 115 S. Ct. at 2391. School children had only that amount of freedom that parents and school administrators thought best. Id. The in loco parentis doctrine remains in full force in private schools. However, its force in public schools, together with the authority/apprenticeship model of education it embodies, has been somewhat weakened by a line of Supreme Court opinions recognizing certain student rights, especially First Amendment rights. See Acton, 115 S. Ct. at 2391-2392 (noting limitations on school authority). (pp. 1535-1536)

The Court first protected actual student expression in public schools in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. Tinker involved high school and junior high school students who were punished for engaging in a nondisruptive, passive expression of a political viewpoint by wearing black armbands to protest the Vietnam war. See Bethel School District v. Fraser, 106 S. Ct. 3159, 3162 (discussing Tinker). In Tinker, the Court explicitly addressed the conflicting interests of school authority and student autonomy. Expressing concern about coercion of political orthodoxy and support for the "marketplace of ideas," Tinker, 89 S. Ct. at 736 and 739-740, the Court endorsed a broad concept of student rights. Id. 89 S. Ct. at 736. The Court acknowledged the vital, at times competing, interests of school officials "to prescribe and control conduct in the schools." Id. 89 S. Ct. at 737. Still, it emphasized a view of schools as institutions of expressive individualism, id. 89 S. Ct. at 739, and found the restrictions on the students' symbolic speech unconstitutional. Id. 89 S. Ct. at 740. The Court elaborated a new test intended to affirm student expression while recognizing the unique nature of the school environment: "[A student] may express his opinions if he does so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." Id. 89 S. Ct. at 740. In dissent, Justice Black argued that the Court had transferred too much authority over students away from schools and to itself. Id. at 89 S. Ct. at 741. Instead of the "marketplace of ideas," Justice Black emphasized more

traditional educational goals, such as keeping student minds on their classwork and inculcating self-discipline and the values of good citizenship. Id. 89 S. Ct. at 742 and 745. (p. 1536)

In Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159, the Court emphasized school authority, much along the lines of Justice Black's dissent in Tinker. Fraser involved a racy (though not technically obscene) nominating speech at a voluntary high school assembly held during school hours as part of a school-sponsored student government program. Some students liked the speech, some were "bewildered and embarressed rassed," id. 106 S. Ct. at 3162, but the record contained no finding that the speech caused any meaningful disruption and no one claimed the speech invaded the rights of others—the two criteria under Tinker for suppression of student speech. Nevertheless, the Court upheld the decision of school authorities to punish the student speaker and issued an opinion strongly stressing an inculcative and even parental vision of public education. The Court acknowledged a freedom interest in "advocat[ing] unpopular and controversial views," but said it "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." Id. 106 S. Ct. at 3163. Since "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings," id. 106 S. Ct. at 3164, schools are free to insist "that certain modes of expression are inappropriate and subject to sanction," for "the inculcation of these values is truly the 'work of the schools.'" Id. 106 S. Ct. at 3164 (quoting Tinker, 89 S. Ct. at 737). (pp. 1536-1537)

The Court repeated Fraser's more deferential approach to the authority of educators in Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, in which a principal removed before publication articles in a high school student newspaper addressing students' experiences with pregnancy and the impact of divorce on students at the school. Addressing the constitutionality of this action, as it had done previously, the Court again acknowledged the competing interests of educational authority and student speech rights, but emphasized that "a school need not tolerate student speech that is inconsistent with its basic educational mission." Id. 108 S. Ct. at 567. (p. 1537)

Key to the holding in Hazelwood, and ultimately to the Court's holding here, was an initial determination of the type of forum at issue. When is a school a public forum? The Court answered that "school facilities may

be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations." Id. 108 S. Ct. at 568 (citing Perry Education Association v. Perry Local Educators' Association, 103 S. Ct. 948, 955 n. 7, 956). A public forum is not created by default, only by design: "'The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'" See Hazelwood, 108 S. Ct. at 568 (quoting Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 105 S. Ct. 3439, 3449). Speech in nonpublic forums is subject to significantly greater regulation than speech in traditional public forums. Thus, where school facilities have been "reserved for other intended purposes, 'communicative or otherwise,'" and no public forum has been created, "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." See Hazelwood, 108 S. Ct. at 567; Perry, 103 S. Ct. at 955 n. 7. The Court's test now is whether the restrictions are "reasonably related to legitimate pedagogical concerns." See Hazelwood, 108 S. Ct. at 571. (pp. 1537-1538)

The Supreme Court has not expressly considered whether the free expression rights, first announced in Tinker, extend to grade school children. Tinker and its progeny dealt principally with older students for whom adulthood and full citizenship were fast approaching. The Court has not suggested that fourth-graders have the free expression rights of high school students. See Baxter v. Vigo County School Corporation, 26 F.3d 728, 737-738 (7th Cir. 1994). In Hedges v. Wauconda Community School District, 118 F.3d 1295, 1298 (7th Cir. 1993), this court acknowledged the religious speech rights of junior high school students, noting that "nothing in the First Amendment postpones the right of religious speech until high school." (p. 1538)

In sum, since Tinker, students retain First Amendment rights, but "the nature of those rights is what is appropriate for children in school" where the government as educator discharges its "custodial and tutelary responsibility for children." See Acton, 115 S. Ct. at 2392. Especially considering the important role age plays in student speech cases, see Baxter, 26 F.3d at 737-378, it is unlikely that Tinker and its progeny apply to public elementary (or preschool) students. But because the Supreme Court has not directly decided this question, the following analysis will assume that grade schoolers partake in certain of the speech

rights set out in the Tinker line of cases. With this background, this court turns to the Mullers' claims. (pp. 1538-1539)

As noted above, Hazelwood stressed the importance of determining whether a public or nonpublic forum is at issue. Thus, this Court begins by analyzing what kind of forum this public elementary school is. See Hazelwood, 108 S. Ct. at 567. The district court concluded that Jefferson Lighthouse Elementary School is a nonpublic forum subject to reasonable restrictions on speech. Despite the Supreme Court's strong support for the discretion of educators, and despite recent case law from this circuit holding that a junior high school is a nonpublic forum, the Mullers challenge the district court's conclusion. (p. 1539)

"School facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' or by some segment of the public, such as student organizations." Id. In Hedges, this court held that a "junior high school is a nonpublic forum, which may forbid or regulate many kinds of speech," including nonschool sponsored literature. (9 F.3d at 1302) The same is true of a public elementary school where, with even younger children, the need for structuring the educational environment is that much greater. Nothing in the record suggests Jefferson Lighthouse Elementary School has been opened to anyone for "indiscriminate use." On the contrary, the complaint before this court says the school is too discriminating in that it imposes significant restrictions on certain types of student expression. (p. 1539)

The Mullers ask us to modify or overrule Hedges and declare an elementary school a public forum, or at least a limited public forum for purposes of distributing student-sponsored literature. Their argument is based mainly on this language from Tinker. "The principal use to which schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication." See Tinker, 89 S. Ct. at 739. From these two sentences the Mullers contend that "schools are by their very nature designated public forums and can be none other than a designated public forum by virtue of the fact that they are dedicated 'to accommodate students during prescribed hours.'" This court cannot agree that this isolated sentence from Tinker was meant to carry such weight, especially in the context of an opinion simultaneously affirming "the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe

and control conduct in the schools." Id. 89 S. Ct. at 737. (p. 1539)

Even assuming Tinker expression rights apply to children in public elementary schools, an elementary school's nonpublic forum status remains, and this court applies the most recent standard elaborated by the Supreme Court in Hazelwood, that of "reasonableness." The test, therefore, is whether the restrictions on student expression are "reasonably related to legitimate pedagogical concerns." See Hazelwood, 108 S. Ct. at 571. This approach is consistent with the firm principle that student rights must be construed "in light of the special characteristics of the school environment," Tinker, 89 S. Ct. at 736, and that "the nature of those rights is what is appropriate for children in school." See Acton, 115 S. Ct. at 2392. The court therefore declines the Mullers' request to overrule Hedges. Prior restraint of student speech in a nonpublic forum is constitutional if reasonable. Hazelwood dealt with prior restraint by a high school principal of articles to be published in a student newspaper. Deeming the newspaper a nonpublic forum, the Supreme Court engaged in a rational basis analysis and upheld the prior restraint as reasonable. (108 S. Ct. at 572) Likewise, in Hedges this court found no constitutional problem with a school code prohibiting entirely the general distribution of written material "which is primarily prepared by nonstudents." (9 F.3d at 1301) Thus, "whether a school serves pupils' interests by curtailing their dissemination of leaflets prepared by third parties is not a question of constitutional law. The Constitution is not a code of education, requiring schools to adopt whatever practices judges believe will promote learning." Id. at 1301. (p. 1540)

Prior restraint in the public school context, and especially where elementary schools are concerned, can be an important tool in preserving a proper educational environment. Where public school children are involved there is no practical way to protect students from materials that can disrupt the educational environment or even severely traumatize a child without some form of prior restraint. Of course, the leaflets Andrew sought to distribute were innocuous enough, but it could have been different. Obviously, school officials cannot know beforehand the nature of all literature students, or those acting through them, seek to distribute; and post-hoc responses to a harmful distribution cannot always undo the damage. Children in public schools are a "captive audience" that "school authorities acting in loco parentis" may "protect." See Frazer, 106 S. Ct. at 3164. The challenged Code provisions aim to do that by permitting

the principal to prescreen for "libelous or obscene language," incitement "to illegal acts," insults "to any group or individuals," or other materials that "will greatly disrupt or materially interfere with school procedures and in-trude into school affairs or the lives of others." See supra, note 2. There is nothing facially unreasonable about such restrictions. (p. 1541)

As a related argument, the Mullers contend the Code is unconstitutional because it does not contain adequate procedural safeguards and because it fails to provide a definite time limit within which the decision to grant or deny permission will be made. This court disagrees. The Supreme Court has never held that a detailed administrative code is required before student speech may be regulated. The Constitution does not dictate to school authorities a precise time limit for evaluating the propriety of a proposed student handout. Discretion is in the nature of the educational process and such matters of "daily operation" are reserved to the schools. See Pico, 102 S. Ct. at 2806-2807; Barnette, 63 S. Ct. at 1185 (schools have "highly discretionary functions"); Hazelwood, 108 S. Ct. at 573 ("public educator's task is weighty and delicate" and "demands particularized and supremely subjective choices" among educational options) (Brennan, J., dissenting). Judicial review of the educator's discretion is thus highly deferential. See Tinker, 89 S. Ct. at 736. (p. 1541)

In a nonpublic forum, only unreasonable restrictions are forbidden. How much time is reasonable for evaluating a proposed student handout will depend on the nature of the handout—its subject matter, style, and length; its intended audience; the difficulty in evaluating its educational, emotional, and legal impact on its likely recipients, the broader school environment, and the school itself; the need it creates for prophylactic restrictions to ensure the materials are distributed only to children of sufficient maturity; and so on. Other factors can affect the length of a reasonable prescreening period, such as the ability to contact a student's parents to confirm the requested distribution (especially if it is questionable), the quantity and diversity of proposed handouts, and unexpected school emergencies. Courts should not impose artificial time limits that might result in the distribution of obscene or otherwise harmful materials because a principal was out sick for a day or two, or that might unintentionally convince the school to ban (as it surely can) all student handouts rather than endure the administrative hassle. The Supreme Court's repeated emphasis on school board discretion counsels against judicial imposition of rigid deadlines or in-

tricate procedures to deal with all contingencies. These are schools, not courts or administrative tribunals. The reasonableness of a delay in prescreening a proposed handout must be determined in a highly specific factual inquiry, not in the abstract. Thus, the Mullers' facial challenge cannot prevail. (p. 1541)

The Mullers also attach the Code's requirement that literature be screened for insulting messages as an unconstitutional content-based restriction. This argument has no merit. Even where adults with full First Amendment speech rights are concerned, the government can reserve a nonpublic forum for the purpose for which it was created, and in so doing can censor speech on the basis of content. Thus, contrary to the Mullers' suggestion, "the government can regulate content in a nonpublic forum." See May v. Evansville-Vanderburgh School Corporation, 787 F.2d 1105, 1113 (7th Cir. 1986); Cornelius, 105 S. Ct. at 3451 ("a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum"). What the courts have not permitted is suppression of a particular viewpoint. See May, 787 F.2d at 1113. Yet even that restriction is not hard and fast with public schools, especially elementary schools. The student's right to express a point of view in a public school is only as extensive as "the special characteristics of the school environment" permit. See Tinker, 89 S. Ct. at 736; Acton, 115 S. Ct. at 2392 ("the nature of [student] rights is what is appropriate for children in school"); Hazelwood, 108 S. Ct. at 567 (student rights "are not automatically coextensive with the rights of adults in other settings"). (p. 1542)

Even Tinker's expansive approach to student speech permitted at least some viewpoint censorship where the expression materially disrupts classwork, causes substantial disorder, or invades the rights of others. See Tinker, 89 S. Ct. at 740. This court may assume, therefore, that had the wearing of black armbands (a viewpoint expression) sparked riots at the school, the outcome in Tinker—though not the test—would have been different. Schools, therefore, are free to screen student handouts for material that is insulting or lewd or otherwise inconsistent with legitimate pedagogical concerns. Content regulation is permissible in the school environment; indeed, it is necessary to create a school environment. Thus, the Code's screening requirements are not per se unreasonable. (p. 1542)

In so holding, the court rejects the Mullers' implication that a school must spell out in intricate detail precisely what is "libelous or obscene language" or an incitement "to illegal acts" or an insult "to any group

or individuals" or which materials "will greatly disrupt or materially interfere with school procedures and intrude into school affairs or the lives of others." The Mullers condemn the vagueness of such language with Supreme Court cases addressing restrictions on adult expression outside the school setting. However, schools are different. Their duties and responsibilities are primarily custodial and tutelary and thus discretionary in nature, not legalistic. An education in manners and morals cannot be reduced to a simple formula; nor can all that is uncivil be precisely defined. What is insulting or rude very often depends on contextual subtleties. The touch-stone is reasonableness, and there is nothing facially unreasonable about the Code's content regulations. (pp. 1542-1543)

The Mullers claim the Code's time and place restrictions for literature distribution irrespective of quantity are unreasonable. Again, the court disagrees. The Code states that "a time and place for the distribution [of student sponsored literature] must be set cooperatively with the principal." Reasonable time, place, and manner restrictions are permissible in public and nonpublic forums. (p. 1543)

The establishment of an appropriate time, place, and manner for a student to distribute fliers, even where the quantities are small, is therefore appropriate. The Mullers disagree, arguing that "students obviously should not be prohibited from passing a love note to another student, giving that student a birthday card, or giving another directions to his or her home." But the simple response is that it depends on the time, place, and manner of the distribution. The school may reasonably prohibit distribution of love notes or birthday cards during math class; math class is for learning math, not for passing love notes or birthday cards. Prohibiting handbilling in the hallway between classes is also reasonable to avoid congestion, confusion, and tardiness, to say nothing of the inevitable clutter caused when the recipient indiscriminately discards the handout. See Hemry by Hemry v. School Board of Colorado Springs, 760 F. Supp. 856 (D. Colo. 1991). When, where, and how children can distribute literature in a school is for educators, not judges, to decide "provided [such choices] are not arbitrary or whimsical." See Hedges, 9 F.3d at 1302; see also id. at 1301 (place restrictions proper given nature of school and function of principal). Here the Code requires the student and principal to determine "cooperatively" an appropriate time and place for the distribution. This permits flexibility so that the unique needs of the school can be accommodated. There is nothing a priori unreasonable about that. (p. 1543)

Finally, the Mullers challenge the Code on Establishment Clause grounds. Their argument (a preemptive one) is that the defendants cannot justify the Code by claiming it is necessary to prevent entanglement with religion. The Mullers are correct that speech cannot be suppressed or discriminated against solely because it is religious. See Hedges, 9 F.3d at 1297-1298, and cases cited therein. Banning religious expression, "which the Free Exercise Clause of the First Amendment singles out for protection," id. at 1298, solely because it is religious is per se unreasonable. The Supreme Court has also rejected the view that, in order to avoid the perception of sponsorship, a school may suppress religious speech. See Widmar v. Vincent, 102 S. Ct. 269, 275-276; Board of Education v. Mergens, 110 S. Ct. 2356, 2370-2373; Lamb's Chapel v. Center Moriches Union Free School District, 113 S. Ct. 2141, 2148. On appeal, the defendants do not suggest otherwise and do not attempt to justify any part of the Code by arguing it is necessary to avoid offending the Establishment Clause. The regulations in this case, which apply to religious and nonreligious distributions alike, do not implicate the Establishment Clause. See Hedges, 9 F.3d at 1299. (pp. 1543-1544)

The defendants cross-appeal the district court's holding that the Code provision directing that nonschool sponsored publications contain a disclaimer is unconstitutional. The Code requires this phrase: "The opinions expressed are not necessarily those of the school district or its personnel." The district court found this unreasonable as a regulation of the content of speech. However, the court found no such concern with a similar Code provision (not at issue here) requiring each publication to contain the name of the entity sponsoring the material, holding it was reasonable to vindicate the school's interest in maintaining order the control and in identifying the sponsoring groups and individuals. (p. 1544)

It is not clear why the district court found the provision requiring disclosure of sponsorship reasonable but the provision requiring a disclaimer unconstitutional. Both require a minimal interference with the content of a handout. Neither requirement would noticeably alter the message. The absence of a disclaimer could conceivably convey to students the false impression that the school or some other organization was the publication's sponsor. (p. 1544)

As an institution of vital public concern, a school has a strong interest in clarifying to its students and the public what it does and does not endorse. That does not imply it can discriminate against religious speech (the district court's main concern), but it can

surely inform others that it takes no position on the content of the expression, religious or otherwise. Nonendorsement was a central concern of both Fraser and Hazelwood. In Hazelwood, it helped justify suppression of entire articles in a school newspaper. The district court recognized the school's interest in not endorsing religious expression and indicated the school could post a sign clarifying its policy. Nevertheless, the court found the disclaimer requirement unnecessary and unreasonable. (p. 1544)

No doubt a posted sign clarifying the school's policy would be a reasonable alternative. But school administrators are not confined to those means least restrictive of student speech when they pursue legitimate educational interests. Hazelwood, where far less drastic measures could have been used, makes this clear. The means need only be reasonable. Under that test the disclaimer provision passes. It is one of many reasonable ways for the school to make clear that it does not necessarily espouse what it permits. The affixed disclaimer keeps the reminder with the flier, better ensuring that the message is received. Such an advantage is not obtained by an unreasonable restriction on speech and is therefore permissible. (p. 1544-1545)

Andrew's right not to have his expression suppressed solely because it is religious was vindicated in the district court and not appealed by the defendants. He is therefore free to express himself on religious matters, in both written and spoken form, subject only to restrictions reasonably related to legitimate pedagogical interest. The defendants confirm this on appeal. However, the Mullers' challenge to the entire Code fails. The Code, including the provision requiring a statement disclaiming school endorsement which the district court found unconstitutional, is a facially reasonable tool for ensuring that student-sponsored publications do not interfere with the school's critical educational mission. It is therefore constitutional. (p. 1545)

Disposition: The decision of the District Court for the Eastern District of Wisconsin was affirmed in part and reversed in part. (p. 1545)

Graduation Requirement of Community Service

Citation: Steirer by Steirer v. Bethlehem Area School District, 987 F.2d 989 (3rd Cir. 1993)

Facts: On April 30, 1990, the Bethlehem Area School District, by a majority vote of its board of directors,

adopted a graduation requirement that every public high school student, except those in special education classes, complete a total of 60 hours of community service during the student's 4 years of high school. These hours may be completed after school hours, on weekends, or during the summer. Students must complete this requirement through participation in a course entitled the "Community Service Program" (the Program), which requires them to "perform sixty (60) hours of unpaid service to organizations or experiential situations approved by the Bethlehem Area School District." (p. 991)

The stated goal of the program is to "help students acquire life skills and learn about the significance of rendering services to their communities [and] gain a sense of worth and pride as they understand and appreciate the functions of community organizations." (p. 991)

The program is jointly administered by the high school principal, the district coordinator, and the school counselor. In addition, parents are "fully informed" of the program and are expected to encourage their children to successfully complete the 60 hours of service, to encourage them to continue performing community service after completing the course requirements, to assist in identifying appropriate organizations or experiential situations, and to provide transportation to the placement site. (p. 991)

The program maintains an extensive list of more than 70 approved community service organizations. As an alternative to providing service to an approved community service organization, a student may choose to participate in an "experiential situation." This option allows a student to "develop [his or her] own individual community service experience." This alternative experience requires parental approval, the recommendation of the school counselor, and verification by a responsible adult. It may involve the arts, community special events, aid to the elderly, the handicapped or the homeless, emergency services, the environment, library/historical research, recreation activities, or tutoring. (p. 991)

After completing the 60 hours of community service, the student must complete a written Experience Summary Form describing and evaluating his or her community service activity. Once the school counselor (i) certifies that the 60 hours of service were completed; and (ii) reviews and approves the student's Experience Summary Form, the student receives half a unit of course credit and a grade of Satisfactory (S). A stu-

dent who does not satisfactorily complete the program will not receive a high school diploma. (pp. 991-992)

Barbara and Thomas Steirer and Thomas and Barbara Moralis, individually and as parents and guardians of Lynn Ann Steirer and David Stephen Moralis, respectively, and their two children brought suit in federal district court challenging the constitutionality of the program and seeking a permanent injunction against its enforcement. Although both minor plaintiffs have performed and intend to continue performing volunteer work on their own time, they object to being forced to engage in community service as a graduation requirement. The named defendants include the Bethlehem Area School District; Thomas J. Dolusio, in his official capacity as superintendent of the Bethlehem Area School District; and the nine members of the Board of Directors of the Bethlehem Area School District in their official capacities. (p. 992)

The parties filed cross-motions for summary judgment, agreeing that there were no genuine issues as to any material facts. On March 30, 1992, the district court granted the defendants' motion and denied the plaintiffs' motion. The plaintiffs appealed. (p. 992)

Issues: Does a school district's mandatory requirement that students engage in community service to be entitled to graduate from high school compel expression in violation of the First Amendment? (p. 990)

Holding: The Court of Appeals for the Third Circuit held that the school district's mandatory requirement that students engage in community service to be entitled to graduate from high school did not compel expression protected by the First Amendment. The court also held that mandatory community service did not constitute involuntary servitude prohibited by the Thirteenth Amendment. (pp. 989-990)

Reasoning: The district court granted summary judgment for the defendants on the plaintiffs' First Amendment claim on the ground that the community service required by the school district is nonexpressive conduct. The plaintiffs contend on appeal that performing mandatory community service is expressive conduct because it forces them to declare a belief in the value of altruism. Proceeding on this premise, the plaintiffs argue that heightened scrutiny should be applied and that the school board's reasons for making the program mandatory are not sufficiently compelling to outweigh the infringement of the students' First Amendment right to refrain from expressing such a belief. (p. 993)

The freedom of speech protected by the First Amendment, though not absolute, "includes both the right to speak freely and the right to refrain from speaking at all." See Wooley v. Maynard, 97 S. Ct. 1428. (p. 993)

To support their position that the required community service is expressive of the school district's ideological viewpoint favoring altruism, the plaintiffs point to statements made by individual members of the school board expressing a favorable view of altruism. The plaintiffs argue that the ideology of altruism is a matter of opinion not shared by all, and that "when a student goes out and works for others in his community, it is natural for an observer to assume that the student supports the idea that helping others and serving the community are desirable." Thus, the plaintiffs conclude, a student who participates in the community service program is being forced to engage in expressive conduct. (p. 993)

It may be assumed that the members of the school board who approved the mandatory community service program believed that there was a value in community service, and that this belief may be equated with what the plaintiffs choose to call the philosophy of altruism. It does not follow that requiring students to engage in a limited period of community service as an experiential program that is part of the school curriculum is constitutionally invalid. The gamut of courses in a school's curriculum necessarily reflects the value judgments of those responsible for its development, yet requiring students to study course materials, write papers on the subjects, and take the examinations is not prohibited by the First Amendment. (p. 993)

While acknowledging that the First Amendment protects more than "pure" speech, the Supreme Court has also consistently rejected the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." See O'Brien, 88 S. Ct. at 1678. (p. 995)

The boundaries of expressive conduct have been particularly cabined when the conduct is associated with school curricula. Moreover, courts have consistently found that hair and dress codes do not infringe students' First Amendment rights in the absence of any showing that a student's appearance was intended as the symbolic expression of an idea. See, e.g., Bishop v. Colaw, 450 F.2d 1069, 1074 (8th Cir. 1971); see also Karr v. Schmidt, 460 F.2d 609, 613 (5th Cir.) (expressing doubt "that the wearing of long hair has

sufficient communicative content to entitle it to the protection of the First Amendment"). (p. 996)

Nonetheless, we do not discount entirely the possibility that a school-imposed requirement of community service could, in some contexts, implicate First Amendment considerations. Arguably, a student who was required to provide community service to an organization whose message conflicted with the student's contrary view could make that claim. The plaintiffs in this case do not make that argument, and the record is to the contrary. The program does not limit students to providing service to a particular type of community service organization. Students have a multitude of service options which allows them to provide services to organizations with a wide range of political, religious, and moral views. The list of approved organizations is extensive and open to additions. Furthermore, students are free to design their own experiential situations. (p. 996)

Thus, the plaintiffs do not contend that the students are obliged to adopt an organization's objectionable philosophy. Instead they limit their First Amendment challenge to the argument that students must "affirm the philosophy that serving others and helping the community are what life is all about." (p. 996)

There is no basis in the record to support the argument that the students who participate in the program are obliged to express their belief, either orally or in writing, in the value of community service. Thus, they are not "confined to the expression of those sentiments that are officially approved." See Tinker, 89 S. Ct. at 739. To the contrary, as plaintiff Thomas Moralis admitted in his deposition, there is no indication that a student who criticized the program would not receive a passing grade. Nothing in the record contradicts Moralis' understanding that the students who participate in the program need not express their agreement with its objectives in order to receive a passing grade. (pp. 996-997)

Finally, the plaintiffs have produced no evidence that people in the community who see these students performing community service are likely to perceive their actions as an intended expression of a particularized message of their belief in the value of community service and altruism. It is just as likely that students performing community service under the auspices of a highly publicized required school program will be viewed merely as students completing their high school graduation requirements. (p. 997)

> Because we conclude that the act of performing community service in the context of the Bethlehem Area School District high school graduation requirement is not an expressive act that "directly and sharply implicate[s] constitutional values," Epperson, 89 S. Ct. at 270, we think that it is not our role to say that a school system cannot seek to expose its students to community service by requiring them to perform it. To the extent that there is an implicit value judgment underlying the program, it is not materially different from that underlying programs that seek to discourage drug use and premature sexual activity, encourage knowledge of civics and abiding in the rule of law, and even encourage exercise and good eating habits. Schools have traditionally undertaken to point students toward values generally shared by the community. In fact, the Supreme Court has stated that public schools have a long history and tradition of teaching values to their students, including those associated with community responsibility. Public schools are important "in the preparation of individuals for participation as citizens, in the preservation of the values on which our society rests" and for "inculcating fundamental values necessary to the maintenance of a democratic political system." See Ambach v. Norwick, 99 S. Ct. 1589, 1595. (p. 997)

Disposition: The court of appeals affirmed the decision of the District Court for the Eastern District of Pennsylvania. (p. 1001)

Homosexuality

Citation: Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980)

Facts: The senior reception at Cumberland High School is a formal dinner-dance sponsored by the senior class. It is held shortly before graduation but is not a part of the graduation ceremonies. All seniors, except those on suspension are eligible to attend the dance; no one is required to go. All students who attend must bring an escort, although their dates need not be seniors or even Cumberland High School students. (pp. 382-383)

> The seeds of the present conflict were planted a year ago when Paul Guilbert, then a junior at Cumberland High School, sought permission to bring a male escort to the junior prom. The principal, Richard Lynch, denied the request, fearing that student reaction could lead to a disruption at the dance and possibly to physical harm to Guilbert. The request and its denial were widely publicized and led to widespread community and student reaction adverse to Paul. Some students taunted

> and spit at him, and once, someone slapped him; in response, principal Lynch arranged an escort system, in which Lynch or an assistant principal accompanied Paul as he went from one class to the next. No other incidents or violence occurred. Paul did not attend the prom. At that time, Aaron Fricke was a friend of Paul's and supported his position regarding the dance. (p. 383)
>
> This year, during or after an assembly in April in which senior class events were discussed, Aaron Fricke, a senior at Cumberland High School, decided that he wanted to attend the senior reception with a male companion. Aaron considers himself a homosexual, and has never dated girls, although he does socialize with female friends. He has never taken a girl to a school dance. Until this April, he had not "come out of the closet" by publicly acknowledging his sexual orientation. (p. 383)
>
> Aaron asked principal Lynch for permission to bring a male escort, which Lynch denied. A week later Aaron asked Paul Guilbert to be his escort and Paul accepted. Aaron met again with Lynch, at which time they discussed Aaron's commitment to homosexuality; Aaron indicated that although it was possible he might someday be bisexual, at the present he is exclusively homosexual and could not conscientiously date girls. Lynch gave Aaron written reasons for his action; prime concern was the fear that a disruption would occur and Aaron or, especially, Paul would be hurt. He indicated in court that he would allow Aaron to bring a male escort if there were no threat of violence. (pp. 383-384)
>
> After Aaron filed suit in this court, an event reported by the Rhode Island and Boston papers, a student shoved and, the next day, punched Aaron. The unprovoked, surprise assault necessitated five stitches under Aaron's right eye. The assailant was suspended for nine days. After this, Aaron was given a special parking space closer to the school doors and was provided with an escort between classes. No further incidents occurred. (pp. 382-384)

Issues: The District Court of Rhode Island must determine if the act of a male homosexual high school student bringing a male escort to the senior prom constitutes a political statement that merits free speech protection under the First Amendment. (p. 381)

Holding: It was a denial of First Amendment rights of a male homosexual high school student for school officials to preclude him from bringing a male escort to the senior prom because the student's action amounted to a political statement protected by the First Amendment. Al-

though school officials sought to prevent attendance in order to eliminate the possibility of violence, they failed to show that barring the student was the least restrictive means of attaining that goal. (p.381)

Reasoning: The proposed activity in this case has significcant expressive content. Aaron testified that he wants to go because he feels he has a right to attend and participate just like all the other students and that it would be dishonest to his own sexual identity to take a girl to the dance. He went on to acknowledge that he feels his attendance would have a certain political element and would be a statement for equal rights and human rights. While mere communicative intent may not always transform conduct into speech, Gay Students Organization Bonner, 509 F.2d 652 (1st Cir. 1974), makes clear that this exact type of conduct as a vehicle for transmitting this very message can be considered protected speech. (pp. 384-385)

Accordingly, the school's action must be judged by the standards articulated in United States v. O'Brien, 88 S. Ct. 1673, and applied in Bonner: (1) Was the regulation within the constitutional power of the government? (2) Did it further an important or substantial governmental interest? (3) Was the governmental interest unrelated to the suppression of free expression? and 4) Was the incidental restriction on alleged First Amendment freedoms no greater than essential to the furtherance of that interest? (p. 385)

In regard to the first standard, the school unquestionably has an important interest in student safety and has the power to regulate students' conduct to ensure safety. As to the suppression of free expression, Lynch's testimony indicated that his personal views on homosexuality did not affect his decision, and that but for the threat of violence, he would let the two young men go together. Thus the government's interest here is not in squelching a particular message because it objects to its content as such. On the other hand, the school's interest is in suppressing certain speech activity because of the reaction its message may engender. Surely this is still suppression of free expression. (p. 385)

It is also clear that the school's action fails to meet the last criterion set out in O'Brien, the requirement that the government employ the "least restrictive alternative" before curtailing speech. The plaintiff argues, and this court agrees, that the school can take appropriate security measures to control the risk of harm. The court appreciates that controlling high school students is no easy task. It is, of course, impossible to guarantee that no harm will occur, no

matter what measures are taken. But only one student so far has attempted to harm Aaron, and no evidence was introduced of other threats. The measures taken already, especially the escort system, have been highly effective in preventing any further problems at school. Appropriate security measures coupled with a firm, clearly communicated attitude by the administration that any disturbance will not be tolerated appear to be a realistic, and less restrictive, alternative to prohibiting Aaron from attending the dance with the date of his choice. (pp. 385-386)

It seems that not unlike in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, the school administrators were acting on "an undifferentiated fear of apprehension of disturbance." While the defendants have, perhaps, shown more of a basis for fear of harm than in Tinker, they have failed to make a "showing" that Aaron's conduct would "materially and substantially interfere" with school discipline. See Tinker, 89 S. Ct. at 737. However, even if the court assumes that there is justifiable fear and that Aaron's peaceful speech leads, or may lead, to a violent reaction from others, the question remains: May the school prohibit the speech, or must it protect the speaker? (p. 387)

This court concludes that even a legitimate interest in school discipline does not outweigh a student's right to peacefully express his views in an appropriate time, place, and manner. To rule otherwise would completely subvert free speech in the schools by granting other students a "heckler's veto," allowing them to decide—through prohibited and violent methods—what speech will be heard. The First Amendment does not tolerate mob rule by unruly school children. This conclusion is bolstered by the fact that any disturbance here, however great, would not interfere with the main business of school affected; at the very worst, an optional social event, conducted by the students for their own enjoyment, would be marred. In such a context, the school does have an obligation to take reasonable measures to protect and foster free speech, not to stand helpless before unauthorized student violence. (p. 387)

The present case is so difficult because the court is keenly sensitive to the testimony regarding the concerns of a possible disturbance, and of physical harm to Aaron or Paul. However, this court is convinced that meaningful security measures are possible, and the First Amendment requires that such steps be taken to protect—rather than to stifle—free expression. (p. 389)

Disposition: The district court granted the plaintiff's request for a preliminary injunction ordering school officials to allow him to attend the senior prom with a male escort. (p. 389)

Loitering

Citation: Wiemerslage v. Maine Township School District 207, 29 F.3d 1149 (7th Cir. 1994)

Facts: Kurt Wiemerslage, a student at Maine Township High School South ("Maine South") in Park Ridge, Illinois, was given a three-day suspension from school for violating the school's anti-loitering rule. Alleging that the rule violated his constitutional rights under the First and Fourteenth Amendments, he filed suit under Title 42 U.S.C. Section 1983. The district court dismissed his complaint for failure to state a claim. (p. 1150)

Issues: The First Amendment issue presented in this appeal concerns whether a prohibition against loitering in a specified area of school property is reasonable and does not deny students their First Amendment guarantees of free speech and free assembly. (p. 1150)

Holding: The Court of Appeals for the Seventh Circuit ruled that the school's prohibition against loitering did not violate students' rights of free speech and free assembly. (p. 1149)

Reasoning: One of Wiemerslage's constitutional arguments is that, as applied to him, the school's anti-loitering rule violates the First Amendment's guarantees of free speech and free assembly. The trial court dismissed this claim because Wiemerslage failed to allege facts which might support an allegation of a First Amendment violation. (p. 1152)

> Although on numerous occasions the plaintiff makes reference to the First Amendment and summarily alleges violations thereof, the complaint is notably devoid of any facts which would support a constitutional violation. First Amendment rights are not absolute and may be subject to time, manner, and place restrictions so long as those restrictions are narrowly tailored to serve legitimate governmental interests. See Grayned, 92 S. Ct. at 2303-04. Schools may restrict expressive activity if such activity "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 740. (p. 1152)

> In this instance, Maine South students entering and leaving school through Hamlin Gate presented school officials with two problems. First, there was a concern for the students' own safety because of the traffic in the area. Second, residents in the vicinity reported damage to their properties as a result of students milling about the area. To address these twin concerns, school officials prohibited students from congregating in a specified area as a means of inducing them to proceed wherever it was they were going. (p. 1152)
>
> Maine South's response to these problems was appropriate. Personal safety and damage to property are two legitimate reasons to regulate speech and assembly. See e.g., Cameron v. Johnson, 88 S. Ct. 1335. The rule drafted by Maine South was narrowly tailored in that it was limited to a confined space and proscribed conduct regardless of its expressive content. (p. 1153)
>
> Wiemerslage fails to allege facts which render these restrictions constitutionally unreasonable. Maine South's anti-loitering rule was not designed to prevent student speech or assembly. Wiemerslage does not articulate why the school's concerns for safety and property damage were somehow outweighed by his need to exercise his rights of free speech and assembly in the Hamlin Gate area. Nor does he explain why the rule was overly broad. Consequently, his claim alleging violations of the First Amendment was properly dismissed. (p. 1153)

Disposition: The ruling of the District Court for the Northern District of Illinois was affirmed. (p. 1153)

Nonschool Publications

Citation: Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969)

Facts: The plaintiff, Jeffrey Schwartz, a student at the Jamaica High School, claims he was suspended for exercising his First Amendment right of freedom of speech in distributing off school grounds near the property of the high school, Issue No. 5 of a newspaper entitled "High School Free Press," criticizing the principal, Louis Schuker, and other members of the administration. (p. 239)

> Jeffrey was a senior at the high school and was found on April 2, 1968, distributing Peace Strike materials on school grounds during the school day, calling for a student strike. He was not punished but was advised by the dean that students were not permitted to distribute outside literature on school grounds without specific

permission and that a violation of this resolution would constitute a serious breach of school discipline. Subsequently, on December 9, 1968, at a time when there were city-wide riots by students protesting the lengthened school day, Jeffrey was interviewed by an administrative assistant concerning materials to be distributed in the school calling for a student strike during school hours, and admitted that he was part of the student strike movement. (p. 239)

On January 20, 1969, Principal Schuker conferred with Jeffrey about the proposed Issue 5 of the High School Free Press (which is independently published off school property for circulation among many high schools) and advised him that under no conditions would he be permitted to distribute this material in school or on school grounds. Schuker based his reason upon the fact that he had read the previous issue, number 4, which contained four-letter words, filthy references, abusive and disgusting language and nihilistic propaganda. Nevertheless, Jeffrey, on January 24, 1969, appeared on the school grounds carrying 32 copies of Issue 5 of the High School Free Press. This issue criticized Principal Schuker, referring to him as "King Louis," "a big liar," and a person having "racist views and attitudes." Other pupils were apprehended distributing copies of this newspaper on school grounds, and four admitted violating school regulations and surrendered this material. Jeffrey was not charged with distribution but upon demand, refused to surrender to the dean the material unless taken by force. At the same time he advised a second- year student to disobey the dean and to likewise refuse to surrender his copies. (p. 240)

As a result of this action, Jeffrey was excluded from classes as stated in a letter to his parents requesting an interview, which was held on January 27, 1969. Upon this occasion the parents were informed, in Jeffrey's presence, that Jeffrey was formally suspended and that a suspension hearing would be set up in the future. This notice was confirmed in writing by a letter to Jeffrey's parents on the same day. Nevertheless, on February 5, 1969, Jeffrey appeared in the classroom at the Jamaica High School and admitted that he was present in defiance of the superintendent's order by his mother's instructions. The suspension hearing was held, as a result of which the district superintendent recommended that Jeffrey be graduated on January 31, 1969 or, as an alternative, be transferred to either of two other high schools in the same district. This option was not exercised by Jeffrey or his parents. Instead, the minor plaintiff, through his mother, brought action for a declaratory judgment and an injunction to prevent further deprivation of his rights, and to mandate his

reinstatement as a student at Jamaica High School. (p. 240)

Issues: Are a high school student's First Amendment free speech rights abridged when he is suspended for bringing copies of a nonschool publication on school premises after being warned by the principal not to do so? (p. 239)

Holding: The District Court for the Eastern District of New York held that the suspension of a high school student who had been cautioned by the principal not to bring on school premises copies of a newspaper, published off school property, but nevertheless did so, and who when asked to surrender the newspapers refused to do so and attempted to influence another student to do likewise, and who after suspension defied the superintendent's orders by appearing in school, did not violate the student's First Amendment right of free speech. (p. 238)

Reasoning: It has been repeatedly held that the provisions of the First Amendment apply to high school students as well as to others. See Tinker v. Des Moines Independent School District, 89 S. Ct. 733. The difficulty with the plaintiff's contention is that it is far from clear that Jeffrey was suspended because of protected activity under the First Amendment rather than flagrant and defiant disobedience of the school authorities. While his action might have also included actual or threatened dissemination of the paper on or off school premises, his conduct went much further. When cautioned not to bring on school premises copies of the newspaper, he nevertheless did so; when asked to surrender the same, he refused and in addition attempted to influence another student to do likewise; when suspended from school and told not to report, he nevertheless appeared in school and admitted defiance of the superintendent's orders. The latter event confirmed a pattern of open and flagrant defiance of school discipline, aided and abetted by his parents' encouragement. There surely was another way, if he and his parents so desired, to squarely present the issue of his right to disseminate off, but next to, school property, copies of the underground paper, High School Free Press. A special note should be taken that the activities of high school students do not always fall within the same category as the conduct of college students, the former being in a much more adolescent and immature stage of life and less able to screen fact from propaganda. (pp. 241-242)

In our system of government, there is no right to suppress or censor speech or expressions even though they may be hateful or offensive to those in authority or

opposed by the majority. It is likewise true that the freedom of speech protected by the First Amendment is not "absolute" and is subject to constitutional restriction for the protection of the social interest in government, order, and morality. While there is a certain aura of sacredness attached to the First Amendment, nevertheless, these First Amendment rights must be balanced against the duty and obligation of the state to educate students in an orderly and decent manner to protect the rights not of a few but of all of the students in the school system. The line of reason must be drawn somewhere in this area of ever-expanding permissibility. Gross disrespect and contempt for the officials of an educational institution may be justification not only for suspension but also for expulsion of a student. (p. 242)

Disposition: The district court found no basis for a preliminary injunction against school authorities. (p. 242)

Citation: Baker v. Downey City Board of Education, 307 F. Supp. 517 (C.D.Cal. 1969)

Facts: Norma J. Baker and Paul David Schaffner, as guardians for their minor sons, David Keith Baker and William Alan Schaffner, seek injunctive and declaratory relief, claiming, among other things, that their children's First Amendment rights of free speech and expression were violated. (p. 519)

William Schaffner, then a senior, and student body president of Earl Warren High School, was, on November 10, 1969, suspended from school for ten school days for use of "profanity or vulgarity" appearing in an off-campus newspaper published by the plaintiffs. (p. 519)

David Baker, at the time a senior, and president of the senior class, was likewise suspended from school for ten school days on November 10, 1969, for the same reason. (p. 519)

Since November, 1968, the plaintiffs had jointly written, published and distributed to the students of Warren High School an off-campus newspaper entitled Oink. Twelve issues were so published and distributed, nine of said issues before the controversial issue (Exhibit 4) which, as the other issues, was distributed to students entering the campus for morning classes during the period from about 7:30 A.M. until the first class convened at 8:00 A.M. The distribution of all issues of Oink was made by the plaintiffs by handing copies to students just outside the main gate to the campus. (p. 519)

Among other claims, the plaintiffs contend that they were illegally suspended for violation of their rights to free speech under the First Amendment of the United States Constitution. The defendants urge that the suspensions were not in violation of the plaintiffs' right to free speech but were within the authority of the high school administrators in performance of their obligation and duty to maintain a proper educational program with the necessary control and discipline of students to assure its success and to insure the careful supervision of the moral conditions in their school, as required by paragraph 24, Title 5, California Administrative Code. (p. 520)

Issues: The First Amendment issue in this case involves the use of profane or vulgar speech in an off-campus newspaper. In particular, the question is whether the temporary suspension of high school students for use of profanity or vulgarity in a nonschool publication infringes upon their First Amendment rights of free speech and expression. (pp. 518-519)

Holding: The District Court for the Central District of California held that the suspension of high school students for use of profane or vulgar language in a nonschool publication distributed to students just outside the main campus was not violative of their rights to free speech and expression. (pp. 518-519)

Reasoning: In support of their position that their constitutional rights to free speech have been violated, the plaintiffs argue that the November 5, 1969, issue of Oink did not cause disruption or interference with the normal educational program at Warren High School and that they were merely expressing their views and opinions, which they had every right to do, although such expression might be unpopular with some. (pp. 520-521)

Zucker v. Panitz, 299 F. Supp. 102, 106, on which the plaintiffs rely, involved the publishing in a school paper of a paid advertisement opposing the Vietnam war. The district court held that the paper was open to the free expression of ideas and that the students were entitled to publish the advertisement on freedom of speech grounds. (p. 521)

The plaintiffs also cite Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, which case concerned the rights of a few high school students to wear black armbands to protest the war in Vietnam. Five students were suspended. The Supreme Court held that the wearing of the armbands was akin to free speech and that First Amendment rights were available to teachers and students, subject to application in light of the special characteristics of the school

environment. The Court went on to say that a student may express his opinions on campus, even on controversial subjects "if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others," 89 S. Ct.740.

In the case of Burnside v. Byars, 363 F.2d 744, 748, cited by the Supreme Court, the Court states:

> The interest of the state in maintaining an educational system is a compelling one, giving rise to a balancing of First Amendment rights with the duty of the state to further and protect the public school system. The establishment of an educational program requires the formulation of rules and regulations necessary for the maintenance of an orderly program of classroom learning. In formulating regulations, including those pertaining to the discipline of school children, school officials have a wide latitude of discretion. (p. 521)

The Court also says that it is not for the court to consider whether such rules are wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities. (p. 522)

Following distribution of Exhibit 4 and prior to the suspensions, there were numerous inquiries by parents in the school district, students, teachers, and at least one public official, as to what the school officials were going to do about the vulgarities in Exhibit 4, and some students were taking the position that if the plaintiffs were not to be restrained that there was no reason why they could not use the same manner of expression on campus. (p. 526)

The plaintiff's insistence that Oink was not distributed on campus is of little aid to their case. First, the fact the distribution was technically not on campus because the paper was handed to students just outside the main gate does not mitigate against the fact that the plaintiffs knew the students were entering the campus for class and also knew and intended that Oink would be well distributed on campus. Second, the fact the acts which resulted in the distribution on campus were not actually performed on campus is of no consequence. The school authorities are responsible for the morals of the students while going to and from school, as well as during the time they are on campus. When the bounds of decency are violated in publications distributed to high school students, whether on campus or off

campus, the offenders become subject to discipline. (p. 526)

Freedom of speech is not the right to say anything one may please in any manner or place. The rule that the constitutional right to free speech may be infringed by the State, if there are compelling reasons to do so, must also be considered. (p. 527)

It appears to the court that the school administrators were amply justified in their conclusion that Exhibit 4 contained profane and vulgar expressions. The instant case is to be distinguished from Tinker v. Des Moines Independent Community School District, Zucker v. Panitz, and Burnside v. Byars. In those cases, profanity and vulgarity were not involved, only the right to espouse a cause, political or otherwise, which did not disrupt the educational program of the school involved. In this case, the plaintiffs were not disciplined for the criticism of the school administrators and the faculty, or of the Vietnam war, but because of the profane and vulgar manner in which they expressed their views and ideas. Several of the prior issues of Oink, all of which are in evidence, contained articles critical of the school administration, but no disciplinary action was taken until Exhibit 4 was distributed. (p. 527)

Having in mind all of the facts and circumstances in this case, the court determines that the plaintiffs' First Amendment rights to free speech do not require the suspension of decency in the expression of their views and ideas. The right to criticize and to dissent is protected to high school students, but they may be more strictly curtailed in the mode of their expression and in other manners of conduct than college students or adults. The education process must be protected and educational programs properly administered. (p. 527)

Disposition: The plaintiffs were not entitled to the injunctive or declaratory relief sought by their complaint. (p. 528)

Citation: Graham v. Houston Independent School District, 335 F. Supp. 1164 (S.D.Tex. 1970)

Facts: This action was filed pursuant to Title 42 U.S.C. Section 1983 and Title 28 U.S.C. Section 2201 by three students at Bellaire High School against the school principal and the superintendent and members of the board of the Houston Independent School District. The plaintiffs allege that as a result of their publishing and distributing an off-campus publication called The Plain Brown Watermelon, they were harassed by school officials and were told to leave the school until their

"attitudes changed." Contending that their rights under the First, Fifth, and Fourteenth amendments to the United States Constitution were violated, the plaintiffs first sought a temporary restraining order to restrain the defendants or their agents from refusing the plaintiffs permission to re-enter the school, from harassing the plaintiffs, and from imposing discipline upon them because of their activities in connection with the newspaper. The motion for the temporary restraining order was denied on October 22, 1969. By motion for preliminary injunction, the plaintiffs seek the foregoing relief, and in addition, an order enjoining the defendants from maintaining a record of the disciplinary action; from enforcing regulations designed to inhibit the production and distribution of private student newspapers in the district; and for an order requiring the return of seized newspapers. (pp. 1164-1165)

The basic facts in this case are for the most part undisputed. The plaintiffs began on-campus distribution of The Plain Brown Watermelon on October 17, 1969. On the same day, they were called before high school administrators and were told to cease distributing the paper. They were informed that they were to leave the school until they did so. They were not formally expelled. They and their parents were offered an opportunity to meet with the school principal, but only two of the defendants took advantage of the hearing. The students remained intransigent, and the school principal refused to revoke his directive; the students therefore left the school and filed this suit. (p. 1165)

The evidence adduced at the hearing in this court showed that prior to the distribution of The Plain Brown Watermelon, the school principal, Mr. Harlan Andrews, had on two occasions announced to the student body the rule that the distribution of unauthorized material on the campus would result in disciplinary measures. One of the plaintiffs, Harrell Graham, testified that a major purpose behind distributing the paper was to flaunt that rule. The testimony of the other two witnesses was to the same effect; they knew at the time that their activities were against school policy and that they were subjecting themselves to the disciplinary measures previously announced by Mr. Andrews. (p. 1165)

Issues: The First Amendment issue at hand concerns whether school authorities, who discipline students for disregarding school rules and administrative directives by distributing an unauthorized newspaper at school, violate the students' freedom of speech. (p. 1164)

Holding: The District Court for the Southern District of Texas, Houston Division, ruled that school authorities have the power to discipline students who disregard school rules and administrative directives, where the evidence shows that students are reprimanded more for disobedience than for dissemination of material protected by the First Amendment. (p. 1164)

Reasoning: Judge Woodrow Seals of this district was recently presented with a situation similar to that in the instant case in Sullivan v. Houston Independent School District, 307 F. Supp. 1328 (S.D.Tex. 1969). Judge Seals well and thoroughly enunciated the principles as they currently stand pertaining to the rights of students to register dissent on the school campus. To summarize, Judge Seals held, primarily on the basis of Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, that students do not shed their constitutional rights when they enter the high school campus; First Amendment protections apply fully to high school students. Judge Seals noted, however, that "speech and assembly are subject to reasonable restrictions as to time, place, manner and duration." See Sullivan v. Houston Independent School District, 307 F. Supp. at 1339. Freedom of speech may therefore be exercised on the school campus "so long as it does not unreasonably interfere with normal school activities." (Id. at 1340) In Tinker, the Supreme Court stated the underlying test:

> "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible." Tinker v. Des Moines Independent Community School District, 89 S. Ct. at 739. (pp. 1165-1166)

To this point, the court concurs with Judge Seals' analysis in Sullivan as to the rules pertaining to First Amendment freedoms on the campus. In a proper case, the issue would now be whether the students were responsible for "material and substantial" disruption of school procedures within the meaning of Tinker. This court cannot agree, however, with the unstated conclusion that seems to logically follow from the Sullivan decision: that any activity involving speech, even when coupled with gross disobedience of school disciplinarians, must be tested against the disruption standard. (p. 1166)

This court reached this conclusion because, in this case, the evidence tends to show that these plaintiffs were reprimanded more for disobedience than for the dissemination of material protected under the First

Amendment. In the first instance, the students were not expelled. In effect, they were told to leave their classes until they could obey the principal's directives. They were never told that they could not distribute the paper off the campus. They knew that there were reasonable and proper channels to explore in order that they might distribute the paper on campus, but they bypassed them completely. The plaintiffs testified that one purpose in distributing the paper was to flaunt the school rule prohibiting the activity in which they were engaged. Moreover, there was evidence that the distribution of the paper had caused a disturbance in certain classrooms and in the halls. Whether it was "substantial" within the Tinker standard does not need answering. In connection with the other activities of the plaintiffs, the resulting disturbance was sufficient to warrant the school principal in disciplining the students. (p. 1166)

This court will not begin to intimate the extent to which a student may be disobedient before disciplinary measures are properly taken. That determination is within the province of the school administrators. It is sufficient to state that the court finds the principal's decision neither arbitrary nor unreasonable under the circumstances. (p. 1167)

School authorities are not without power to discipline students for prohibited activity simply because that activity may involve speech. This court concludes that the school authorities do have the power to discipline students who disregard school rules and administrative directives. (p. 1168)

Disposition: The district court found no basis for the relief sought by the plaintiffs, and the applications for preliminary and permanent injunction were denied. The plaintiffs' complaint was dismissed. (p. 1168)

Citation: Scoville v. Board of Education of Joliet Township High School District 204, 425 F.2d 10 (7th Cir. 1970)

Facts: The plaintiffs are Raymond Scoville and Arthur Breen, students at Joliet Central High School, one of three high schools administered by the defendant board of education. Scoville was editor and publisher, and Breen senior editor, of the publication Grass High. They wrote the pertinent material. Grass High is a publication of fourteen pages containing poetry, essays, movie and record reviews, and a critical editorial. Sixty copies were distributed to faculty and students at a price of fifteen cents per copy. (p. 11)

On January 18, 1968, three days after Grass High was sold in the school, the dean advised the plaintiffs

that they could not take their fall semester examinations. Four days thereafter, the plaintiffs were suspended for a period of five days. Nine days after that Scoville was removed as editor of the school paper, and both he and Breen were deprived of further participation in school debating activities. (pp. 11-12)

The dean then sent a report to the superintendent of the high schools with a recommendation of expulsion for the remainder of the school year. The superintendent wrote the parents of the plaintiffs that he would present the report, together with the recommendation, to the board of education at its next meeting. He invited the parents to be present. Scoville's mother wrote a letter to the board expressing the plaintiffs' sorrow for the trouble they had caused, stating that they had learned a lesson, that they were worried and upset about possible interruption in their education, and that the parents thought the boys had already been adequately punished. Neither the plaintiffs nor their parents attended the board meeting. The board expelled the plaintiffs from the day classes for the second semester, by virtue of the board's authority under Ill. Rev. Stat. Ch. 122, Section 10-22.6 (1967), upon a determination that they were guilty of "gross disobedience [and] misconduct." The board permitted them to attend, on a probationary basis, a day class in physics, and night school at Joliet Central. The suit before this court followed. (p. 12)

Upon the defendants' motion to dismiss, the district court decided that the complaint, on its face, alleged facts which "amounted to an immediate advocacy of, and incitement to, disregard of school administrative procedures," especially because the publication was directed to an immature audience. In other words, the court implicitly applied the clear and present danger test, finding that the distribution constituted a direct and substantial threat to the effective operation of the high school. At no time, either before the board of education or in the district court, was the expulsion of the plaintiffs justified on grounds other than the objectionable content of the publication. The board has not objected to the place, time, or manner of distribution. The court found, and it is not disputed, that the plaintiffs' conduct did not cause any commotion or disruption of classes. (p. 12)

No charge was made that the publication was libelous, and the district court felt it unnecessary to consider whether the language in Grass High labeled as "inappropriate and indecent" by the board could be suppressed as obscene. The court thought that the interest in maintaining its school system outweighed the private

interest of the plaintiffs in writing and publishing Grass High. (p. 12)

Issues: The First Amendment issue in this case is whether freedom of expression is denied if high school students are expelled for writing, off school premises, material critical of school policies and authorities and then distributing their publication in the school. (p. 10)

Holding: The Court of Appeals for the Seventh Circuit ruled that the complaint of two high school students who were expelled after writing, off school premises, and distributing in school, a publication which was critical of school policies and authorities, disclosed on its face an unjustified invasion of the students' First and Fourteenth Amendment rights and was sufficient to state a claim for declaratory judgment, injunctive relief, and damages. (p. 10)

Reasoning: The plaintiffs contend that the expulsion order violated their First and Fourteenth Amendment freedoms. The authoritative decision, pertinent to the important issue before this court, is Tinker v. Des Moines School District, 89 S. Ct. 733. Tinker is a high school "armband" case, but its rule is admittedly dispositive of the case before the court. (p. 13)

The Tinker rule narrows the question before this court to whether the writing of Grass High and its sale in school to 60 students and faculty members could "reasonable have led [the board] to forecast substantial disruption of or material interference with school activities or intru[sion] into the school affairs or the lives of others." See Tinker v. Des Moines School District, 89 S. Ct. at 740. This court holds that the district court erred in deciding that the complaint "on its face" disclosed a clear and present danger justifying the defendants' "forecast" of the harmful consequences referred to in the Tinker rule. (p. 13)

Tinker announces the principles which underlie our holding: High school students are persons entitled to First and Fourteenth Amendment protections. States and school officials have "comprehensive authority" to prescribe and control conduct in the schools through reasonable rules consistent with fundamental constitutional safeguards. Where rules infringe upon freedom of expression, the school officials have the burden of showing justification. (p. 13)

The plaintiffs' freedom of expression was infringed by the board's action, and the defendants had the burden of showing that the action was taken upon a reasonable forecast of a substantial disruption of school activity. No reasonable inference of such a showing can be

drawn from the complaint which merely alleges the facts recited in the beginning of this opinion. The criticism of the defendants' disciplinary policies and the mere publication of that criticism to 60 students and faculty members leaves no room for reasonable inference justifying the board's action. While recognizing the need of effective discipline in operating schools, the law requires that the school rules be related to the state interest in the production of well-trained intellects with constructive critical stances, lest students' imaginations, intellects, and wills be unduly stifled or chilled. Schools are increasingly accepting student criticism as a worthwhile influence in school administration. (pp. 13-14)

The Grass High editorial imputing a "sick mind" to the dean reflects a disrespectful and tasteless attitude toward authority. Yet does that imputation to 60 students and faculty members, without more, justify a "forecast" of substantial disruption or material interference with the school policies or invade the rights of others? The court thinks not. The reference undoubtedly offended and displeased the dean. But mere "expressions of [the students'] feelings with which [school officials] do not wish to contend" (Burnside v. Byars, 363 F.2d at 749; Tinker v. Des Moines School District, 89 S. Ct. at 739) are not the showing required by the Tinker test to justify expulsion. (p. 14)

Finally, there is the Grass High random statement, "Oral sex may prevent tooth decay." This attempt to amuse comes as a shock to an older generation. But today's students in high school are not insulated from the shocking but legally accepted language used by demonstrators and protestors in streets and on campuses and by authors of best-selling modern literature. A hearing might even disclose that high school libraries contain literature which would lead students to believe the statement made in Grass High was unobjectionable. (p. 14)

This court believes the discussion above makes it clear, on the basis of the admitted facts and exhibits, that the board could not have reasonably forecast that the publication and distribution of this paper to the students would substantially disrupt or materially interfere with school procedures. (p. 15)

Disposition: The appeals court reversed the decision of the District Court for the Northern District of Illinois, Eastern Division, and remanded the case for further proceedings. (p. 15)

Citation: Eisner v. Stamford Board of Education, 314 F. Supp. 832 (D.Conn. 1970)

Facts: The plaintiffs, students at Rippowam High School, a public high school in Stamford, Connecticut, are authors and publishers of an independent mimeographed newspaper entitled the Stamford Free Press. The newspaper is printed at the students' expense and expresses their views upon current controversial subjects. Three issues of the newspaper were distributed beyond school limits without incident. After there was an attempt to circulate a fourth issue on school grounds, school officials, named defendants herein, warned the students they would be suspended if the activity continued. In existence at the time was a regulation passed by the board of education, which prohibited "using pupils for communications." When negotiations between the students and administration failed to resolve the dispute, this suit was instituted on June 23, 1969. (p. 833)

Thereafter, on November 18, 1969, the board of education restated its policy on the matter with the following enactment:

> The Board of Education desires to encourage freedom of expression and creativity by its students subject to the following limitations:
>
> > No person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such material shall have prior approval by the school administration. (p. 833)
>
> In granting or denying approval, the following guidelines shall apply:
>
> > No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others. (p. 834)

The plaintiffs contend this regulation contravenes the guarantee of freedom of speech and press under the First Amendment. The defendants argue that the regulation is a valid exercise of the board's inherent power to impose prior restraints on the conduct of schoolchildren. (p. 834)

Issues: In addition to a free press question, the primary First Amendment issue of free speech centers on whether a nonschool student newspaper may be distributed in a public high school without being submitted to the

school's administrators for prior approval of its contents. (p. 833)

Holding: The District Court of Connecticut determined that the regulation requiring prior administrative approval of the contents of any printed or written material before its distribution on school grounds was constitutionally invalid as providing for unjustified prior restraint of speech and press. (p. 833)

Reasoning: At the outset, it is important to stress what is not contested in this lawsuit. The plaintiffs acknowledge that the school authorities may, and indeed must at times, control the conduct of students. To this end, the administration has the power and the duty to promulgate rules and the appropriate guidelines for their application. More specifically, with respect to this case, the plaintiffs concede the defendants possess the authority to establish reasonable regulations concerning the time, exact place in the school, and the manner of distribution of the newspaper, and to insist that each article identify its author. (p. 834)

Moreover, the plaintiffs do not challenge the board's power to issue guidelines on the permissible content of the newspaper. For example, they do not object to a prohibition of obscene or libelous material. They further recognize that the board has the duty to punish "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." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 740. (p. 834)

The only issue before the court concerns the constitutional validity of the requirement that the content of the literature be submitted to school officials for approval prior to distribution. Viewing the regulation in question solely on its face, it seems clear to the court that the regulation is a classic example of prior restraint of speech and press which constitutes a violation of the First Amendment. (p. 834)

The right of students to freedom of expression, however, is not absolute. The "heavy presumption" against restrictive regulations on free speech may be overcome "in carefully restricted circumstances." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. School administrations of necessity must have wide latitude in formulating rules and guidelines to govern student conduct within the school. If there is "a specific showing of constitutionally valid reasons to regulate their speech," Tinker, 89 S. Ct. at 739, students must conform to reasonable regulations which

intrude on that freedom. Free speech is subject to reasonable restrictions as to time, place, manner, and duration. See Tinker, 89 S. Ct. 733. (pp. 834-835)

In the present case, the defendants have not produced a scintilla of proof which would justify the infringement of the students' constitutional rights to be free of prior restraint in their writings. The contents of the issues of the Stamford Free Press submitted to the court are infinitely less objectionable than the underground newspaper Grass High, involved in Scoville v. Board of Education, 425 F.2d 10, and the personal conduct and attitude of the plaintiffs have been commendable. (p. 835)

Moreover, even assuming the defendants carried their burden and demonstrated the necessity for prior restraint, the regulations provide none of the procedural safeguards designed to obviate the dangers of a censorship system. Among other things, the regulations do not specify the manner of submission, the exact party to whom the material must be submitted, the time within which a decision must be rendered; nor do they provide for an adversary proceeding of any type or for a right of appeal. (pp. 835-836)

Finally, this court is convinced that reasonable regulations can be devised to prevent disturbances and distractions in Rippowam High School and at the same time, protect the rights of the plaintiffs to express their views through their newspaper. The board of education has the duty under Connecticut law, and the right under Tinker, to punish "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." See Tinker, 89 S. Ct. at 740. But this right and duty does not include blanket prior restraint; the risk taken if a few abuse their First Amendment rights of free speech and press is outweighed by the far greater risk run by suppressing free speech and press among the young. Student newspapers are valuable educational tools, and also serve to aid school administrators by providing them with an insight into student thinking and student problems. They are valuable peaceful channels of student protest which should be encouraged, not suppressed. (p. 836)

Disposition: The district court granted the plaintiffs' motion for summary judgement. (p. 836)

Citation: Poxon v. Board of Education, 341 F. Supp. 256 (E.D.Cal. 1971)

Facts: The plaintiffs are students within the San Juan Unified School District who were denied permission to circulate a nonschool-sponsored newspaper known as Downwind. They brought this action to challenge such denial and the existence of a system requiring prior submission of their publication for administration approval under guidelines established by the district. Specifically, the plaintiffs moved for summary judgment, challenging the "Policy Governing the Distribution of Non-School Sponsored Literature" as unconstitutionally vague and overbroad and as an unconstitutional prior restraint on plaintiff-students' First Amendment rights of expression and speech. (p. 257)

Issues: Is a policy permitting prior restraint of a nonschool-sponsored newspaper published by students an unconstitutional abridgement of the students' First Amendment freedoms of expressions and speech? (p. 256)

Holding: The District Court for the Eastern District of California held that the school's policy allowing prior restraint of a nonschool-sponsored newspaper published by students denied the students their First Amendment right of free expression and speech. (p. 256)

Reasoning: Any system of prior restraints of expression comes to a court with a heavy presumption against its constitutional validity. (p. 257)

Defendant Board of Education, San Juan Unified School District did not present any triable issues of facts which, if true, would permit adoption of a system of prior restraints applicable to the students in its schools. (p. 257)

Defendant Board of Education, San Juan Unified School District, did not present any triable issues of fact which, if true, would demonstrate that less offensive alternatives to a prior restraint system are unavailable. (p. 257)

Policy No. 5138, entitled "Policy Governing the Distribution of Non-School Sponsored Literature" is declared to be an unconstitutional prior restraint system. (p. 257)

The court does not decide the question of vagueness or overbreadth of the policy herein at this time; nor does it decide whether the individual defendant principals violated the constitutional rights of the plaintiff students in the application of the policy herein to said plaintiffs and are liable in damages therefor.

Disposition: The court determined that summary judgment for the plaintiff students to enjoin enforcement of the

particular school policy was appropriate, there being no disputable or triable issues of material facts. (pp. 256-257)

Citation: Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971)

Facts: At the time of the commencement of this action, the plaintiff was a tenth-grade high school student at Pine Forest High School near Southern Pines, North Carolina. (p. 55)

Among the regulations of Pine Forest High School was the following, designated as General School Rule 7:

> "7. Each pupil is specifically prohibited from distributing, while under school jurisdiction, any advertisements, pamphlets, printed material, written material, announcements or other paraphernalia without the express permission of the principal of the school." (p. 55)

On November 19, 1970, the plaintiff violated Rule 7 by distributing in school an "underground" newspaper. For such infraction, he was suspended for ten school days and placed on probation. Some two months later, on January 29, 1971, he again distributed without permission, in violation of the school rule, an "underground" paper in which one of the articles concluded in large capital letters with this statement:

> . . . We have to be prepared to fight in the halls and in the classrooms, out in the streets because the schools belong to the people. If we have to—we'll burn the buildings of our schools down to show these pigs that we want an education that won't brainwash us into being racist. And that we want an education that will teach us to know the real truth about things we need to know, so we can better serve the people!!! (pp. 55-56)

On account of this second violation, he was again suspended for ten school days. (p. 56)

At this point, the plaintiff, suing both individually and as a representative of a class, began this action, seeking both a declaratory judgment that Rule 7 was violative of his First Amendment rights and a temporary and permanent injunction against the enforcement of his suspension and any other punishment for his violation of such rule, as well as damages. Following the filing of this action, he applied to the district court for temporary injunctive relief pending the disposition of the cause. The district court denied the application and proceeded to stay the action until there had been

an exhaustion of state administrative and judicial remedies by the plaintiff. From this order, the plaintiff has appealed to this court. (p. 56)

Issues: The relevant First Amendment issue addressed by the court in this case is whether a high school rule prohibiting students from distributing any written material without the express permission of the principal denies students their free speech rights under the First Amendment. (p. 54)

Holding: The Court of Appeals for the Fourth Circuit ruled that the free speech rights of students had been denied. Specifically, the court held that the school rule prohibiting students from distributing any printed material without the express permission of the principal was constitutionally invalid on its face as an improper prior restraint on speech in that the rule failed to contain any criteria to be followed by school authorities in determining whether to grant or deny permission, and failed to contain any procedural safeguards for review of the decision of school authorities. (p. 54)

Reasoning: The regulation, assailed by the plaintiff, is facially invalid. Its basic vice does not lie in the requirement of prior permission for the distribution of printed material, though such requirement is manifestly a form of prior restraint of censorship. Free speech under the First Amendment, though available to juveniles and high school students, as well as to adults, is not absolute, and the extent of its application may properly take into consideration the age or maturity of those to whom it is addressed. Thus, publications may be protected when directed to adults but not when made available to minors, or, as Justice Stewart emphasized it in his concurring opinion in Tinker, First Amendment rights of children are not "coextensive with those of adults." Similarly, a difference may exist between the rights of free speech attaching to publications distributed in a secondary school and those in a college or university. It is generally held that the constitutional right to free speech of public secondary school students may be modified or curtailed by school regulations "reasonably designed to adjust these rights to the needs of the school environment." See Antonelli v. Hammond (D.C.Mass. 1970) 308 F. Supp. 1329, 1336. Specifically, school authorities may, by appropriate regulation, exercise prior restraint upon publications distributed on school premises during school hours in those special circumstances where they can "reasonably 'forecast substantial disruption of or material interference with school activities'" on account of the distribution of such printed material. If a reasonable basis for such a forecast exists, it is not necessary

that the school stay its hand in exercising a power of prior restraint "until disruption actually occurred." See Butts v. Dallas Independent School District (5th Cir. 1971) 436 F.2d 728, 731. The school authorities are not required to "wait until the potential (for disorder) is realized before acting." See LeClair v. O'Neil (D.C.Mass. 1969) 307 F. Supp. 621, 625, aff. 91 S. Ct. 1219. And if there are substantial facts which reasonably support a forecast of likely disruption, the judgment of the school authorities in denying permission and in exercising restraint will normally be sustained. See Butts v. Dallas Independent School District, supra. (pp. 57-59)

What is lacking in the present regulation, and what renders its attempt at prior restraint invalid, is the absence both of any criteria to be followed by the school authorities in determining whether to grant or deny permission, and of any procedural safeguards in the form of "an expeditious review procedure" of the decision of the school authorities. The regulation does not provide the procedural safeguards mandated by Freedman v. Maryland (1965) 85 S. Ct. 734, as modified to take into account what Eisner v. Stamford Board of Education, (2d Cir. 1971) 440 F.2d 803, refers to as the practical problems involved in applying Freedman to the school environment. Eisner, which involved largely the same issue as is presented here, set forth the reasonable requirements for "an expeditious review procedure" that are practical as applied in connection with the operation of a public school and that will meet the basic requirements of Freedman. (440 F.2d at pp.810-811) The regulation involved in this action includes neither such limited procedural safeguards nor any guidelines for determining the right to publish or distribute and is accordingly constitutionally defective. (pp. 59-60)

It follows that the plaintiff was entitled to declaratory judgment that, as presently framed, the regulation is invalid and its subsequent enforcement should have been enjoined. (p. 60)

The plaintiff, also, asks that his suspension be voided and expunged from his school record. Actually, the suspension was not enforced, since the order of the district court restrained its imposition. The school year has now ended. The issue of the suspension itself has accordingly become moot. Since the suspension was never enforced, it will not support an award of damages, but it would seem proper, in these particular circumstances, to expunge it from the plaintiff's record. (pp. 60-61)

Disposition: The court of appeals vacated the order of the District Court for the Eastern District of North Carolina. The cause was remanded to the district court for the entry of relief in accordance with the views herein expressed. (p. 61)

Citation: Shanley v. Northeast Independent School District, Bexar County, Texas, 462 F.2d 960 (5th Cir. 1972)

Facts: The appellants, Mark S. Shanley, Clyde A. Coe, Jr., William E. Jolly, John A. Alford, and John Graham, were seniors at MacArthur High School in the Northeast Independent School District of San Antonio. Each of the students was considered a "good" or "excellent" student. All were in the process of applying for highly competitive slots in colleges or for scholarships. The three days of zeros that resulted from the suspensions substantially affected their grade averages at a critical time of their educational careers. (p. 964)

The occasion of the suspension was the publication and distribution of a so-called "underground" newspaper entitled Awakening. The newspaper was authored entirely by the students, during out-of-school hours, and without using any materials or facilities owned or operated by the school system. The students distributed the papers themselves during one afternoon after school hours and one morning before school hours. At all times distribution was carried on near, but outside, the school premises on the sidewalk of an adjoining street, separated from the school by a parking lot. The students neither distributed nor encouraged any distribution of the papers during school hours or on school property, although some of the newspapers did turn up there. There was absolutely no disruption of class that resulted from distribution of the newspaper, nor were there any disturbances whatsoever attributable to the distribution. It was acknowledged by all concerned with this case that the students who passed out the newspapers did so politely and in orderly fashion. The Awakening contains absolutely no material that could remotely be considered libelous, obscene, or inflammatory. (p. 964)

The five students were suspended by the principal for violation of school board "policy" 5114.2, which reads in pertinent part:

> Be it further resolved that any attempt to avoid the school's established procedure for administrative approval of activities such as the production for distribution and/or distribution of petitions or printed documents of any kind, sort, or type without the specific approval of the principal shall be cause for suspension and, if in the judg-

> ment of the principal, there is justification, for referral to the office of the Superintendent with a recommendation for expulsion. (pp. 964-965)
>
> The students requested a hearing before the full school board, which was transcribed by a court reported at the students' request and expense. Counsel for the students and the school board were present at the hearing. The students argued before the board that, after consulting with an attorney and a professor at a local law school, they had concluded that the regulation in question simply did not apply to conduct exercised entirely outside school hours and off school premises. The school board affirmed the suspensions one day later. (p. 966)
>
> Objecting to the school board's bootstrap transmogrification into Super-Parent, the parents of the five affected students sought both temporary and permanent injunctive relief as next friends in the federal courts, requesting that the school board be enjoined from entering the zeros into the students' permanent records and from prohibiting the distribution of the Awakening off campus and outside school hours. The district court denied all relief, dismissing the case on its own motion as "wholly without merit." The district court also denied the students' request for an injunction pending appeal to this court, and the students immediately appealed. (pp. 966-967)

Issues: Is a school board's policy prohibiting the distribution of petitions or printed documents of any kind without approval of the school's principal being unconstitutionally applied to students in violation of their First Amendment rights to free expression? (p. 963)

Holding: The Court of Appeals for the Fifth Circuit held that where distribution by high school students of an "underground" newspaper was entirely off campus and was effected only before and after school hours, distribution was orderly and polite, and no disruption actually occurred or was reasonably foreseeable under the circumstances and the content of the paper was not obscene, libelous, or inflammatory, school board policy prohibiting the distribution of petitions or printed documents of any kind without specific approval of the school's principal was unconstitutionally applied to the students in violation of their First Amendment right to free expression. (p. 961)

Reasoning: That courts should not interfere with the day-to-day operations of schools is a platitudinous but eminently sound maxim which this court has reaffirmed on many occasions. See e.g., Burnside v. Byars, 5 Cir. 1966, 363 F.2d 744. This court laid to rest more than a

decade ago the notion that state authorities could subject students at public-supported educational institutions to whatever conditions the state wished. See Dixon v. Alabama State Board of Education, 5 Cir. 1961, 294 F.2d 150, cert. denied, 82 S. Ct. 368. Of paramount importance is the constitutional imperative that school boards abide by constitutional precepts. (p. 967)

The recent cases involving so-called "underground" newspapers or other modes of expression in high schools relate almost entirely to the circumstances under which a school board can constitutionally limit expression during class hours and on school premises. This case involves the less difficult question of conduct that is removed from the school milieu in exercise and in effect. Since school boards have rarely asserted the breadth of authority that the Northeast School District "policy" attempts to assert here, the constitutional standards are not entirely embraced by precedent. It is clear, however, that the authority of the school board to balance school discipline against the First Amendment by forbidding or punishing off-campus activity cannot exceed its authority to forbid or punish on-campus activity. Therefore, the court must first examine the authority of the school board to order the actions of students on school grounds and within school hours. (p. 968)

While a school is certainly a marketplace for ideas, it is just as certainly not a marketplace. Thus, this court has endeavored to give "careful recognition to the differences between what are reasonable restraints in the classroom and what are reasonable restraints on the street corner." See Ferrell v. Dallas Independent School District, 392 F.2d at 704-705. Because high school students and teachers cannot easily disassociate themselves from expressions directed towards them on school property and during school hours, because disciplinary problems in such a populated and concentrated setting seriously sap the educational processes, and because high school teachers and administrators have the vital responsibility of compressing a variety of subjects and activities into a relatively confined period of time and space, the exercise of rights of expression in the high schools, whether by students or by others, is subject to reasonable constraints more restrictive than those constraints that can normally limit First Amendment freedoms. (pp. 968-969)

There is nothing unconstitutional per se in a requirement that students submit materials to the school administration prior to distribution. Given the necessity for discipline and orderly processes in the high schools, it is not at all unreasonable to require that materials destined for distribution to students be

submitted to the school administration prior to distribution. As long as the regulation for prior approval does not operate to stifle the content of any student publication in an unconstitutional manner and is not unreasonably complex or onerous, the requirement of prior approval would more closely approximate simply a regulation of speech and not a prior restraint. Nor is there anything unconstitutional per se in a reasonable administrative ordering of the time, place, and manner of distributing materials on school premises and during school hours. (p. 969)

When the constitutionality of a school regulation is questioned, it is settled law that the burden of justifying the regulation falls upon the school board. The test for curtailing in-school exercise of expression is whether or not the expression or its method of exercise "materially and substantially" interferes with the activities or discipline of the school. See Burnside v. Byars, supra; Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. The purpose of any screening regulation, at least in theory, is to prevent disruption and not to stifle expression. Thus, the school board does not have a difficult burden to meet in order to justify the existence of a prior screening rule. See, e.g., Eisner v. Stamford Board of Education, 2 Cir. 1971, 440 F.2d 803. Tinker requires that presumably protected conduct by high school students cannot be prohibited by the school unless there are

> facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities. (pp. 969-970)

Under the First Amendment and its decisional explication, this court concludes that: (1) expression by high school students can be prohibited altogether if it materially and substantially interferes with school activities or with the rights of other students or teachers, or if the school administration can demonstrate reasonable cause to believe that the expression would engender such material and substantial interference; (2) expression by high school students cannot be prohibited solely because other students, teachers, administrators, or parents may disagree with its content; (3) efforts at expression by high school students may be subjected to prior screening under clear and reasonable regulations; and (4) expression by high school students may be limited in manner, place, or time by means of reasonable and equally applied regulations. (p. 970)

When the Burnside/Tinker standards are applied to this case, it is beyond serious question that the activity

punished here does not even approach the "material and substantial" disruption that must accompany an exercise of expression, either in fact or in reasonable forecast. As a factual matter, there were no disruptions of class; there were no disturbances of any sort, on or off campus, related to the distribution of the Awakening. Disruption in fact is an important element for evaluating the reasonableness of a regulation screening or punishing student expression. In a companion case to Burnside, this court held that conduct presumptively protected in Burnside itself was not protected by the First Amendment when it was accompanied by disorderly and raucous distribution. See Blackwell v. Issaquena County Board of Education, 336 F.2d 749 (1966). (p. 970)

The "reasonable forecast" of disruption that might result from the exercise of expression is a more difficult standard to apply. It is not necessary that the school administration stay a reasonable exercise of restraint "until disruption actually occur[s]." See Butts v. Dallas Independent School District, 5 Cir. 1971. Nor does the Constitution require a specific rule regarding every permutation of student conduct before a school administration may act reasonably to prevent disruption. See Eisner v. Stamford Board of Education, supra. The Awakening contains no remarks that could remotely be considered obscene, libelous, or inflammatory, and protection has been afforded to publications much more hortatory than the one before this court. The court does not here delimit the categories of materials for which a high school administration may exercise a reasonable prior restraint of content to only those materials obscene, libelous, or inflammatory, for this court realizes that specific problems will require individual and specific judgments. Therefore, in deference to the judgment of the school boards, the court refers ad hoc resolution of these issues to the neutral corner of "reasonableness." This court does conclude, however, that the school board's burden of demonstrating reasonableness becomes geometrically heavier as its decision begins to focus upon the content of materials that are not obscene, libelous, or inflammatory. The best that can be said for the administration's concern in this case is that two topics mentioned in the Awakening are "controversial" in the community. Yet it should be axiomatic at this point in our nation's history that in a democracy "controversy" is, as a matter of constitutional law, never sufficient in and of itself to stifle the views of any citizen. (pp. 970-971)

The two "controversial" subjects in the Awakening are a statement advocating a review of the laws regarding marijuana and another statement proffering information on, among other things, birth control. The court finds

the allegedly outrageous and "controversial" nature of these two subjects rather peculiar. Encouragements to become informed of social issues are certainly not the "fighting words" of Chaplinsky v. New Hampshire, 62 S. Ct. 766, words that inherently prompt only divisiveness and disruption. (p. 972)

This court has discussed potential disturbance a great deal, for in substance that is what school discipline is designed to prevent. However, the court must emphasize, in the context of this case, that even reasonably forecast disruption is not per se justification for prior restraint or subsequent punishment of expression afforded to students by the First Amendment. Reasonable regulation of expression is constitutionally preferable to restraint. If the content of a student's expression could give rise to a disturbance from those who hold opposing views, then it is certainly within the power of the school administration to regulate the time, place, and manner of distribution with even greater latitude of discretion. And the administration should, of course, take all reasonable steps to control disturbances, however generated. This court is simply taking note of the fact that disturbances themselves can be wholly without reasonable or rational basis, and that those students who would reasonably exercise their freedom of expression should not be restrained or punishable at the threshold of their attempts at expression merely because a small, perhaps vocal or violent, group of students with differing views might or does create a disturbance. (pp. 973-974)

The court realizes that each situation involving expression and discipline will create its own problems of reasonableness, and for that reason the court does not endeavor here to erect any immovable rules, but only to sketch guidelines. This court emphasizes, however, that there must be demonstrable factors that would give rise to any reasonable forecast by the school administration of "substantial and material" disruption of school activities before expression may be constitutionally restrained. While this court has great respect for the intuitive abilities of administrators, such paramount freedoms as speech and expression cannot be stifled on the sole ground of intuition. (p. 974)

Although the students urge the argument, this court does not feel it necessary to hold that any attempt by a school district to regulate conduct that takes place off the school ground and outside school hours can never pass constitutional muster. This court has evaluated situations involving off-campus activity and has required a fair hearing in such instances, Dixon v. Alabama State Board of Education, supra, but the court has never had occasion to discuss the constitutional

propriety of applying a school regulation directly to off-campus conduct. The court does note, however, that it is not at all unusual to allow the geographical location of the actor to determine the constitutional protection that should be afforded to his or her acts. In this case, the distribution of the Awakening was entirely off-campus and was effected only before and after school hours. The distribution was orderly and polite, and no disruption actually occurred or was reasonably foreseeable under the circumstances. Thus, this court holds only that the exercise of disciplinary authority by the school board under the aegis of "policy" 5114.2 was unconstitutionally applied to prohibit and punish presumptively protected First Amendment expression that took place entirely off-campus and without "substantial and material" disruption of school activities, either actual or reasonably foreseeable. (pp. 974-975)

Under the circumstances of this case and this appeal, we are compelled to proceed further with "policy" 5114.2. Recognizing the close distinction between "unconstitutional as applied" and "facially unconstitutional as overbroad," the court is, nevertheless, compelled to declare the regulation in question facially unconstitutional as both overbroad and vague. (p. 975)

The court concludes that the regulation is overbroad: (1) because it purports to establish a prior restraint on any and all exercise of expression by means of the written word on the part of high school students at any time and in any place and for any reason; and (2) because it contains no standards whatsoever by which principals might guide their administrative screenings of "petitions or printed documents of any kind, sort, or type." (p. 975)

There is absolutely no requirement in "policy" 5114.2 that the proscribed activity of attempting to publish or distribute "any printed document" relate in any way whatsoever to maintaining the orderly conduct of school activities. The regulation in question does not facially lend itself to any limitation in terms of intent, time, or geography to what should be its principal concern—the sound administration of the school. (p. 976)

In addition, this court must conclude that the regulation in question is unconstitutionally vague because the blanket prohibition against "distributions" or "attempts to distribute" does not reflect any reasonable, constitutional standards of the First Amendment as applied to the orderly administration of high school activities. The language of "policy" 5114.2 regarding what is intended by "distribution" is such that reason-

able men not only can differ and have differed, but should differ substantially as to its meaning. There is no intimation, let alone a requirement, that any proscribed "distribution" must interfere in a material and substantial way with the administration of school activity and discipline. In order to remedy its vagueness, the policy in question must include guidelines stating the relationship between the prevention or curtailment of "distribution" and the prevention of material and substantial disruption of school activities that the "policy" seeks to remedy. (p. 977)

Disposition: The Northeast Independent School District was enjoined from entering any zeros upon the permanent records of the five plaintiff students that resulted from the unlawful suspensions or from preventing the students from making up work missed during the suspensions. (p. 975) The decision of the District Court for the Western District of Texas was reversed. (p. 978)

Citation: Vail v. Board of Education of Portsmouth School District, 354 F. Supp. 592 (D.N.H. 1973)

Facts: On November 12, 1969, the Board of Education of the Portsmouth School District adopted a rule forbidding "the distribution of nonschool sponsored written materials within Portsmouth schools and on school grounds for a distance of 200 feet from school entrances." All of the students and the general public have been apprised of this rule. There have been in excess of eight suspensions of students for distributing leaflets without permission in violation of the rule. Plaintiff Vail has been suspended three times for violating this rule. (p. 595)

Rule 15 of the Discipline Code adopted by the Portsmouth Board of Education on August 25, 1970, reads in pertinent part as follows:

> Students who are defiant to school officials, including teachers, will be suspended for ten school days. (p. 595)

On several occasions, school officials have told Vail that the distribution of written materials on school grounds constituted "defiance." (p. 596)

In early November, 1971, an attorney representing plaintiffs Vail, Mayo, and other students met with the Superintendent of Schools to discuss the distribution of literature at Portsmouth High School. Specifically, the students asked that they be allowed to distribute the Strawberry Grenade, a local Portsmouth, New Hampshire, publication. On November 16, 1971, Attorney Johnson requested that the board of education place the

matter of distribution of literature on the agenda of its next meeting. On November 23, 1971, Johnson met with the board of education and presented the views of the students he represented as to the distribution of literature at the school. The board denied the petition presented by Attorney Johnson requesting that his clients (students) be allowed to distribute the Strawberry Grenade in the Portsmouth schools because the rule of November 12, 1969, prohibited such distribution and because the specific publication in question (November 11, 1971, issue of the Strawberry Grenade) "has no redeeming educational, social, or cultural value; that its distribution could substantially disrupt normal educational activities; and that its distribution might incite lawless action." (p. 596)

Issues: The primary First Amendment issue in question is whether an absolute ban on the distribution of non-school publications in schools governed by the board constitutes unreasonable prior restraint of freedom of expression. (p. 593)

Holding: The District Court of New Hampshire determined that the school board regulation, which was a blanket prohibition against the distribution of all nonschool-sponsored written materials, was an unconstitutional violation of the students' right to free expression and free speech, and the student suspensions under such a rule could not stand. (p. 592)

Reasoning: It is well settled that First Amendment rights are available to both students and teachers in the school environment as well as elsewhere. The Supreme Court in Tinker v. Des Moines School District, 89 S. Ct. 733, 736, made this clear when it stated that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." On the other hand, the Supreme Court in Tinker also 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." (89 S. Ct. at page 737) (p. 597)

The Portsmouth School Board adopted a regulation on November 12, 1969, expressly forbidding "the distribution of nonschool-sponsored written material within Portsmouth schools and on school grounds for a distance of 200 feet from school entrances." Several students have been suspended from Portsmouth High School for distributing literature on school grounds in violation of this rule. What is presented by these facts is a direct collision between the students' exercise of their First Amendment rights and a rule of the school authorities. (p. 597)

When the constitutionality of a school regulation is questioned, the burden of justifying the regulation falls upon the school board. See Tinker v. Des Moines School District; Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966). The test for curtailing in-school exercise of expression is whether or not the expression or its method of exercise "materially and substantially" interferes with the activities or discipline of the school. See Burnside v. Byars at 749; Tinker v. Des Moines School District at 509. And, of course, the authority of the school board to balance school discipline against the First Amendment by forbidding or punishing activity on school grounds cannot exceed its authority to forbid or punish in-school activity. See Shanley v. Northeast Independent School District, Bexar County, Texas, 462 F.2d 960, 968 (5th Cir. 1972). The sole purpose of any literature distribution regulation is to prevent disruption and not to stifle expression. (p. 597)

The regulation assailed by the plaintiffs is a blanket prohibition against the distribution of all nonschool-sponsored written materials. It does not reflect any reasonable, constitutional standards of the First Amendment as applied to the orderly administration of high school activities. There is no intimation, let alone a requirement, that any proscribed "distribution" must interfere in a "material and substantial" way with the administration of school activity and discipline or with the rights of other students. The rule in question does not facially lend itself to any limitation in terms of intent, time, place, and manner of distribution of literature. The regulation does not reflect any effort on the part of the school board to minimize the adverse effect of prior restraint. (pp. 597-598)

This court finds that the rule is unconstitutional as overbroad and that it violates the First Amendment right of freedom of speech of the plaintiffs. This ruling does not prevent the defendants from promulgating reasonable specific regulations setting forth the time, manner, and place in which distribution of written materials may occur. This does not mean, however, that the school board may require a student to obtain administrative approval of the time, manner, and place of the particular distribution he proposes. Rather, the board has the burden of telling students when, how, and where they may distribute materials, consistent with the basic premise that the only purpose of any restrictions on the distribution of literature is to promote the orderly administration of school activities by preventing disruption and not to stifle freedom of expression. For example, the board may provide that all leafletting is to take place outside of the school building or in the student lounge and in such a manner

that regular classroom and other school activities are not interfered with. (p. 598)

In the present case, there is no evidence and no finding can be made that the suspended plaintiffs were disciplined because of the content of the publications being distributed. The letter announcing the suspensions of plaintiffs Vail and Dukes indicate that the reason for the suspensions was solely the "distribution of leaflets on school property and grounds." The plaintiffs were denied permission to distribute the Strawberry Grenade in the Portsmouth schools not only because of the ban on the distribution of nonschool-sponsored literature, but also because the specific issue in question (November 11, 1971) was found to have "no redeeming educational, social, or cultural value; its distribution could substantially disrupt normal educational activities; and its distribution might incite lawless action." (p. 598)

Free speech under the First Amendment is not absolute, and the extent of its application may properly take into consideration the age or maturity of those to whom it is addressed. As Justice Stewart stated in his concurring opinion in Tinker v. Des Moines School District, "The First Amendment rights of children are not co-extensive with those of adults." (89 S. Ct. at p. 741) It is generally held that the constitutional right to free speech of public secondary school students may be modified or curtailed by school regulations "reasonably designed to adjust these rights to the needs of the school environment." See Antonelli v. Hammond, 308 F. Supp. 1329, 1336 (D.C.Mass. 1970). Specifically, school authorities may exercise a reasonable prior restraint on the content of publications distributed on school premises during school hours only in those special circumstances where they can "reasonably 'forecast substantial disruption of or material interference with school activities'" on account of the distribution of such printed material. See Eisner v. Stamford Board of Education, 440 F.2d 803, 806-807 (2nd Cir. 1971). A similar policy prevails where the printed material is obscene or libelous. See Shanley v. Northeast Independent School District, Bexar County, Texas at 970-971 of 462 F2d. (pp. 598-599)

The ad hoc resolution of such issues, however, must be based on "reasonableness" and not upon the "undifferentiated fear or apprehension of disturbance," Tinker v. Des Moines School District, 89 S. Ct. at 737, nor upon dislike or disagreement with the views expressed in the written material. (p. 599)

The sort of profanity and vulgarisms which appear in the November 11, 1971, issue of the Strawberry Grenade,

however crude they may seem, do not compel a finding that the periodical is obscene. The words that appear in that issue are not used to appeal to prurient sexual interests and fall without the prevailing legal definition of obscenity. (p. 599)

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. Certainly, where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. See Burnside v. Byars, 363 F.2d at 749. (p. 599)

Therefore, the absolute ban on the distribution of the Strawberry Grenade in the Portsmouth schools cannot withstand constitutional attack as it constitutes an unreasonable prior restraint of freedom of expression. This ruling is not to be interpreted as judicial acquiescence in the views espoused by the Strawberry Grenade nor as judicial license to distribute all future issues of the periodical on school grounds. School authorities may, by appropriate regulation, exercise prior restraint upon publications distributed on school premises during school hours only in those special circumstances where they can "reasonably 'forecast substantial disruption of or material interference with school activities'" on account of the distribution of such printed material. See Eisner v. Stamford Board of Education at 806-807, of 440 F.2d. If a reasonable basis for such a forecast exists, it is not necessary that the schools stay its hand in exercising a power of prior restraint "until disruption actually occurred." See Butts v. Dallas Independent School District, 436 F.2d 728, 731 (5th Cir. 1971). But there must be substantial facts which reasonably support a forecast of likely disruption. For example, if on the basis of substantial reliable information, the school authorities believe that a given publication is pornographic or advocates destruction of school property or urges "physical violence" against teachers or fellow students, then the school officials would be justified in prohibiting the distribution of such material on school premises during school hours. (p. 600)

Disposition: The defendants were enjoined from enforcing the present rule relative to the distribution of non-school-sponsored written materials. All suspensions for the distribution of leaflets on school property and grounds were voided, and it was ordered that the defen-

dants expunge the students' records of all such suspensions. The defendants were further ordered to study the record of all students affected by the suspensions to determine the impact, if any, of the policies of awarding zeros and denying makeup work because of suspensions. The defendants were to report to the court and to opposing counsel, no later than 30 days after the date of the court's order, on the results of this review. This opinion and order were to be posted on the school bulletin board in a prominent place, and copies of this opinion and order were to be made available to students in the school library. (p. 604)

Citation: Sullivan v. Houston Independent School District, 475 F.2d 1071 (5th Cir. 1973)

Facts: The case is on appeal from an order of the district court, 333 F. Supp. 1149, supplementing a 1969 permanent injunction. The facts giving rise to that first permanent injunction are set out at 307 F. Supp. 1328. (p. 1072)

Before classes started on the morning of October 20, 1970, Paul Kitchen, a junior student at Waltrip Senior High School, was standing near an entrance to the campus selling Space City!, an "underground" newspaper, to students as they entered the campus. Gordon Cotton, the Waltrip principal, purchased a copy and scanned its contents. On the second page, he noticed a letter, captioned "High Skool is F. . .ed" and containing several other instances of coarse language. Mr. Cotton told Paul that he was selling the papers in violation of the prior submission rule, and asked him to stop. Paul continued selling the papers. At this point, Mr. Cotton determined to suspend Paul for his failure to comply with both the prior submission rule and Mr. Cotton's request that he stop selling the papers. Before Paul was sent home, Mr. Cotton notified both his parents by telephone that Paul was being suspended and told them the reasons for his decision. Mr. Cotton requested that both parents come to the school for a conference, but Mr. Kitchen replied that his job would prevent his attending a conference until six days later. A conference was agreed to be held on October 26, 1970, and it was agreed that Paul would remain on suspension until that date. As Paul was leaving Mr. Cotton's office after being informed that he was to be suspended, he slammed the door and shouted "I don't want to go to this goddamn school anyway" within the hearing of two of Mr. Cotton's female assistants. (p. 1074)

During the period of Paul's agreed suspension between October 20 and October 26, he returned to the campus several times purportedly to talk with his teachers.

Each time school officials told him to leave the campus because students were not allowed on school premises while under suspension. On the morning of October 26, the day on which the conference with Paul's parents was scheduled, Paul was again at the entrance to the campus selling Space City! to students on their way to school. Mr. Cotton showed Paul a copy of the prior submission rule, and told him that if he did not stop selling the papers, he would call the police. In response, Paul shouted "the common Anglo-Saxon vulgarism for sexual intercourse" in apparent reference to Mr. Cotton. Paul was taken to the police station but was released without charges having been filed. Mr. Kitchen obtained legal counsel and failed to appear for the scheduled conference with Mr. Cotton. Later that day, Mr. Cotton notified Paul's parents in writing that he was suspending Paul for violating the prior submission rule and using profanity in the presence of his secretary, and informed them of the suspension procedures available to students and parents under the new regulations. (p. 1074)

On October 29, 1970, Mr. Cotton conducted a hearing at which Paul was represented by counsel. Following the hearing Mr. Cotton suspended Paul for the remainder of the semester, on the basis of Paul's violation of the prior submission rule and his use of profanity toward Mr. Cotton. A de novo appellate hearing was conducted before the assistant superintendent on November 9, 1970. Paul appeared with his father and an attorney; an extensive evidentiary hearing was held during which witnesses were cross-examined and testimony was transcribed by a court reporter. The assistant superintendent affirmed Mr. Cotton's decision. The transcript of the appellate hearing was reviewed by the Deputy Superintendent for Secondary Schools and the Superintendent for Instruction and Administration, who both affirmed the suspension. (pp. 1074-1075)

On November 23, 1970, Paul and his father applied in the court below for an order holding the school district in contempt for violating the 1969 permanent injunction, and for supplementary injunctive relief and damages in aid of the injunction. At the direction of the court, a four-hour hearing was held before the school board, at which Paul and his father, represented by counsel, presented and cross-examined witnesses. The board declined to entertain a facial challenge to the new regulations, ordered Paul suspended for an additional two weeks beginning January 4, 1971, and directed that he be placed on probation for the remainder of the school year. (p. 1075)

Issues: Is a high school student's off-campus sale of an underground newspaper protected by the First Amend-

ment's right to free speech even if the student flagrantly disregards established school regulations, never attempts to comply with a prior submission rule, and his actions do not materially and substantially disrupt school activities? (p. 1071)

Holding: The Court of Appeals for the Fifth Circuit held that a high school student's sale of an underground newspaper was not so protected by the First Amendment as to preclude school discipline where the student flagrantly disregarded established school regulations, never having attempted to comply with a prior submission rule which was the product of an extensive good-faith effort to formulate a valid student conduct code, openly and repeatedly defied the principal's request, and resorted to profane epithets, even through it did not appear that the student's actions materially and substantially disrupted school activities. (p. 1071)

Reasoning: On appeal and in the court below, Paul Kitchen's position has been, basically, that his selling the newspaper was an activity protected by the First Amendment. Pointing to the fact that sale of the newspaper created little, if any, disruption of normal school activities—let alone the "material and substantial" disruption required by Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, and its progeny—he argues that the prior submission rule was unconstitutionally applied to him. He claims further that the language in the newspaper was not constitutionally obscene and that, therefore, the school officials could not suppress it. In this court's view, however, Paul's conduct in the instant case outweighs his claim of First Amendment protection, and gave school officials sufficient grounds for disciplining him. (p. 1075)

As the court below recognized when it rebuked Paul for failing to challenge the prior submission rule by "lawful" means, Paul's conduct can hardly be characterized as the pristine, passive acts of protest "akin to pure speech" involved in Tinker, supra. Rather, Paul defied Mr. Cotton's request that he stop selling the newspapers, persisted in returning to the campus during the initial six-day suspension period, and twice shouted profanity at Mr. Cotton within the hearing of others. Paul's reappearance on the campus and continued sale of the newspapers on October 26 served only to exacerbate the situation. (p. 1075)

Moreover, Paul never once attempted to comply with the prior submission rule. Had Paul submitted the newspaper prior to distribution and had it been disapproved, then he could have promptly sought relief in the courts without having been first suspended from school. Having chosen to disregard established school policy regarding

distribution of off-campus literature, Paul's opportunity for obtaining relief from the principal's decision was delayed by several months of administrative appellate hearings, during which his academic career suffered severely from continued suspension. (pp. 1075-1076)

Considering Paul's flagrant disregard of established school regulations, his open and repeated defiance of the principal's request, and his resort to profane epithet, the court cannot agree that the school authorities were powerless to discipline Paul simply because his actions did not materially and substantially disrupt school activities. In the years since Tinker was decided, courts have refused to accord constitutional protection to the actions of students who blatantly and deliberately flout school regulations and defy school authorities. Thus, in Schwartz v. Schuker, E.D.N.Y. 1969, 298 F. Supp. 238, a high school student disregarded several prior warnings of the principal not to distribute literature without prior permission. The court declined to reach the student's constitutional arguments and refused to grant him injunctive relief because he had failed to challenge the principal in an orderly manner. The same result was reached in Graham v. Houston Independent School District, S.D. Tex. 1970, 335 F. Supp. 1164, where Judge Ingraham of this court, sitting as a district judge by designation, based his denial of injunctive relief on the student's disregard of established school regulations. Finally, in Healy v. James, 92 S. Ct. 2338, the court approved the principle that the open disregard of school regulations is a sufficient and independent ground for imposing discipline, when it held that a student group's announced refusal to abide by campus regulations would be a proper reason for denying university recognition to the group. 92 S. Ct. at 2351-2352. (p. 1076)

This court hastens to point out that by thus limiting its review in this case, the court does not invite school boards to promulgate patently unconstitutional regulations governing student distribution of off-campus literature. Nor, needless to say, does the court encourage school authorities to use otherwise valid regulations as a pretext for disregarding the rights of students. Today, this court merely recognizes the right of school authorities to punish students for the flagrant disregard of established school regulations; the court asks only that the student seeking equitable relief form allegedly unconstitutional actions by school officials come into court with clean hands. (pp. 1076-1077)

Disposition: The appeals court vacated the ruling of the District Court for the Southern District of Texas,

Houston Division, with instructions that the suit be dismissed. (p. 1078)

Citation: Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973)

Facts: This is another freedom of speech case in the high school context. The court is asked to extend its decision in Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971) to prohibit any prior restraint based on content from being exercised by school officials over written material to be distributed on school grounds. The court declines to do so. However, the application of Quarterman to this case requires that the decision of the district court be vacated insofar as it fails to grant the plaintiffs the complete relief to which they are entitled. (p. 1347)

The plaintiffs, parents on behalf of their children in the Montgomery County school system, brought this action seeking injunctive and declaratory relief against the Montgomery County Board of Education, its members and officers, and against the Maryland State Board of Education. The complaint attacked certain regulations as unlawful prior restraint on the distribution of nonschool-sponsored literature in violation of the First Amendment. (p. 1347)

Distribution of a pamphlet criticizing the prior restraint regulations resulted in a warning letter from the principal and subsequently the commencement of this litigation. As in Quarterman, this court need not assess the content of the pamphlet; the court is concerned only with the constitutional validity of the September 20, 1971, regulations and the scope of further relief to which plaintiffs are entitled. (p. 1347)

Issues: Does a school board's regulation proscribing distribution, in schools, of publications produced without school sponsorship unreasonably restrict the students' First Amendment right to freedom of expression? (p. 1346)

Holding: The Court of Appeals for the Fourth Circuit held that the school board's regulation proscribing distribution of publications in schools, if, in the opinion of the principal, the publications contained libelous or obscene language, advocated illegal actions, or were grossly insulting to any group or individual, unreasonably restricted the First Amendment expression rights of students, in that the regulation lacked procedural safeguards of a specified and reasonably short period of time in which the principal had to act and in that it failed to provide for the contingency of the principal's failure to act within a brief period of time. The

court further held that the regulation was invalid insofar as it allowed the imposition of prior restraint on obscene or libelous material, in that the terms "obscene" and "libelous" were not sufficiently precise and understandable by high school students and administrators and in that libel is often privileged. (p. 1345)

Reasoning: The regulation complained of reaches the activity of pamphleteering which has often been recognized by the Supreme Court as a form of communication protected by the First Amendment. It does not deal with such expression in neutral terms of time, place, and manner of distribution. Rather it is a rule imposing prior restraint on expression because of "its message, its ideas, its subject matter, or its content"—a power of restraint denied government by the First Amendment in public areas including state college campuses. (p. 1348)

In the secondary school setting, First Amendment rights are not coextensive with those of adults and while such rules of prior restraint may be valid, they nevertheless come to this court with a presumption against their constitutionality. See Tinker v. Des Moines Community School District, 89 S. Ct. 733. To overcome this presumption, school regulations must come within the constitutional limits defined in Quarterman. (p. 1348)

It is generally held that the constitutional right to free speech of public secondary school students may be modified or curtailed by school regulations "reasonably designed to adjust these rights to the needs of the school environment." Specifically, school authorities may by appropriate regulation, exercise prior restraint upon publications distributed on school premises during school hours in those special circumstances where they can "reasonably 'forecast substantial disruption of or material interference with school activities'" on account of the distribution of such printed material. (p. 1348)

What is lacking in the present regulation, and what renders its attempt at prior restraint invalid, is the absence both of any criteria to be followed by the school authorities in determining whether to grant or deny permission, and of any procedural safeguards in the form of "an expeditious review procedure" of the decision of the school authorities. 453 F.2d at 58-59. (p. 1348)

The present regulation, as the one in Quarterman, is impermissible. It lacks the procedural safeguard of a specified and reasonably short period of time in which the principal must act. Moreover, the regulation fails to provide for the contingency of the principal's fail-

ure to act within a specified brief time, i.e., whether upon such failure the material then could be distributed. It is not this court's province to suggest a time limit, but the court cautions that whatever period is allowed, the regulation may not lawfully be used to choke off spontaneous expression in reaction to events of great public importance and impact. Furthermore, as pointed out in Quarterman, "'an expeditious review procedure' of the decision of the school authorities" is required. (453 F.2d at 59) The present regulation lacks these procedural safeguards and is, therefore, an unreasonable restriction on the First Amendment rights of school children. See Burnside v. Byars, 363 F.2d 744, 747-748 (5th Cir. 1966). (pp. 1348-1349)

Moreover, the proscription against "distribution" is unconstitutionally vague. With respect to some communicative material, there may be no prior restraint unless there is "a substantial distribution of written material, so that it can reasonably be anticipated that in a significant number of instances there would be a likelihood that the distribution would disrupt school operations." See Eisner v. Stamford Board of Education, 440 F.2d at 803, 811. With respect to other types of material, e.g., pornography, one copy, indeed, the only copy may be the subject of what is legitimate prior restraint if what is forbidden is precisely defined. The prohibition of material which "advocates illegal actions, or is grossly insulting to any group or individual" seems to belong in the first category and thus goes beyond the permissible standard (for that type of material) of forecasting substantial disruption. See Tinker v. Des Moines Community School District, 89 S. Ct. 733. (p. 1349)

While the district court found the regulation invalid, the court, nevertheless, found "that the Montgomery County Rule, insofar as it allows the imposition of a prior restraint upon obscene or libelous material, is valid." This court agrees that material which is, in the constitutional sense, unprivileged libel or obscenity if read by children can be banned from school property by school authorities. See Eisner v. Stamford Board of Education, 440 F.2d 803, 809 n. 6 (2d Cir. 1971). If there were no contemplated prior restraint but instead merely post-publication sanction, the problem of vagueness would not be intolerable. Put affirmatively, the court thinks that a regulation imposing prior restraint must be much more precise than a regulation imposing post-publication sanctions. (p. 1349)

Thus a regulation requiring prior submission of material for approval before distribution must contain narrow, objective, and reasonable standards by which the material will be judged. See Quarterman, 453 F.2d

at 59. Such a standard is required in order that those charged with enforcing the regulation are not given impermissible power to judge the material on an ad hoc and subjective basis and that forbidden activity be clearly delineated so as not to inhibit basic First Amendment freedoms. (p. 1350)

Disposition: The appeals court affirmed in part the ruling of the District Court of Maryland, reversed with regard to the denial of declaratory and injunctive relief, and remanded the case for further proceedings. (p. 1351)

Citation: Peterson v. Board of Education of School District No. 1 of Lincoln, Nebraska, 370 F. Supp. 1208 (D.Neb. 1973)

Facts: The Gazette Publishing Cooperative, a nonprofit, unincorporated association formed for the purposes of editing, publishing, and distributing a biweekly newspaper known as the Lincoln Gazette, has between ten and twenty members who receive no salary or other compensation from the Cooperative. The Gazette is a "counter-culture" or "alternative" newspaper, its purpose being to provide an outlet for news stories, editorial viewpoints, social and artistic commentary which are either not treated at all or which are treated significantly differently by mass circulation newspapers. (p. 1209)

The Gazette contains commercial advertisements for profit-making establishments and for commercial products, although advertisements for tobacco and liquor products are not published. Commercial advertisements for products and establishments are also found in the newspaper published by the four local high schools in the district, although advertisements for liquor products are not carried in these newspapers. (p. 1209)

The Gazette is distributed by unpaid volunteers, some of whom are members of the Cooperative, on a "free-or-donation" basis, at various locations within the city of Lincoln, including street corners, public and private shopping malls, and the campus of the University of Nebraska. Donations to the Gazette have been made by students at all four Lincoln high schools upon receipt of the paper. (pp. 1209-1210)

The defendant Lauterbach, principal of Southeast High School, at a meeting held in his office on August 31, 1972, informed representatives of the Cooperative that he was banning the on-campus distribution of the newspaper at Southeast High School. At or about the same time the defendant Huge, principal of East High School, banned the on-campus distribution of the Gazette for the reason that its distribution contravened school

policy. The defendant Prasch, the Superintendent of Schools, concurred in the decision of the defendants Huge and Lauterbach to ban the on-campus distribution of the Gazette. (p. 1210)

The plaintiff Kurtenbach met with the defendants Prasch and Ferguson, the Director of Publications for the school district, on September 1, 1972, to seek a reversal of the actions of defendants Lauterbach and Huge. He was informed by them that the actions of the two principals would be affirmed because the distribution of the Gazette was not in accordance with existing school policy relating to commercialism in the schools, solicitation of funds from students, visitors in schools, and selection of instructional materials. (p. 1210)

Later, at a meeting of the senior high school principals of the district, the district's policy with respect to the on-campus distribution of the Gazette was announced by the defendant Prasch, and it was related that the ban on the on-campus distribution of the Gazette extended to the grounds on which the schools were located, as well as to the buildings themselves. The ban did not extend to the mere possession of the paper by students or the casual handing of single copies from one student to another within the schools. (p. 1211)

No student was expelled, suspended, or subjected to official disciplinary action as a result of participation in the distribution of the Gazette, nor was any student denied the right to have the Gazette in his or her possession on the school campus and to read it there at any time when not engaged in class activities. The plaintiffs seek the right to enter upon the premises of the schools to distribute the Gazette at or near the outside of the entrances to the buildings in a manner so as not to impede traffic into or out of the school buildings. (p. 1211)

Issues: The First Amendment question presented in this case is whether a ban on the on-campus distribution of a "counter-culture" or "alternative" newspaper constitutes an unconstitutional prior restraint on the students' freedom of speech. (pp. 1211-1212)

Holding: The District Court of Nebraska held that, in the absence of any indication that prohibition of the on-campus distribution of an "alternative" newspaper was necessary to avoid material and substantial interference with school work or discipline, distribution could not be prohibited without violating the First Amendment guarantee of free speech. Such distribution is constitutionally protected despite the facts that the newspaper contained advertisements, that contributions were

solicited from those receiving it, and that some of the distributors were nonstudents. (p. 1208)

Reasoning: The constitutional protection of speech and press is not absolute. There is no constitutional protection of obscenity. Speech which tends to cause a breach of the peace by provoking the person addressed to acts of violence, is not protected by the First Amendment from the restraint by government. Suffice it to say that there is no claim here that the Gazette is obscene or is likely to incite its readers to violence. Speech which presents a clear and present danger or which is likely to cause a substantial disruption of or material interference with school activities also may be restrained by the state. (pp. 1212-1213)

The claim here is that the state, acting through school officials, may restrict freedom of speech and press because (1) the Gazette constitutes commercialism, (2) distribution of the Gazette involves solicitation of funds from students, (3) distribution of it involves visitors in school buildings, and (4) the schools have a right to select instructional materials. (p. 1213)

The primary thrust of the Gazette is that of reporting information and the expression of opinion, whereas the commercial advertisements are only a minor part of the communication. The ban by the defendants of the Gazette has not been a ban of the advertisements, but a ban of the entire newspaper. The Gazette cannot be said to be "purely commercial advertising." (p. 1213)

The dissemination of commercial advertisements and solicitation of funds within a publication devoted largely to expression of opinion and factual matter can scarcely be said to be an evil which, standing by itself, is in need of elimination. The defendants in this action seem to concede as much by their act of permitting publication of school newspapers in each of the four public high schools within the district. A cursory examination of numerous editions of the four school newspapers reveals that those newspapers contain at least three or four times as much commercial advertising as does the Gazette. (p. 1214)

One trouble is that the school officials in the present case have not been "even-handed" regarding commercialism. While sanctioning it in school newspapers, prepared by students and distributed to students, it decries it in the Gazette, prepared in part by students and distributed to students. In its policy against solicitation, the defendants also are scarcely even-handed. Direct solicitation of students is permitted by the Community Chest, March of Dimes, and Junior Red Cross. Permitting such direct solicitation suggests

that the defendants recognize that solicitations do not necessarily result, or are not necessarily likely to result, in any immediate interference with educational endeavors. (p. 1214)

This court is persuaded that before the school officials may ban the distribution of the Gazette in its present form, they must meet the criterion of Tinker v. Des Moines Independent Community School District, that is, that the prohibition of distribution of the newspaper "is necessary to avoid material and substantial interference with school work or discipline." A concern that it may so interfere or that others in the future may so interfere is not sufficient. Evidence is lacking that past or future distribution of the Gazette has or probably will encroach upon the orderly conduct of the schools. (p. 1214)

The third reason assigned by the Superintendent of Schools for preventing distribution of the Gazette was that distribution would be contrary to the policy of the schools regarding visitors in school buildings. However, the banning of distribution of the newspaper because it may involve visitors, without any showing that the mere having of visitors will disrupt the school or result in danger to other person on the school grounds, is not constitutionally permissible. (pp. 1214-1215)

The fourth reason for the ban is that the school should retain some ability to select instructional materials. The school officials should, indeed, be permitted control over instructional materials, but there is not the slightest indication that the plaintiffs expect the Gazette to be used as an instructional material or that distribution of it on school grounds, as opposed to just off school grounds, would be likely to result in its being used as an instructional piece of literature. (p. 1215)

The board of education and the school administrators must understand that nothing in this opinion or in the order which will follow is intended to prevent their fashioning reasonable regulations as to the time, place, and manner of distribution of the Gazette and for the safety of persons on the school grounds. Furthermore, if the Gazette hereafter becomes obscene or is calculated to incite its readers to violence, or interferes by the fact of distribution on school grounds, or by any other fact, with the class work or other orderly operation of the schools, or impedes traffic, the injunction is not effective to prevent the distribution. (p. 1215)

Disposition: The court entered injunctive relief for the plaintiffs, where the plaintiffs' relief is limited to being permitted to distribute and to receive "upon the campuses of but outside of the structures of the public high schools." (p. 1215)

Citation: Jacobs v. Board of School Commissioners, 400 F.2d 601 (7th Cir. 1973)

Facts: The plaintiffs were minors, represented by counsel. They alleged that activities of the defendants violated their First and Fourteenth Amendment rights. They sued on behalf of themselves and all other high school students under the defendants' jurisdiction. They primarily sought injunctive relief except that they also asked for $150 compensatory damages and nominal or other punitive damages. Except for the request for damages in modest amount, the plaintiffs won. (p. 603)

During the 1971-1972 public school term, five issues of the Corn Cob Curtain were published. They contained letters, articles about politics, education, student affairs, religion, American history, music, movie and book reviews, poetry, and cartoons. The first four issues were distributed in Indianapolis high schools. At the time, the fifth issue was ready for distribution, school authorities notified the student population that school board rules prohibited sales or solicitations on school grounds without the express prior approval of the General Superintendent. After conferring with various school officials, the named plaintiffs were informed that the Corn Cob Curtain could no longer be distributed because it contained obscene materials. The appellees refrained from distributing the fifth issue pending resolution of these issues in the courts. (p. 604)

At the time of the above events, Sections 11.05 and 11.06 of the board's rules prohibited the sale or distribution of literature in the public schools without express prior approval of the General Superintendent. After the district judge stated his belief that these rules were unconstitutional prior restraints under Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972), the defendants amended the rules to their present form. The district court held that the amended rules were unconstitutional. (p. 604)

The amended rules involved are set forth at 349 F. Supp. 607-609. Rule 11.05 consists of a series of numbered items or paragraphs, designated in the district court judgment as provisos. This court adopts that term, and proceeds to consider the arguments made by the defendants with respect to them. (p. 604)

Issues: Where the boundaries between prohibited and permissible conduct are ambiguous in school regulations, is it presumed that curtailment of free expression is minimized, or are such regulations invalid because they infringe upon students' First Amendment rights? (p. 602)

Holding: The Court of Appeals for the Seventh Circuit held that where boundaries between prohibited and permissible conduct are ambiguous in a regulation, it cannot be presumed that curtailment of free expression is minimized; therefore, school board provisos pertaining to the distribution of literature were invalid. The court also ruled that the occasional presence of "earthy" words in an unofficial student newspaper did not render the newspaper obscene. (p. 602)

Reasoning: Reading provisos 1.1.1. and 1.1.1.3 together, they provide:

> No student shall distribute in any school any literature that is . . . either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others. (p. 604)

The district court held that this rule was both vague and overbroad. This court agrees. (p. 604)

The court thinks that proviso 1.1.1.3 is vague in defining the consequences which will make a distribution of literature unlawful. Those consequences are articulated as "a significant disruption of the normal educational processes, functions, or purposes in any of the Indianapolis schools, or injury to others." Is decorum in the lunchroom a "normal educational . . . purpose"? If an article sparks strident discussion there, is the latter a "disruption"? When does disruption become "significant"? The phrase "injury to others" is also vague. Does it mean only physical harm? Does it include hurt feelings and impairment of reputation by derogatory criticism, short of defamation, since libelous material is already covered by proviso 1.1.1.2? (p. 605)

The defendants argue unpersuasively that proviso 1.1.1.3 is not over-vague because of its similarity to the text of the standard by which the Supreme Court tested a precise regulation against wearing armbands in Tinker v. Des Moines School District, 89 S. Ct. 733. It does not at all follow that the phrasing of a constitutional standard by which to decide whether a regulation infringes upon rights protected by the First Amendment is sufficiently specific in a regulation to convey

notice to students or people in general of what is prohibited. (p. 605)

Proviso 1.1.1.3 is also unconstitutionally overbroad. The overbreadth stems both from the vagueness and from the inclusiveness of the phrase "productive of, or likely to produce" in the proviso. Expression may lead to disorder under many circumstances where the expression is not thereby deprived of First Amendment protection. This court does not read Tinker as authorizing suppression of speech in a school building in every such circumstance where the speech does not have a sufficiently close relationship with action to be treated as action. (pp. 605-606)

Where the boundaries between prohibited and permissible conduct are ambiguous, the court can not presume that the curtailment of free expression is minimized. Instead, the plaintiffs are permitted to attack the regulation by suggesting impermissible applications without demonstrating that their own conduct "could not be regulated by a statute drawn with the requisite narrow specificity." See Dombrowski v. Pfister, 85 S. Ct. 1116, 1121. See Gooding v. Wilson, 92 S. Ct. 1103. Proviso 1.1.1.3 at least threatens a penalty for a student who distributes a controversial pamphlet in a lunchroom resulting in robust arguments or who distributes a newspaper including derogatory, but not defamatory, remarks about a teacher. Absent extraordinary circumstances, the school authorities could not reasonably forecast substantial disruption of or material interference with school discipline or activities arising from such incidents. See Tinker, supra. (p. 606)

Reading provisos 1.1.1 and 1.1.1.4 together, they provide:

> No student shall distribute in any school any literature that is . . . not written by a student, teacher, or other school employee; provided, however, that advertisements which are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted. (p. 606)

This court has no doubt that this rule abridges First Amendment rights of the plaintiffs, although not for the reason assigned by the district court. Whether the student distribution of literature be viewed as individual speech or as press publication, this court thinks that authorship by a nonschool person of the material distributed is not germane to any of the constitutional standards which must be met before conduct which is also expression can be prohibited. (p. 606)

Reading provisos 1.3.1 and 1.3.1.6 together, they provide:

> No distributable literature shall be distributed by any student in any school . . . unless the name of every person or organization that shall have participated in the publication is plainly written in the distributable literature itself. (p. 607)

Although the rule leaves students free to distribute anonymous literature beyond the schoolhouse gate, the question here, as in Tinker, is whether the state has demonstrated a sufficient justification for this prohibition within the school community, where students and teachers spend a significant portion of their time. See Tinker, 89 S. Ct. 733. The defendants contend that the names of persons who have "participated in the publication" of literature must be provided so that those responsible for the publication of libelous or obscene articles can be held accountable. However, the requirement is not limited to material as to which such justification might be urged. Indeed, if the regulation be read literally, 1.3.1.6 applies only to literature the content of which is acceptable. School authorities could not reasonably forecast that the distribution of any type of anonymous literature within the schools would substantially disrupt or materially interfere with school activities or discipline. See Tinker, 89 S. Ct. 733. (p. 607)

Reading provisos 1.3.1 and 1.3.1.5 together, they provide:

> No distributable literature shall be distributed by any student in any school . . . in immediate exchange for money or any other thing of value . . ., whether the transaction is characterized as a sale of the distributable literature, as a contribution to finance the publication or distribution of the distributable literature, or as any other transaction whereunder money or any other thing of value (or a promise of either) immediately passes to or for the direct or indirect benefit of the student who is distributing the distributable literature. . . . (p. 607)

The plaintiffs suggest that these rules were adopted to accomplish indirectly that which can not be accomplished directly: the blanket prohibition of the distribution of the Corn Cob Curtain and other similar student newspapers. The plaintiffs alleged the dependence of the paper upon contributions of money for survival. It can readily be observed that a ban upon the receipt of contributions on school grounds would create financial difficulties in raising the $120 to $150

necessary to publish each edition of the Corn Cob Curtain. (p. 608)

Sale of the newspaper, or other communicative material within a school, is conduct mixing both speech and nonspeech elements. In order to determine whether a "sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," the court must consider whether the regulation "is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." See United States v. O'Brien, 88 S. Ct. 1673, 1679, reh. denied 98 S. Ct. 63. (p. 608)

Ultimately, the defendants rely on the proposition that "commercial activities are time-consuming unnecessary distractions and are inherently disruptive of the function, order, and decorum of the school." (p. 608)

Provisos 1.3.1.2, .3, and .4 already regulate the place and manner of distribution so as to avoid interference with others and littering. They have not been challenged here. It has not been established, in this court's opinion, that regulation of the place, time, and manner of distribution can not adequately serve the interests of maintaining good order and an educational atmosphere without forbidding sale and to that extent restricting the First Amendment rights of the plaintiffs. (pp. 608-609)

Reading provisos 1.3.1 and 1.3.1.1 together, they provide:

> "No distributable literature shall be distributed by any student in any school . . . while classes are being conducted in the school in which the distribution is to be made." (p. 609)

It is well established that the right to use public places for expressive activity is not absolute and that "reasonable 'time, place and manner' regulations [which] may be necessary to further significant governmental interests" are constitutionally permissible. See Grayned v. City of Rockford, 92 S. Ct. 2294. The question here is whether the board could reasonably forecast that the distribution of student newspapers anywhere within a school at any time while any class was being conducted would materially disrupt or interfere with school activities and discipline. In determining whether "the manner of expression is basically incom-

patible with the normal activity of a particular place at a particular time, . . . we must weigh heavily the fact that communication is involved [and] the regulation must be narrowly tailored to further the State's legitimate interest." See Grayned v. City of Rockford, 92 S. Ct. at 2304. (p. 609)

It does appear that there are periods in the morning, around noon, and in the late afternoon when, although some classes are in session, substantial numbers of students are on the premises, are not involved in classroom activity, and are barred by proviso 1.3.1.1 from distributing and indirectly from receiving student newspapers. This court concludes that the defendants have not satisfied their burden of demonstrating that the regulation banning distribution at all these times is narrowly drawn to further the state's legitimate interest in preventing material disruptions of classwork. See Tinker, 89 S. Ct. 733. (p. 609)

The defendants' original answer averred, among other things, that the plaintiffs' publications are obscene, indecent, vulgar, and profane. While the action was pending, the rules were amended so that when Rule 11.05, provisos 1.1.1 and 1.1.1.1, are read together, they provide "No student shall distribute in any school any literature that is . . . obscene as to minors. . . ." (p. 609)

A substantial portion of the defendants' brief is devoted to what it terms the most crucial issue, "whether school authorities may constitutionally and legitimately prevent and/or punish the use of defamatory, obscene and indecent language in the school house which is contrary to the moral standards of the community." (pp. 609-610)

In the first place, the issues of the Corn Cob Curtain in the record are very far from obscene in the legal sense. A few earthy words relating to bodily functions and sexual intercourse are used in the copies of the newspaper in the record. Usually they appear as expletives or at some similar level. (p. 610)

It is well established that a distinction must be drawn between obscene materials and nonobscene materials containing profanity. See Cohen v. California, 91 S. Ct. 1780. The only possible question is whether the board's educational responsibilities justify its preventing the use by students in these circumstances of words considered coarse or indecent. Clearly a university can not constitutionally regulate expression on that grounds. See Papish v. University of Missouri Curators, 93 S. Ct. 1197. Although there is a difference in maturity and sophistication between students at

a university and at a high school, this court concludes that the occasional presence of earthy words in the Corn Cob Curtain can not be found to be likely to cause substantial disruption of school activity or materially to impair the accomplishment of educational objectives. See Scoville v. Board of Education of Joliet T.P.H.S. District 204, Etc., Illinois, 425 F.2d 10, 13 (7th Cir. 1970). (p. 610)

Disposition: The court of appeals affirmed the judgment of the District Court for the Southern District of Indiana. (p. 610)

Citation: Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975)

Facts: This civil rights action under Title 42 U.S.C. Section 1983 was brought in United States District Court after school officials of Woodlawn Senior High School in Baltimore County, Maryland, ordered two private student newspapers to cease publication in November of 1973. The appellants, the student publishers of the newspapers and their parents, alleged that Rule No. 5130-1—the Baltimore County Board of Education's statement of "Students' Rights and Responsibilities"—violated the First and Fourteenth Amendments insofar as it authorized prior restraint of "nonschool literature." (p. 380)

After the filing of this suit in December of 1973, the Baltimore County School Board reexamined its original regulations governing on-campus distribution of non-school sponsored literature and produced a second version on January 24, 1974. The district court, however, found the new rules vague and overbroad and, in an opinion filed February 25, 1974, gave the board two weeks to meet constitutional standards. On March 26, 1974, the district court reviewed the board's third version, again found them wanting, and enjoined the board from enforcing the rules. On May 17, 1974, the court continued the injunction and ordered revision of the fourth version. The board again redrafted its rules, and on May 30, 1974, the district court approved the regulations and dissolved the injunction. This appeal followed. (pp. 380-381)

Issues: The significant First Amendment issue in this case concerns prior restraint. In specific, the issue is whether punishing a student who publishes literature which may have suffered improper prior restraint results in a chill on First Amendment activity in violation of the student's constitutional rights of freedom of expression and freedom of speech. (p. 380)

Holding: The Court of Appeals for the Fourth Circuit held that regulations which permitted distribution of litera-

ature only as long as such distribution did not reasonably lead the school's principal to forecast substantial disruption of or material interference with school activities, but which gave no guidance whatsoever as to what amounted to a "substantial disruption of or material interference with" school activities and failed to detail criteria by which school administrators might reasonably predict the occurrence of such a disruption, and which failed to provide for prompt and adequate decisions on proposed publications, were void for vagueness and overbreadth. Punishing a student who publishes literature under such improper prior restraint is violative of a student's First Amendment rights and is constitutionally intolerable. (pp. 379-380)

Reasoning: The controlling constitutional principles in student publication cases for this circuit have been set forth by Judge Russell in Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971), as follows:

> Free speech under the First Amendment, though available to juveniles and high school students, as well as to adults, is not absolute. As Justice Stewart emphasized it in his concurring opinion in Tinker v. Des Moines School District, 89 S. Ct. 733, First Amendment rights of children are not "coextensive with those of adults." Similarly, a difference may exist between the rights of free speech attaching to publications distributed in a secondary school and those in a college or university. It is generally held that the constitutional right to free speech of public secondary school students may be modified or curtailed by school regulations reasonably designed to adjust those rights to the needs of the school environment." Specifically, school authorities may, by appropriate regulation, exercise prior restraint upon publications distributed on school premises during school hours in those special circumstances where they can "reasonably 'forecast substantial disruption of or material interference with school activities'" on account of the distribution of such printed material. (453 F.2d at 57-58) (p. 382)

Subsequently, in Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973), Judge Craven re-emphasized the necessity of "narrow, objective, and reasonable standards" as the essential element in any scheme which required prior submission of material for approval before distribution and summarized the constitutional requirements as follows:

> (a) Secondary school children are within the protection of the First Amendment, although their rights are not coextensive with those of adults.
>
> (b) Secondary school authorities may exercise reasonable prior restraint upon the exercise of students' First Amendment rights.
>
> (c) Such prior restraints must contain precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write.
>
> (d) A prior restraint system, even though precisely defining what may not be written, is nevertheless invalid unless it provides for:
>
> > (1) A definition of "Distribution" and its application to different kinds of material.
> >
> > (2) Prompt approval or disapproval of what is submitted;
> >
> > (3) Specification of the effect of failure to act promptly; and,
> >
> > (4) An adequate and prompt appeals procedure.
>
> 478 F.2d at 1351 (p. 382)

It is clear that Rule 5130.1(b) was intended to come within the exception to the ban on prior restraints suggested in Tinker v. Des Moines School District, 89 S. Ct. 733. There the Court appeared to recognize the right of school administrators to block the distribution of literature which would substantially disrupt school work and discipline. Applying this test, this court finds the challenged regulation to be improperly drawn in several respects. (p. 383)

A crucial flaw exists in this directive because it gives no guidance whatsoever as to what amounts to a "substantial disruption of or material interference with" school activities; and, equally fatal, it fails to detail the criteria by which an administrator might reasonably predict the occurrence of such a disruption. Though the language comes directly from the opinion in Tinker, this court agrees with Judge Fairchild's remark in Jacobs v. Board of School Commissioners, 490 F.2d 601 (7th Cir. 1973):

> It does not at all follow that the phrasing of a constitutional standard by which to decide whether a regulation infringes upon rights protected by the First Amendment is sufficiently specific in a

> regulation to convey notice to students or people in general of what is prohibited. 490 F.2d at 605 (p. 383)
>
> In Baughman, this circuit made it quite plain that a prior restraint procedure, to be valid, must provide prompt and adequate review. Here, the procedures to be followed by the school administration are unclear. A principal must render a decision on a proposed publication within two "pupil days"; and the assistant superintendent who reviews the principal's decision must render his decision within three "pupil days." Nowhere is the term "pupil days" defined. More importantly, no time limit whatever is specified for an appeal from the assistant superintendent's decision to the superintendent, and ultimate review by the school board is permitted only "at the time of its next regularly scheduled meeting." Such protracted steps in the appeals procedure are obviously incompatible with the quick disposition so necessary in free speech cases. (pp. 383-384)

Disposition: The judgment of the district court was reversed and appropriate action in the implementation of this opinion, including injunctive relief where necessary, was directed to the end that the regulations adopted by the board be in keeping with the requirements of this decision. (p. 385)

Citation: Leibner v. Sharbaugh, 429 F. Supp. 744 (E.D. Va. 1977)

Facts: The plaintiff, a minor who sues by his next friend, is a student at Washington Lee High School, Arlington, Virginia, who brings this action under Title 42 U.S.C., Section 1983 to challenge the constitutionality of certain school regulations pertaining to the distribution of literature in the high school. The defendants include the principal of Washington Lee High School, the Superintendent of Schools for Arlington County, Virginia, and the individual members of the school board of that county. The matter comes before this court on the plaintiff's motion for a temporary restraining order. (p. 746)

> The plaintiff is a junior at Washington Lee High School, a public school in Arlington County, Virginia. On October 17, 1976, the plaintiff published and sold (during free periods outside the classroom) the first issue of an "underground" newspaper titled the Green Orange. Pursuant to school policy, the plaintiff submitted the newspaper to the school principal for his approval. The principal, Dr. Sharbaugh, orally forbade further distribution of the publication and ordered the confiscation of all distributed issues. The second

> issue of the paper was circulated in early November of 1976. Dr. Sharbaugh told the plaintiff to discontinue distribution of the newspaper upon threat of suspension. On Friday, November 5, the plaintiff sold an issue of the paper at a school football game. The following Monday, the plaintiff was suspended. (pp. 746-747)
>
> Counsel for the plaintiff has described the Green Orange as "a showcase of bad taste." Affidavits submitted by the defendant Sharbaugh and two students at Washington Lee High School attest that in their opinions, the content of the paper might offend certain segments of the student population—particularly racial minorities—and lead to acts of physical confrontation. (p. 747)
>
> At the heart of this controversy are the substantive rules and procedures pertaining to distribution of student publications on campus. A student desiring to distribute written material must submit a copy of the text to the school principal at least one school day prior to the day of intended distribution. The material itself "should conform to journalistic standards of accuracy, taste, and decency maintained by the newspapers of general circulation in Arlington; it shall not contain obscenity, incitements to crime, material in violation of law or lawful regulation, or libelous material." Should a principal refuse to permit the distribution of the submitted material, the student may appeal to the Director of School and Community Activities. The director must reply to the appeal within one week. An adverse decision by the director may be appealed to the Superintendent of Schools who must act within one week of receiving any such appeal. A complainant may ultimately have the decision reviewed by the school board at its then next regular meeting. The student may submit additional materials for the consideration of the school board, but no speakers will be heard on the matter unless the board so directs. (p. 747)

Issues: Are school district regulations which require that student publications conform to the "journalistic standards of accuracy, taste, and decency maintained by the newspapers of general circulation" in the city and which proscribe distributing obscene or libelous material but do not define the terms "obscenity" or "libelous" inadequate to withstand the First Amendment challenges of free expression and free speech as they relate to freedom of the press? (p. 745)

Holding: The District Court for the Eastern District of Virginia, Alexandria Division, held that school district regulations, pursuant to which the student had been

suspended, were infected with blatant constitutional defects of both a substantive and procedural nature. In addition, the regulations constituted immediate and irreparable harm. (p. 745)

Reasoning: The pleadings and affidavits submitted to date indicate to this court's satisfaction that the plaintiff is likely to prevail on the merits of this controversy. The United States Court of Appeals for the Fourth Circuit has addressed the issue of free press in a high school setting on several occasions. In general, school regulations which act as a prior restraint on the distribution of student literature are constitutionally permissible only where the substantive justifications for such restraint are precisely defined and the procedures for making these determinations and the review of any decision to restrain distribution are adequate. (p. 748)

Procedures contemplated under the regulations are constitutionally defective. Several weeks may pass between the time a student submits literature for approval and the time final action is taken, if necessary, by the school board. There is no time limit specified within which a principal must render a decision as to whether a submitted piece of literature may be distributed. An appeal of a principal's decision adverse to the student may take as much as two weeks before being considered at the then next regular meeting of the school board. A virtually identical procedure was struck down in Nitzberg v. Parks, 525 F.2d at 383-385. It must also be noted that at no point in the administrative process is a student guaranteed an opportunity to orally present his or her side of the issue. Such a procedure is constitutionally suspect where, as here, the distribution of material without prior approval can result in the suspension of the student. (p. 748)

This court must, in deciding whether to grant injunctive relief, look to the future rather than the past. Accordingly, the threat of disruption as of October-November of 1976 is of little relevance to the issue at hand. The possibility of disrupting school activities is, of course, a significant consideration. Before activity protected by the First Amendment can be repressed on this basis, however, both the criteria for determining the likelihood of disruption and the process for rendering such a determination must be adequate. See Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971). A blanket conclusion does not pass the constitutional muster. (p. 749)

The issuing of a restraining order, although an interference with school policy, will not unduly burden school officials. See Nitzberg v. Parks, 525 F.2d at

384. The court's observation in this regard indicates that the public interest, indeed, is advanced by the protection and not the repression of First Amendment activity. (pp. 749-750)

Disposition: The school officials were enjoined from disciplining the student for violating the constitutionally defective sections of the regulations. (p. 745)

Citation: Thomas v. Board of Education, Granville Central School District, 607 F.2d 1043 (2nd Cir. 1979)

Facts: Donna Thomas, John Tiedeman, David Jones, and Richard Williams, all students in the Granville Junior-Senior High School, conceived a plan in November 1978 to produce a satirical publication addressed to the school community. As their project evolved in succeeding months, the students decided to emulate National Lampoon, a well-known publication specializing in sexual satire. After soliciting topics from their fellow students, the editors drafted articles satirizing school lunches, cheerleaders, classmates, and teachers. Articles on masturbation and prostitution as well as puzzles and a cartoon were also prepared. Some of the initial preparation for publication occurred after school hours in the classroom of a Granville teacher, George Mager. Intermittently, the students conferred with Mager for advice on isolated questions of grammar and content. At most, it appears that only an occasional article was composed or typed within the school building, always after classes. Apart from these scant and insignificant school contacts, however, they worked exclusively in their homes, off campus, and after school hours. (p. 1045)

In mid-January, Mager first noticed a draft of an article in the students' papers and immediately informed Granville's assistant principal, Frederick Reed, of his discovery. Shortly thereafter, Reed summoned Tiedeman and discussed with him the "dangers" of publishing material that might offend or hurt others. Specifically, he told Tiedeman that a similar publication several years before had culminated in the suspension of the students involved. Accordingly, Reed cautioned Tiedeman to refrain from mentioning particular students and to keep the publication off school grounds. (p. 1045)

In response to Reed's admonition, Tiedeman and his young associates deleted several proposed articles and excised students' names from others. Moreover, they assiduously endeavored to sever all connections between their publication and the school. A legend disclaiming responsibility for any copies found on school property was affixed to the newspaper's cover. Indeed, all 100 copies of the paper were produced by the facilities of

a community business. Once completed, the publication was stored, with Mager's permission, in his classroom closet. At the end of each school day, the students retrieved a number of copies and sold each one for twenty-five cents to classmates at Stewart's, a store in Granville. (p. 1045)

The publication, entitled Hard Times, first surfaced within the school on January 24 when a teacher confiscated a copy from a student and presented it to Granville's principal, William Butler. Butler and Don Miller, Superintendent of Schools, initially agreed to take no action, at least until they could assess the publication's impact. Subsequently, however, Beverly Tatko, President of the Granville Board of Education, learned of the paper's existence through her son. Shocked and offended, Tatko met with Miller and Butler on January 29 to ascertain how the school officials intended to proceed. Moreover, Tatko intimated her dissatisfaction with the administrators' inaction, and suggested convening a school board meeting to discuss the episode. Immediately Butler instituted an investigation. Mager, surrendering the seven remaining copies deposited for storage in his closet, informed Butler of his limited role in the paper's composition. Moreover, the principal determined that the four appellants were primarily responsible for publication and dissemination of the paper. Miller then telephoned each of the students' parents and invited them to attend a school board meeting that evening. (p. 1046)

At the meeting, Butler summarized the results of his investigation and distributed copies of the publication. Later, Miller and Butler, following consultation with the board of education, decided to impose a number of penalties: (1) five-day suspensions to be reduced to three days if the student prepared an essay on "the potential harm to people caused by the publication of irresponsible and/or obscene writing"; (2) segregation from other students during study hall periods, throughout the month of February and possibly longer if an acceptable essay were not submitted; (3) loss of all student privileges during the period of suspension; and (4) inclusion of suspension letters in the students' school files. These sanctions took effect on February 1, when Butler personally informed each student of the punishment and then telephoned their parents to explain the decision. At the same time, he prepared a letter to the parents describing Hard Times as "morally offensive, indecent, and obscene," and outlining the penalties imposed. (p. 1046)

On February 6, the students brought this suit under Title 42, U.S. C. Section 1983 in the Northern District of New York seeking injunctive and declaratory relief

from alleged deprivations of their First and Fourteenth Amendment rights. The Granville Board of Education, Butler, Miller, Reed, Tatko, and the other individual board members were named as defendants. (p. 1046)

The district court denied the plaintiffs' request for a permanent injunction. The plaintiffs have filed timely appeals from the orders denying both temporary and permanent relief. (p. 1047)

Issues: Are the First Amendment free speech rights of public high school students denied if they are punished for publishing and distributing a nonschool publication off school grounds? (p. 1043)

Holding: The Court of Appeals for the Second Circuit held that, in accordance with the First Amendment, where high school students diligently labored to insure that their publication was printed outside school and that no copies were sold on school grounds, where publication was conceived, executed and distributed outside school, where any activity within school involving use of school typewriter and storage of publication in teacher's closet was de minimis, school administrators could not punish students for their publication of an allegedly "morally offensive, indecent, and obscene" tabloid. (p. 1043)

Reasoning: The proper resolution of this appeal requires us to measure the sanctions imposed by Granville school officials against the yardstick of our constitutional commitment to robust expression pursuant to the First Amendment. (p. 1047)

Nowhere is this delicate accommodation more vital than in our nation's schools. Realistically, our children could not be educated if school officials supervising pre-college students were without power to punish one who spoke out of turn in class or who disrupted the quiet of the library or study hall. (p. 1049)

These cases, therefore, are not easy of solution and much depends on the specific facts before the court. For example, the court has consistently maintained that students and teachers enjoy significant First Amendment Rights even within the school itself. Thus, in West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178, the Supreme Court held that a student could not be forced to salute the American flag against his will. Moreover, in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, the court ruled that the First Amendment rights of students were abridged when school officials punished them for wearing black armbands in symbolic protest of the Vietnam War. (p. 1049)

But even the Tinker line of cases recognizes that expression in school may be curtailed if it threatens to "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." See Tinker, 89 S. Ct. at 738. Moreover, school officials must have some latitude within the school in punishing and prohibiting ordinarily protected speech both out of regard for fellow students who constitute a captive audience, and in recognition of the fact that the school has a substantial educational interest in avoiding the impression that it has authorized a specific expression. (p. 1049)

The case before this court, however, arises in a factual context distinct from that envisioned in Tinker. While prior cases involved expression within the school itself, all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate. That a few articles were transcribed on school typewriters, and that the finished product was secretly and unobtrusively stored in a teacher's closet do not alter the fact that Hard Times was conceived, executed, and distributed outside the school. At best, therefore, any activity within the school itself was de minimis. (p. 1050)

In this case, because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena. Thus, wholly apart from the ultimate constitutional status of the words employed, these punishments could only have been decreed and implemented by an independent, impartial decision maker. Because the appellees do not satisfy this standard, this court finds that the punishments imposed here cannot withstand the proscription of the First Amendment. (p. 1050)

The court may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property. Nor may courts endorse such punishment because the populace would approve. (p. 1051)

In the last analysis, a school official acts as both prosecutor and judge when he moves against student expression. His intimate association with the school itself and his understandable desire to preserve institutional decorum give him a vested interest in suppressing controversy. Although the court is resigned to condone an added increment of chilling effect when school officials punish strictly limited categories of speech within the school, this court rejects the impo-

sition of such sanctions for off-campus expression. (p. 1051)

The First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon. Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of parens patriae. (p. 1051)

The risk is simply too great that school officials will punish protected speech and thereby inhibit future expression. (p. 1051)

When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the bounds of the school itself. (p. 1052)

Disposition: The appeals court expressed no opinion as to the form of relief that should be granted, but reversed and remanded the case to the District Court for the Northern District of New York for further proceedings, consistent with this opinion. (p. 1052)

Citation: Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980)

Facts: Gregory J. Williams and Mark I. Gutstein, students at the time of filing this action at Springbrook High School within the Montgomery County, Maryland school district, brought suit seeking declaratory and injunctive relief, damages, and attorneys' fees against the Montgomery County Board of Education, the superintendent of schools, an area assistant superintendent, a school principal, and a building monitor. They claimed an alleged interference with their First Amendment rights, and sought an order enjoining the school authorities from restraining on school property the distribution of their nonschool-sponsored publication, the Joint Effort, Issue 2, and from enforcing the Publication Guidelines of Montgomery County. (p. 1202)

During the 1976-1977 school term, the plaintiffs published and distributed the first issue of the Joint Effort, a self-styled underground newspaper designed as an alternative for student expression. This issue was

distributed on school grounds with the express permission of the principal. (p. 1202)

Following the success of that first issue, the plaintiffs published a second issue of the paper the following school year. The second issue contained various literary contributions, cartoons, and advertisements. (p. 1202)

The plaintiffs printed approximately 350 copies of the Joint Effort, and acquired advance approval of the school officials for the distribution of the paper on February 17, 1978. The plaintiffs were not, however, required to seek prepublication or predistribution approval of the contents of the publication. In fact, the school officials were not even aware of the contents of the publication prior to the commencement of distribution. (pp. 1202-1203)

Ten to twenty minutes after the sale of the paper began, the building monitor, Mr. Austin Patterson, halted the sale of the paper, confiscated the remaining copies, and took them to the school principal, Dr. Thomas P. Marshall. Patterson was the subject of a cartoon on the back cover of the paper that depicted him in cowboy clothing and speaking in dialect. (p. 1203)

Marshall upheld Patterson's seizure of the paper and banned any further distribution of Issue 2 on school property. The ban on distribution applied only to distribution on school property. (p. 1203)

As required by the Student Rights and Responsibilities Policy (S.R.R.P.) Section IVC-2(d), the school principal, within two school days of halting distribution, stated in writing his reasons for the action. (p. 1203)

The first reason referred to the cartoon depicting the building monitor in western clothing. The second reason for halting the distribution of the Joint Effort referred to an advertisement for the Earthworks Headshop, a store that specializes in the sale of drug paraphernalia. The advertisement primarily promoted the sale of a waterpipe used to smoke marijuana and hashish. The ad also advertised paraphernalia used in connection with cocaine. (p. 1203)

Following their unsuccessful administrative appeals, the students filed this suit against members of the school board, the superintendent, the area assistant superintendent, the principal, and the building monitor. The plaintiffs claimed that the seizure and continued restraint against distribution of the Joint Effort violated their First Amendment rights, and that the school system's regulatory scheme was facially

invalid. The students sought damages for the restraint on distribution of the Joint Effort, and declaratory relief and an injunction to prohibit the school officials from further preventing its distribution. Additionally, the plaintiffs sought to enjoin the enforcement of the publication guidelines of Montgomery County. (p. 1204)

Issues: Several issues related to students' freedom of expression and speech are involved in this appeal: (1) Is a school regulation which allowed the principal to halt the distribution, on school premises, of any publication that encourages actions which endanger the health or safety of students so impermissibly vague as to violate the First Amendment rights of high school students? (2) Does such a regulation prohibit constitutionally protected conduct of the students, and is it unconstitutional on its face? (3) Is it required that school officials demonstrate that the suppressed publication would substantially disrupt school activities? (4) Are school officials acting within their constitutional authority when they ban further distribution, on school property, of a nonschool publication which contains an advertisement for a store that specializes in the sale of drug paraphernalia? (pp. 1201-1202)

Holding: The Court of Appeals for the Fourth Circuit held that: (1) a school regulation which permitted the principal to halt the distribution, on school premises, of any publication that encourages actions which endanger the health or safety of students was not impermissibly vague; (2) the regulation did not prohibit constitutionally protected conduct and was not unconstitutional on its face; (3) there was no requirement that school officials demonstrate that the suppressed publication would substantially disrupt school activities. (Disruption of school activities is only one justification for school authorities to restrain the distribution of a publication. It is not the sole justification.); (4) school officials acted within their constitutional authority when they banned further distribution, on school property, of a nonschool publication which contained an advertisement for a store that specialized in the sale of drug paraphernalia. (Commercial speech, though protected by the First Amendment, is not entitled to the same degree of protection as other types of speech.) (p. 1201)

Reasoning: While secondary school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736, neither are their First Amendment rights necessarily "coextensive with those of adults." Id. 89 S. Ct. at 741. (Justice Stewart concurring). "It is

generally held that the constitutional right to free speech of public secondary school students may be modified or curtailed by school regulations 'reasonably designed to adjust these rights to the needs of the school environment.'" See Quarterman v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971). (p. 1205)

In this case, S.R.R.P. Section IVC-2(c) provides in pertinent part: "Distribution may be halted, and disciplinary action taken by the principal after the distribution has begun, if the publication: . . . (5) Encourages actions which endanger the health or safety of students." The school principal, under this regulation, halted and prohibited the further distribution of the student publication that contained an advertisement for drug paraphernalia. (p. 1205)

The plaintiffs challenge this regulation as being impermissibly vague and thus violative of the First Amendment. This court disagrees. In Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973), this court held that a prior restraint regulation "must contain precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write." This court finds no merit to the argument that a reasonably intelligent high school student would not know that an advertisement promoting the sale of drug paraphernalia encourages actions that endanger the health or safety of students. The First Amendment rights of the students must yield to the superior interest of the school in seeing that materials that encourage actions which endanger the health or safety of students are not distributed on school property. Because the only type of material regulated by the guideline is material that must yield to the school's superior interest, the court thinks the guideline does not prohibit constitutionally protected conduct of the students. Thus, the guideline is not unconstitutional on its face. (p. 1205)

This court also finds no merit to the argument of the plaintiffs that the school officials had to demonstrate that the material would substantially disrupt school activities. The court notes that the Supreme Court in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 737, and this court in Quarterman, Baughman, and Nitzberg v. Parks, 525 F.2d 378, 382-383 (4th Cir. 1971), indicated that "school authorities may by appropriate regulation, exercise prior restraint upon publications distributed on school premises during school hours in those special circumstances where they can 'reasonably "forecast substantial disruption . . ."' on account of such printed material." See Quarterman v. Byrd, 453 F.2d at 58. Such disruption, however, is merely one justification for

school authorities to restrain the distribution of a publication; nowhere has it been held to be the sole justification. (pp. 1205-1206)

Nor is the present case in conflict with prior Fourth Circuit cases dealing with high school publications. The nature of the restraint in this case is far less burdensome than was true in Quarterman, Baughman, and Nitzberg. In those cases, the relevant regulations required that the publication be submitted to the principal prior to distribution, whereas here the students were not required to acquire approval before beginning distribution of the paper. Indeed, those cases could be read to apply only to those situations where prior approval from the appropriate school official is required before distribution may occur. See Baughman, 478 F.2d at 1350. In the case at hand, only after the publication was partially distributed did the school authorities even become aware of the contents of the paper. Additionally, the applicable regulations in Quarterman, Baughman, and Nitzberg failed to meet minimum constitutional requirements. In Quarterman, for example the regulation failed to provide any standard at all for the determination of what materials could be distributed on school grounds. Such is not the case here. Finally, the court thinks the fact that the advertisement was purely commercial is an additional reason for upholding the prohibition against distributing the Joint Effort on school property. Commercial speech, although protected by the First Amendment, is not entitled to the same degree of protection as other types of speech. See, e.g., Bates v. State Bar of Arizona, 97 S. Ct. 2691, 2692, 2707-2708. This case is quite different from one, for example, in which a school prohibits the distribution of a publication containing an article of some literary value that may examine drugs and drug use. The printed material in issue here was paid for by a store seeking to profit from its encouragement of the use of drugs. In Quarterman, Baughman, and Nitzberg, none of the disputed materials involved commercial advertisements. (p. 1206)

Disposition: The appeals court affirmed the order of the District Court of Maryland, which entered judgment for the defendants. (p. 1207)

Citation: Bystrom v. Fridley High School Independent School District No. 14, 822 F.2d 747 (8th Cir. 1987)

Facts: The plaintiffs, students at Fridley High School, brought this suit under Title 42 U.S.C. Section 1983 for declaratory and injunctive relief. The defendants are the school district, its superintendent, and the principal of Fridley High School. The students wished to distribute and in fact, did distribute on school

premises, an "underground newspaper" known as Tour de Farce. The defendants claimed the right to review in advance any such publication and to prevent its distribution on school property unless it complied with school-district rules entitled "Distribution of unofficial written material on school premises." Both sides moved for summary judgment, and the case was submitted on stipulated facts. After hearing argument, the district court held the school policy unconstitutional "particularly as it refers to prior restraint." (p. 749)

Issues: The Court of Appeals for the Eighth Circuit was required to answer two questions in this case: First, does the First Amendment as applied to the States by the Due Process Clause of the Fourteenth Amendment, absolutely prohibit any form of prior restraint on the distribution on school property of written material prepared by students or others? Second, if the answer to the first question is no, is the policy of Independent School District No. 14 of Fridley, Minnesota, on distribution of unofficial written material on school property consistent with the First Amendment? (p. 749)

Holding: Prior restraint is not unconstitutional per se in this limited area. The school policy in this case is, with one important exception, constitutional. (p. 749)

Reasoning: Regarding the legal context of this case, only distribution "on school property" is at issue. The school district asserts no authority to govern or punish what students say, write, or publish to each other or to the public at any location outside the school buildings and grounds. If school authorities were to claim such a power, quite different issues would be raised, and the burden of the authorities to justify their policy under the First Amendment would be much greater, perhaps even insurmountable. See Thomas v. Board of Education, Greenville Central School District, 100 S. Ct. 1084. Prior restraints are traditionally the form of regulation most difficult to sustain under the First Amendment, though "the protection even as to previous restraint is not absolutely unlimited." See Near v. Minnesota ex rel. Olson, 51 S. Ct. at 631. (p. 750)

At the time of the district court's ruling, the validity of prior restraints applied to high school students was an open question in this circuit. But since that time, the view that prior restraints are per se unconstitutional has been clearly rejected. See Kuhlmeier v. Hazelwood School District, 107 S. Ct. 926. This panel is bound by Kuhlmeier, and therefore holds that the defendants' policy is not unconstitutional simply because it asserts a right of prior review and restraint on the part of school authorities. In regard to this

case, this court ventures a few general observations. Many of the terms and phrases contained in the policy are not specific. They are attacked as vague, general, and overbroad, and concededly some of the wording is much more general than this court is accustomed to in many areas of the law. Yet, this court must remember that a high degree of generality is made necessary by the subject matter (p. 750). The policy itself states that students of Fridley Independent School District No. 14 have the right, protected by the First Amendment to the U.S. Constitution, to exercise freedom of speech. This includes the right to distribute, at reasonable times and places, unofficial written material, petitions, buttons, badges, or other insignia, except expression which is: a) obscene to minors; b) is libelous; c) is pervasively indecent or vulgar; d) advertises any product or service not permitted to minors by law; e) invades the privacy of another person or endangers the health or safety of another person; f) constitutes insulting or fighting words; and g) presents a clear and present likelihood that it will cause a material and substantial disruption of the proper and orderly operation and discipline of the school or school activities. The concepts involved are general by their very nature. But violation of these guidelines does not subject anyone to criminal sanctions, nor do they apply to the public at large or to territory outside school property. The addresses of this policy are minors, or at least most of them are. The guidelines are designed to assure that school hours and school property are devoted primarily to education as embodied by the district's prescribed curriculum. Their purpose is to preserve some trace of calm on school property. They are one expression of the "legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." See Board of Education, Island Trees Union Free School District No. 26 v. Pico, 102 S. Ct. 2799, 2806. (p. 755)

The district court did, however, invalidate guideline E, referring to material which "invades the privacy of another person or endangers the health or safety of another person." This panel agrees with the district court with respect to this portion of the guidelines. In Kuhlmeier, this panel held that written material could be forbidden or punished as invasive of the rights of others "only when the publication ... could result in tort liability for the school." See 795 F.2d at 1376. The common law of Minnesota does not recognize the tort of invasion of privacy. Accordingly, guideline E attempts to proscribe speech that could not subject the school or anyone else to tort liability. It therefore is consistent with our holding in Kuhlmeier and cannot stand. In short, the defendants' policy is up-

held, with the exception of guideline E, which refers to invasion of privacy. However, this court deems it appropriate to add a few words of caution. The court has held that the policy, as modified in accordance with this opinion, is not unconstitutional on its face. This does not mean that every application will be valid, or that it would have been valid if applied to prohibit distribution of the particular newspaper produced by these plaintiffs. If the policy is wrongly applied to speech that is constitutionally protected, the courts will be open to hear students' complaints, and "if the students challenge the right of the administrator to limit student speech, the burden is on the school administrators to justify their actions." See Kuhlmeier, 795 F.2d at 1377. Further, the defendants are reminded that criticism of established policies, even in vigorous or abrasive terms, is not to be equated with disruptiveness of a constitutional magnitude under the Tinker standard. The defendants are not at liberty to suppress or punish speech simply because they dislike it, or because it takes a political or social viewpoint different from theirs, or different from that subscribed to by the majority of adults within any given school district. If penalties are to be imposed, they must be "unrelated to any political viewpoint." See Bethel School District No. 403 v. Fraser, 106 S. Ct. at 3166. Finally, this court is certainly not holding that guidelines of the type upheld in this opinion are wise or advisable policy. This is not a judicial question. It is for school boards and administrators to decide whether to attempt to write and apply similar guidelines. This panel's holding is only that, if they choose to do so, their policy will not, on its face, violate the Federal Constitution. (p. 755)

Disposition: On remand, the District Court of Minnesota is directed to vacate the judgement previously entered and enter a new judgement enjoining the defendants from enforcing their policy unless and until they delete from it guideline E. (p. 755)

Offensive Speech, Threats, and Hazing

Citation: Rhyne v. Childs, 359 F. Supp. 1085 (N.D.Fla. 1973)

Facts: The plaintiffs filed this action seeking declaratory and injunctive relief relative to certain alleged discriminatory discipline practices of officials of the Jackson County, Florida, public school system. The defendants in this action are the Superintendent of the Board of Public Instruction, the chairman of that board, the members of the Jackson County School Board

and the principal of Marianna High School. The plaintiffs allege generally on behalf of themselves and a class of "all other black students presently attending schools in Jackson County public school system or who may attend said schools in the future" that they were disciplined, suspended or expelled because of their race. As a result of defendants' alleged constitutionally impermissible conduct, the plaintiffs seek to have the records of disciplinary action against them expunged and to recover counsel fees and costs of these proceedings. (p. 1087)

On Monday, January 3, 1972, a general melee erupted between black and white students at the Marianna High School, which fracas was attributed to happenings the previous Saturday night at a local hamburger establishment. Fighting was widespread throughout the school facility, but this wave of belligerency was soon quelled by the school administrators and staff. Once a semblance of order was restored, it was decided that classes be dismissed for the day and that students be sent home. (p. 1088)

Although the immediate cause of the fighting on January 3, 1972, is in dispute, it appears that once school officials were alerted of the disorder they were dispatched to the scene of the disturbance and began to separate the combatants and to put a halt to the fighting. All but a few of the participants heeded the command of the school officials to cease and desist. Among these were a majority of the plaintiffs. (p. 1088)

The defendant Centers upon reaching one scene of the fighting attempted to restore order. One of the participants was plaintiff Small. Although, in general, the other participants complied with the defendant Centers' order to disengage from further combat, plaintiff Small attempted to provoke further fighting by brandishing a belt and by taunting and antagonizing his adversaries with threatening gestures and disregarded the order. (p. 1088)

At another scene of fighting, an assistant principal of the Marianna High School attempted to subdue hostilities. This administrator, himself a black person, was successful in dispersing all combatants except the plaintiff Long, who picked up a stool and menacingly held it as if to strike the administrator. This plaintiff, upon suggestion of the assistant principal, finally departed without further incident. (p. 1088)

Because of the willful disobedience by these two plaintiffs of the lawful orders of school officials coupled with the plaintiffs' prior record of school misconduct,

these two plaintiffs were expelled by the defendant school board. (p. 1088)

After classes had been dismissed on that date, a second incident involving an instructor and a group of black students including plaintiffs Small, Nance, and Heatrice occurred in the school parking lot. It was these plaintiffs' conduct toward school administrators and teachers during these episodes which prompted the defendant Centers to order their permanent expulsion from the public school system of Jackson County, Florida. As a result of the foregoing, these plaintiffs were expelled because of disrespect for staff members and for threats to staff members. (pp. 1088-1089)

Issues: Although several constitutional issues are raised by this case, the First Amendment issue concerns whether the right to free speech and assembly permits individual students to openly disrupt the educational process in order to press their grievances. (p. 1086)

Holding: The District Court for the Northern District of Florida, Marianna Division, ruled that the plaintiffs were not denied their right of freedom of speech and assembly, where there was a highly reasonable and just basis for suspension and expulsion of students because of prohibited and violative conduct on their part which was clearly established by substantial evidence. (p. 1085)

Reasoning: This court must address the plaintiffs' argument that they were disciplined for their exercise of and involvement in a free speech activity. The underpinnings of the plaintiffs' argument is premised on a reading of Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. There it was said that a student does not discard his First Amendment rights upon entering the school house gate. Equally true is the postulate that freedom of speech is not an absolute right. See Schenck v. United States, 39 S. Ct. 247. From an inter-mixture of these principles has evolved a balancing of rights test particularly where the students' exercise of First Amendment rights collides headlong with the rules of school authorities. From this constitutional base, the courts have fashioned the rule that "the First Amendment does not give individual students the right to disrupt openly the educational process in order to press their grievances." See Murray v. West Baton Rouge Parish High School, 472 F.2d 438, at p. 442, 5th Cir. 1973. In accord, Sullivan et al. v. Houston Independent School District, 475 F.2d 1071, 5th Cir. 1973. (p. 1091)

The evidence before this court conclusively shows that some of the plaintiffs on January 6, 1972, after having

conferred with defendant Centers and being unable to resolve their grievances with school officials, decided to leave campus. In doing so, these plaintiffs sought to enlist the support of other students not in attendance at this meeting and, in doing so, disrupted the otherwise orderly processes of the Marianna High School. These activities clearly find no protection within the First Amendment, and the defendant school officials acted within their constitutional sphere of authority in the manner and extent of punishment of the defiant student participants. The record is barren of any factual substance showing that defendants acted in retaliation for the mere expression of a First Amendment right. It is true that this activity was the precipitating cause of their suspensions, but as the Fifth Circuit has recognized, students cannot be given a free hand to pick and choose the time and place to convene and assemble during school hours to voice grievances against school officials. (pp. 1091-1092)

In the instant proceeding, expulsion resulted not because of fighting among students but because of specific acts of misconduct and disobedience. It is this court's view that expulsion was warranted; however, the severity of the punishment meted out by the defendant school board does not appear commensurate with the severity of the acts committed, and this court is of the view that the expulsions should not be made permanent but that they be lifted after the present school year terminates. (p. 1095)

Disposition: The plaintiffs' motion for preliminary injunction was denied. The defendant school board was directed to modify the terms and conditions of the plaintiffs' expulsions in conformity with the terms of this order. (p. 1095)

Citation: Fenton v. Stear, 423 F. Supp. 767 (W.D.Pa. 1976)

Facts: On Sunday evening, May 16, 1976, the plaintiff was sitting in a car with some friends at North Plaza, a shopping center situated in Indiana, Pennsylvania, a community several miles from the Marion Center High School where the plaintiff attended school and the defendant, Donald Stear, is employed as a teacher. During the time that the plaintiff was sitting in the car, the defendant, Stear, passed him by in an automobile. One of the plaintiff's friends stated, 'there's Stear.' The plaintiff replied, obviously loud enough for the defendant, Stear, to hear, 'He's a prick.' (p. 769)

On May 17, 1976, the plaintiff reported to Marion Center High School at the usual time, whereupon he was confronted by the defendant, Vice-Principal Everett

> Dembosky, with the facts of the occurrence of the previous evening. These facts had been reported to the defendant, Principal Robert Stewart, by the defendant, Stear. Stewart in turn related the facts to Dembosky. The plaintiff did acknowledge that he, in fact, referred to the defendant, Stear, by the above-stated name. The defendant, Dembosky, informed the plaintiff that as of that moment, he was under a three-day in-school suspension, which required that the plaintiff attend school, but not participate in classroom activities or in any other extra-curricular activities. (p. 769)
>
> The plaintiff was further informed at that time that he would not be allowed to participate in the senior class trip, for which all of the seniors had been planning for the entire year, and which was to take place on the following day, May 18, 1976. (p. 769)
>
> Civil rights action was brought by the former high school student against the defendants individually and as officials of the school district seeking injunctive relief, compensatory and punitive damages, an apology from the defendants and expunction of the plaintiff's disciplinary record. (p. 767)

Issues: The First Amendment issue in this case centers on insulting or "fighting" words. Specifically, does the constitutional guarantee of freedom of speech protect a student's use of "fighting" words directed at a teacher in a public place? (p. 767)

Holding: The plaintiff's use of "fighting" words directed at a teacher in a public place was not protected speech under the First Amendment. (p. 767)

Reasoning: The plaintiff's use of insulting or "'fighting'" words—those which by their very utterance inflict injury or tend to incite an immediate breach of peace"—directed at Mr. Stear in a public place is not immunized by the constitutional guarantee of freedom of speech. See Chaplinsky v. New Hampshire, 62 S. Ct. 766. Speech, including fighting words, the lewd and obscene, the profane and libelous, is not safeguarded by the Constitution. The plaintiff's alleged right of free speech under the First Amendment is not safeguarded in the admitted circumstances of this case. Furthermore, in the opinion of this court, when a high school student refers to a high school teacher in a public place on a Sunday by a lewd and obscene name in such a loud voice that the teacher and others hear the insult, it may be deemed a matter for discipline in the discretion of the school authorities. To countenance such student conduct, even in a public place, without imposing sanc-

tions could lead to devastating consequences in the school. (pp. 771-772)

Disposition: All claims by the plaintiff were dismissed. (p. 773)

Citation: Klein v. Smith, 635 F. Supp. 1440 (D.Me. 1986)

Facts: The matter before the court is whether the plaintiff, Jason Klein, who is a student at Oxford Hills High School, may be suspended from school for making a vulgar gesture to a teacher off school grounds and after school hours. (p. 1440)

The parties have stipulated to the facts set forth by teacher Clyde Clark in his affidavit. On April 14, 1986, Mr. Clark drove his son to Michael's Restaurant in South Paris, Maine, so that his son could apply for a job there. He parked his car facing the side entrance of the restaurant and waited in the car while his son went inside. Another car pulled up to the side entrance and stopped perpendicular to the Clark car. Plaintiff Jason Klein was seated in the passenger seat of the other car. Mr. Klein extended the middle finger of one hand toward Mr. Clark, exited the car in which he was seated, and entered the restaurant. (pp. 1440-1441)

As a result of this incident, Klein was suspended from school for ten days pursuant to a school rule that provides that students will be suspended for "vulgar or extremely inappropriate language or conduct directed to a staff member." In response, Klein filed a Complaint and Motion for a Temporary Restraining Order, seeking to enjoin the defendant from suspending him until this court had an opportunity to review the merits of the plaintiff's action. This court granted the plaintiff's motion. A full hearing and oral arguments have not been had, and the matter is before the court on the plaintiff's claim for a permanent injunction against the disciplinary suspension. (p. 1441)

Issues: The District Court of Maine must decide if the suspension of a student for making a vulgar gesture to a teacher off school grounds and after school hours violated the student's right to free speech under the First Amendment. (p. 1440)

Holding: The student's making a vulgar gesture to a teacher off school grounds and after school hours was too attenuated to support the imposition of discipline, and therefore, the student's suspension violated his First Amendment right to free speech. (p. 1440)

Reasoning: The conduct in question occurred in a restaurant parking lot, far removed from any school premises or

facilities at a time when teacher Clark was not associated with his duties as a teacher. The student was not engaged in any school activity or associated in any way with school premises or his role as a student. Any possible connection between his act of "giving the finger" to a person who happens to be one of his teachers and the proper and orderly operation of the school's activities is, on the record here made, far too attenuated to support discipline against Klein for violating the rule prohibiting vulgar or discourteous conduct toward a teacher. The gesture does not constitute "fighting words" which might justify stripping the communicative aspects of the gesture of a protected status under the First Amendment. Anyone would wish that responsible teachers could go about their lives in society without being subjected to Klein-like abuse. But the question becomes, ultimately, what should we be prepared to pay in terms of restriction of our freedom to obtain that particular society. This court reasons that the First Amendment protection of freedom of expression may not be the casualty of the effort to force-feed good manners to the ruffians among us. Accordingly, the ten-day suspension imposed upon the plaintiff as a disciplinary sanction for violating the rule cannot be sustained in the circumstances of this case in the face of his right of free speech under the First Amendment of the Constitution of the United States. (pp. 1441-1442)

Disposition: The court ordered that Defendant Kenneth Smith, and all acting in concert with him, forthwith permanently terminate the disciplinary administrative suspension at Oxford Hills High School of Plaintiff Jason Klein imposed because of the conduct in question. (p. 1442)

Citation: Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159 (1986)

Facts: On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-year-olds, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor. (p. 3161)

A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides: "Con-

duct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." (p. 3162)

The morning after the assembly, the assistant principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct, and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises. (p. 3162)

Fraser sought review of this disciplinary action through the school district's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive-conduct rule, and affirmed the discipline in its entirety. Fraser served two days of his suspension and was allowed to return to school on the third day. (p. 3162)

The respondent, by his father as guardian ad litem, then brought this action in the United States District Court for the Western District of Washington. The respondent alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages under Title 42 U.S.C. Section 1983. The district court held that the school's sanctions violated the respondent's right to freedom of speech under the First Amendment to the United States Constitution, that the school's disruptive-conduct rule is unconstitutionally vague and overbroad, and that the removal of the respondent's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment because the disciplinary rule makes no mention of such removal as a possible sanction. The district court awarded the respondent $278 in damages, $12,750 in litigation costs and attorney's fees, and enjoined the school district from preventing the respondent from speaking at the commencement ceremonies. The respondent, who had been elected graduation speaker by a write-in vote of his classmates, delivered a speech at the commencement ceremonies on June 8, 1983. (p. 3162)

The Court of Appeals for the Ninth Circuit affirmed the judgment of the district court, holding that the respondent's speech was indistinguishable from the protest armband in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. The court explicitly rejected the school district's argument that the speech, unlike the passive conduct of wearing a black armband, had a disruptive effect on the educational process. The court of appeals also rejected the school district's argument that it had an interest in protecting an essentially captive audience of minors from lewd and indecent language in a setting sponsored by the school, reasoning that the school district's "unbridled discretion" to determine what discourse is "decent" would "increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools." Finally, the court of appeals rejected the school district's argument that, incident to its responsibility for the school curriculum, it had the power to control the language used to express ideas during a school-sponsored activity. (pp. 3162-3163)

The Supreme Court granted certiorari. (pp. 3161-3163)

Issues: The overriding issue in this case focuses on the relationship between the First Amendment's guarantee of free speech and the authority of school officials to prohibit the use of vulgar, offensive terms in school-sponsored public discourse. The particular issue addressed is whether the school district could impose sanctions on a student because of his lewd and indecent speech. (p. 3159)

Holding: The Supreme Court held that the school district acted entirely within its permissible authority in imposing sanctions upon the student in response to his offensively lewd and indecent speech, which had no claim to First Amendment protection. (p. 3159)

Reasoning: This Court acknowledged in Tinker v. Des Moines Independent Community School District that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (89 S. Ct. at 736) The court of appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in Tinker as a form of protest on the expression of a political position. The marked distinction between the political "message" of the armbands in Tinker and the sexual content of the respon-

dent's speech in this case seems to have been given little weight by the court of appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in Tinker, this court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students." 89 S. Ct. at 737. It is against this background that this Court considers the level of First Amendment protection accorded to Fraser's utterances and actions before an official high school assembly attended by 600 students. (p. 3163)

The fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences. For example, in our nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The First Amendment guarantees wide freedom in matters of adult public discourse. It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. 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. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." See Tinker, 89 S. Ct. at 737. (pp. 3163-3164)

The process of educating our youth for citizenship in public schools is not confined to books, the curricu-

lum, and the civic classes; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teacher—and indeed older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy. The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students, indeed to any mature person. (p. 3164)

In addressing the question whether the First Amendment places any limit on the authority of public schools to remove books from a public school library, all members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar. See Board of Education v. Pico, 102 S. Ct. 2799, 2814-2815. Such cases recognize the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children, especially in a captive audience, from exposure to sexually explicit, indecent, or lewd speech. Therefore, this Court holds that the petitioner school district acted entirely within its permissible authority in imposing sanctions on Fraser in response to his offensively lewd and indecent speech. (p. 3165)

Unlike the sanctions imposed on the students wearing armbands in Tinker, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech, such as the respondent's, would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education. Justice Black, dissenting in Tinker, made a point that is especially relevant in this case: "I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." 89 S. Ct. at 746. (pp. 3165-3166)

Disposition: The judgement of the Court of Appeals for the Ninth Circuit was reversed. (p. 3166)

Citation: Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989)

Facts: In May of 1987 plaintiff Dean Poling, an honor student who was subsequently to become president of his senior class, was one of about a dozen juniors who had qualified as candidates for the Unioci High School student council presidency. It was customary for such candidates to give campaign speeches at a school assembly held shortly before the election. Except for pupils with excused absences, attendance at the assembly was mandatory for all members of the student body. (p. 758)

According to Mrs. Barbara Ollis, a guidance counselor who served as one of two faculty sponsors of the student council, it had long been the practice for faculty sponsors to review candidates' speeches in advance of delivery. About a week before the 1987 election campaign assembly, therefore, Mrs. Ollis met with the student candidates, including Dean Poling, and told them to submit drafts of their speeches to her for review. The deadline she set was Thursday, May 7, the day before the assembly. (p. 758)

As instructed, Dean Poling brought his proposed speech to Mrs. Ollis for review on Thursday afternoon, May 7. Mrs. Ollis read the speech "very carefully," as she later attested, because it contained a "sick-baby joke" that initially struck her as being in dubious taste. The proposed speech read as follows:

> Hi, I'm Dean Poling and I'm running for president of the Student Council. It's a common practice of politicians to cut down each other. Instead of doing this, I'm going to cut down you, the audience. Why am I going to do this? Because you idiots are too darn gullible. For example, what is black and blue and wrapped in plastic? A baby in a trash bag, of course.
>
> I just made you laugh at something incredibly sick. If I can do this to you, then the administration could probably take advantage of you also. For example, have you noticed that each year there are less and less assemblies? How many of you would like at least a chance at open campus? Would you like a better chance of having the prom in Johnson City? Is there something in this school you would like changed? The administration plays tricks with your mind and they hope you won't notice. Because of the administration's iron grip, our school has been kept behind other schools like Science Hill. If you want to break this grip, vote for me for president. I can try to bring back student rights that you have missed and maybe get

> things that you always wanted. All you have to do is vote for me, Dean Poling! (pp. 758-759)

She placed a mark beside the sentence that referred to "the administration's iron grip" and told Dean, as he later attested, "change this and your speech will be okay." (p. 759)

Change it he did. As he delivered at the assembly on Friday, May 8, the speech had this peroration:

> The administration plays tricks with your mind and they hope you won't notice. For example, why does Mr. Davidson stutter while he is on the intercom? He doesn't have a speech impediment. If you want to break the iron grip of this school, vote for me for president. I can try to bring back student rights that you have missed and maybe get things that you have always wanted. All you have to do is vote for me, Dean Poling. (p. 759)

When Dean gave his revised speech, according to Mrs. Ollis, many of the students jumped up at the reference to Mr. Davidson (the assistant principal in charge of discipline at the school), clapped their hands, and yelled things like "way to go, Dean," and "we don't like him either." The remark unquestionably brought down the ire of the school's principal, defendant Ellis Murphy. "I was quite upset," Mr. Murphy stated, adding that "I thought that the content of this speech was inappropriate, disruptive of school discipline, and in bad taste." (p. 759)

Mr. Murphy's affidavit says that Dean volunteered to apologize to Mr. Davidson. This proposal met with Murphy's enthusiastic approval, and the record contains no indication that Dean failed to make the promised apology to Mr. Davidson. (p. 759)

Principal Murphy, the incumbent president, and both of the faculty sponsors participated in a mid-morning conference at which "[i]t was the consensus that Dean Poling should be declared ineligible to run." Superintendent of Schools Ron Wilcox subsequently concurred in the decision to declare Dean ineligible. (p. 760)

Dean and his father, Mr. Roy Poling, a minister and substitute teacher, met with Mrs. Ollis and Principal Murphy in the latter's office that Friday afternoon. The Polings were informed that Dean had been disqualified, and a lengthy discussion ensued. (p. 760)

With respect to the comment on Mr. Davidson and his "stutter," Dean's father himself expressed the view that "it was very discourteous." Mr. Poling explained,

however, that Dean "was not attacking Mr. Davidson, but the administration." The administration, in the person of Principal Murphy, remained unmoved; the disqualification was not revoked, and the election went forward on Monday, May 11, with a reduced field of candidates. (p. 760)

Mr. Poling warned the administrators that "there is a higher court than you four." Superintendent Wilcox agreed, and encouraged Mr. Poling to take the matter to the board of education if he was not happy with the decision. (pp. 760-761)

Mr. Poling did not ask for a hearing before the board of education. Instead, a federal civil rights action was filed in Dean's name, by his parents as next friends, against the four school administrators and the board of education. The complaint alleged violations of Dean's rights under the First and Fourteenth Amendments of the United States Constitution, and it sought declaratory and injunctive relief and an award of damages in the amount of $300,000. (p. 761)

The defendants moved for summary judgment, supporting the motion with affidavits. The Polings filed opposing affidavits. The district court granted the motion for summary judgment and dismissed the action. A motion for reconsideration was overruled and an appeal followed. (p. 761)

Issues: The main question in this appeal is whether the First Amendment gives a high school student license to make "discourteous" and "rude" remarks about school administrators in a speech delivered at a school-sponsored activity. (p. 758)

Holding: Disqualifying a student as a candidate for student council president because of "discourteous" and "rude" remarks made about a school administrator in the course of a speech delivered at a school assembly does not violate the student's First Amendment right to free speech. (p. 757)

Reasoning: It is true that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and "[s]chool officials do not possess absolute authority over their students." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736, and 739. It also remains true, however, that the Federal Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students." See Bethel School District No. 403 v. Fraser, 106 S. Ct. at 3166. Limitations on speech that would be unconstitutional outside

the schoolhouse are not necessarily unconstitutional within it. The Supreme Court has drawn a distinction between "personal expression that happens to occur on school premises" and expressive activities that are "sponsored" by the school and "may be fairly characterized as part of the school curriculum." See Hazelwood School District v. Kuhlmeier, 108 S. Ct. at 569-570. Speech sponsored by the school is subject to "greater control" by school authorities than speech not so sponsored, because educators have a legitimate interest in assuring that participants in sponsored activities "learn whatever lessons the activity is designed to teach." See Hazelwood, 108 S. Ct. at 569-570. As long as the actions of educators are "reasonably related to legitimate pedagogical concerns," the Supreme Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities." See Hazelwood, 108 S. Ct. at 571. (p. 762)

Applying these concepts to the case at hand, there can be no doubt that the election and the election assembly were "school-sponsored" activities within the meaning of Hazelwood. The only real question, under Hazelwood, is whether the actions of school officials were reasonably related to "legitimate pedagogical concerns," and the existence or nonexistence of such a relationship is a question of law. The universe of legitimate pedagogical concerns is not confined to the academic. As the Supreme Court stated in Fraser, "Schools must teach by example the shared values of a civilized social order." 106 S. Ct. at 3165. Sometimes these "shared values" come in conflict with one another; independence of thought and frankness of expression occupy a high place on our scale of values, or ought to, but so too do discipline, courtesy, and respect for authority. Judgement on how best to balance those values may well vary from school to school. Local school officials, better attended than the court to the concerns of the parents/taxpayers who employ them, must obviously be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are promoted. The court may disagree with the choices, but unless they are beyond the constitutional pole, the court has no warrant to interfere with them. Local control over the public school is one of this nation's most deeply rooted and cherished traditions. To the administrators of the Unicoi County High School, Dean Poling's seemingly gratuitous comment about Assistant Principal Davidson was in "bad taste." Whether it strikes the court as such is immaterial. The art of stating one's views without indulging in personalities and without unnecessarily hurting the feelings of others surely has a legitimate place in any high

school curriculum, and this panel is not prepared to say that the lesson Unicoi County High School tried to teach Dean Poling and his captive audience were illegitimate. Neither can this panel say that the method by which this school sought to drive the lesson home was so extreme as to violate the Constitution. It is important to bear in mind that this court thinks that the school officials made no attempt to compel Dean Poling to say anything he did not want to say. See West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178. It is also important to bear in mind, again, that Dean Poling's speech—unlike the symbolic acts of John and Mary Beth Tinker in wearing black armbands to school—was speech sponsored by the school and disseminated under its auspices. "A school must be able to set high standards for student speech that is disseminated under its auspices." See Hazelwood, 108 S. Ct. at 570-571. The Supreme Court has made it quite clear that the First Amendment standard for determining when non-sponsored student speech may be punished is a standard that need not be applied where sponsored student speech (a student newspaper, e.g., or a student council election campaign) is concerned. If words have meaning, that is the First Amendment test which this court is required to apply to Dean Poling's campaign speech. (pp. 762-764)

Disposition: The judgement of the district court was affirmed. (p. 764)

Citation: Chandler v. McMinnville School District, 978 F.2d 524 (9th Cir. 1992)

Facts: On February 8, 1990, the school teachers in McMinnville, Oregon, commenced a lawful strike. In response to the strike, the school district hired replacement teachers. Chandler and Depweg were students at McMinnville High School and their fathers were among the striking teachers. On February 9, 1990, Chandler and Depweg attended school wearing various buttons and stickers on their clothing. Two of the buttons displayed the slogans "I'm not listening scab" and "Do scabs bleed?" Chandler and Depweg distributed similar buttons to some of their classmates. (p. 526)

During a break in the morning classes, a temporary administrator saw Depweg aiming his camera in a hallway as if to take a photograph. The administrator asserted that Depweg had no right to take his photograph without permission and instructed Depweg to accompany him to the vice principal's office. Chandler witnessed the request and followed Depweg into the office, where they were met by Vice Principal Whitehead. Whitehead, upon noticing the buttons, asked both students to remove them because they were disruptive. Depweg told White-

head that his morning classes had not been disrupted. A replacement teacher in one of Depweg's classes confirmed that there had been no disruption. Nonetheless, Whitehead ordered that the buttons be removed. Chandler and Depweg, in the belief that the buttons were protected as a lawful exercise of free speech, refused to comply. They also refused to be separated. Whitehead then suspended them for the remainder of the school day for willful disobedience. (p. 526)

Depweg and Chandler returned to school on February 13, 1990, the next regularly scheduled school day, with different buttons and stickers on their clothing. They each wore a button that read "Scabs" with a line drawn through it, and a sticker that read "Scab we will never forget." In addition, they displayed buttons with the slogans "Students united for fair settlement," and "We want our real teachers back." Approximately 1:45 p.m., Assistant Vice Principal Hyder asked Chandler to remove those buttons and stickers containing the word "scab" because they were disruptive. Chandler, anticipating further disciplinary action, complied with the request. (p. 526)

Chandler and Depweg filed this action in district court, pursuant to Title 42 U.S.C. Section 1983, alleging that the school officials' reasons for requesting the removal of the buttons were false and pretextual, and therefore violated their First Amendment rights to freedom of expression. They stated that the buttons caused no classroom disruption. (p. 526)

The school district moved to dismiss the complaint for failure to state a claim. The district court granted the motion, stating that the slogans on the buttons were "offensive" and "inherently disruptive." The students appealed the district court's decision. (p. 526)

Issues: For purposes of free speech analysis, the primary issue addressed in this circumstance is whether students' wearing "scab" buttons to school, in connection with a teachers' strike, constitutes inherently disruptive behavior not entitled to protection under the First Amendment. (p. 525)

Holding: The Court of Appeals for the Ninth Circuit ruled that the students' buttons, containing the word "scab" in connection with a teachers' strike, were not inherently disruptive for purposes of First Amendment free speech analysis. (p. 524)

Reasoning: Chandler and Depweg argue that the district court applied an incorrect standard when it dismissed the complaint as a matter of law. They contend that this case is governed by Tinker. In this case, the

district court dismissed the action although there was no allegation of disruption or interference with the rights of other students, relying primarily on Fraser. Fraser involved a speech given by a student at a high school assembly. The speech contained sexual innuendo and metaphor. Chandler and Depweg argue that Fraser is distinguishable from this case on three grounds. First, they contend that the buttons constituted a "silent, passive expression of opinion" "akin to 'pure speech.'" See Tinker v. Des Moines Independent Community School District, 89 S. Ct. at 737. They contrast the silent expression of the buttons with the sexually explicit speech in Fraser. Next, the students focus on the fact that the speech in Fraser was made at a school assembly, a sanctioned school event, whereas their display of the buttons was a passive expression of personal opinion. They cite language in Hazelwood that distinguishes between suppression of "a student's personal expression that happens to occur of the school premises" and "educators' authority over school-sponsored [activities] that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." See Hazelwood School District v. Kuhlmeier, 108 S. Ct. at 570. Finally, Chandler and Depweg argue that the court in Fraser distinguished between the lewd speech in Fraser and the political speech in Tinker, thereby implying that restrictions on political speech should be governed by the more exacting Tinker test. See Bethel School District No. 403 v. Fraser, 106 S. Ct. at 3165. (p. 527)

Although some of the slogans employed by Chandler and Depweg could be interpreted as insulting, disrespectful, or even threatening, this court must consider the facts in the light most favorable to the students in reviewing the district court's dismissal of the complaint. In a case such as this one, where arguably political speech is directed against the very individuals who seek to suppress that speech, school officials do not have limitless discretion. "Courts have a First Amendment responsibility to insure that robust rhetoric is not suppressed by prudish failures to distinguish the vigorous from the vulgar." See Thomas v. Board of Education, Granville Central School District, 100 S. Ct. 1034. Subsequent proof may show that the word "scab" can reasonably be viewed as insulting, and may show that the slogans were directed at the replacement teachers. Such evidence would bear upon the issue of whether the buttons might reasonably have led school officials to forecast substantial disruption of school activities. Mere use of the word "scab," however, does not establish a matter of law that the buttons could be suppressed about the showing set forth above. The passive expression of a viewpoint in the form of a button worn on one's clothing "is certainly not the class of

those activities which inherently distract students and break down the regimentation of the classroom." See Burnside v. Byars, 363 F.2d at 748. The district court erred in dismissing the complaint. (pp. 527-531)

Disposition: The decision of the District Court of Oregon was reversed. This matter was remanded to the district court with instructions to enter a judgement in favor of the appellants in the amount of $26,737.56, and for further proceedings consistent with this opinion. This panel retained appellate jurisdiction of this case. (p. 524)

Citation: Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996)

Facts: On October 11, 1993, Brian Seamons was assaulted by five of his upper-class football teammates in the locker room at Sky View High School. Brian was grabbed as he came out of the shower, forcibly restrained and bound to a towel rack with adhesive tape. Brian's genital area was also taped. After Brian was restrained, one of his teammates brought a girl that Brian had dated into the locker room to view him. All of this took place while other members of the team looked on. (p. 1230)

Brian reported this incident to school administrators and other authorities, including the football coach, Douglas Snow, and the school principal, Myron Benson. The coach brought Brian before the football team, accused Brian of betraying the team by bringing the incident to the attention of the administration and others, and told Brian to apologize to the team. When Brian refused to apologize, the coach dismissed Brian from the team. The five individuals who assaulted Brian were permitted to play in the next football game. The school district responded to the whole incident by canceling the final game of the season, a state playoff game. (p. 1230)

Brian alleges that he was subjected to a "hostile environment" because he was branded as the cause of the football team's demise, and that he was threatened and harassed. Eventually the principal suggested to Brian and his parents that Brian should leave the high school. Brian did so and enrolled in a distant county. (p. 1230)

Brian alleged the following bases for recovery in the district court: (1) Defendants Cache County School District and Sky View High School created and tolerated a hostile educational environment in violation of Title IX, 20 U.S.C. Section 1681(a); (2) Defendants are liable under Title 42 U.S.C. Section 1983 for violating Brian's constitutional rights to procedural due pro-

cess, substantive due process, freedom of association, freedom of speech, familial association, and for violating Brian's right to equal education and equal protection; (3) Sky View High School and the school district had a policy of deliberate indifference to Brian's constitutional rights in violation of Section 1983; (4) Sky View High School and the School District failed adequately to train their coaches, faculty and administrators in violation of 42 U.S.C. Section 1983; and (5) Defendants conspired to violate Brian's constitutional rights in violation of 42 U.S.C. Section 1985. In addition, Brian sought injunctive relief, attorney's fees under 42 U.S.C. Section 1988(b), and punitive damages. (p. 1230)

Issues: Although several issues are raised by the plaintiffs, the overriding issue focuses on the parents' and the student's First Amendment right to free speech. (p. 1226)

Holding: The Court of Appeals for the Tenth Circuit upheld the student's claim that his complaint was entitled to First Amendment protection under freedom of speech. All other claims were dismissed, including the parents' claim against school officials for violation of their right to freedom of speech. (p. 1226)

Reasoning: The government may not "deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech"—even though the person has no right to the valuable governmental benefit and "even though the government may deny him the benefit for any number of reasons." See Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694. Brian and his parents assert that the defendants violated their First Amendment right to freedom of speech by discouraging them from making statements to the press about the incident, and by removing Brian from the football team because he refused to apologize for informing authorities of the incident. The district court disposed of this issue by holding that merely discouraging another from speaking out on an issue does not constitute a First Amendment violation and, in any event, the defendants were protected by qualified immunity. (p. 1236)

This court agrees with the dismissal of the First Amendment claims of Sherwin and Jane Seamons individually because the only conduct of the defendants that was directed at them individually were discussions (ultimately unsuccessful) to persuade them not to speak out publicly about the incident together with statements by the defendants pursuant to their own First Amendment rights that Sherwin and Jane Seamons perceived as hostile to them or their position. The es-

sence of the First Amendment is to allow all parties the opportunity for attempts to persuade as well as the opportunity for robust, even hostile, exchanges of conflicting views. This court sees no allegations against these defendants that violates any of the individually held First Amendment rights of Sherwin or Jane Seamons. (p. 1237)

With regard to Brian, it appears he was denied a benefit (participation on the football team) because of his decision to tell his parents and school officials about the incident in the locker room. Brian's actions certainly constitute speech; the question is whether this "speech" is entitled to First Amendment protection. In situations such as this, which do not involve "school-sponsored expressive activities," see Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, 571, the school district's ability to restrict a student's speech requires a showing that such speech would "substantially interfere with the work of the school or impinge upon the rights of other students." See Tinker v. Des Moines School District, 89 S. Ct. 733, 738. It is well established that students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." See Tinker, 89 S. Ct. at 736. In Tinker, the Supreme Court set forth the relevant analytical framework for addressing the question of how to accommodate First Amendment rights in the school environment: A student's personal expression may be restricted where the forbidden conduct "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." See Tinker, 89 S. Ct. at 740. However, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," Tinker at 508, 89 S. Ct. at 737, and the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" cannot justify the prohibition by school officials of a particular expression of opinion, Tinker, 89 S. Ct. at 737-738. "Thus, if the speech involved is not fairly considered part of the school curriculum or school regulated if it would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" See Tinker, 89 S. Ct. at 737-738. See also Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, 569-570. (p. 1237)

Applying these guiding principles to this case, this court concludes that Brian properly states a claim that his speech is entitled to First Amendment protection. The complaint indicates that Brian's speech was responsibly tailored to the audience of school administra-

tors, coaches, family and participants who needed to know about the incident. Brian's behavior neither disrupted classwork nor invaded the rights of other students. His speech was not part of a school-sponsored expressive activity such that listeners might believe that Brian's speech had the imprimatur of school sponsorship. This court sees no overriding school interest in denying Brian the ability to report physical assaults in the locker room. At most, the school's interest was based on its fear of a disturbance stemming from the disapproval associated with Brian's unpopular viewpoint regarding hazing in the school's locker rooms. Under Tinker, that is not a sufficient justification to punish Brian's speech in these circumstances. (pp. 1237-1238)

The district court did not make a determination as to whether Brian's speech was protected by the First Amendment. It simply foreclosed the issue by holding that the defendants were protected by qualified immunity because the officials involved did not "know or reasonably should have known that the action [they] took within [their] sphere of official responsibility would violate [Brian's] constitutional rights." See Seamons v. Snow, 864 F. Supp. 1111, 1121 (D.Utah 1994). Based on this court's reading of the complaint, resolving all reasonable inferences in Brian's favor, the court concludes that the district court was premature in granting qualified immunity to the defendants. (p. 1238)

Disposition: The dismissal by the District Court of Utah of all claims was affirmed, with the exception of Brian Seamon's First Amendment freedom of speech claim against all of the defendants. The court of appeals reversed the district court's order dismissing Brian Seamon's First Amendment freedom of speech claim and remanded the claim for further proceedings consistent with this opinion. (p. 1239)

Citation: Heller v. Hodgin, 928 F. Supp. 789 (S.D.Ind. 1996)

Facts: Plaintiff Emily J. Heller, a senior at Lawrence Central High School ("Lawrence Central") has brought a claim against the Metropolitan School District of Lawrence Township ("MSD"), the district's board of education, the board's individual members, the district's superintendent and assistant superintendent, and the principal, assistant principal, and dean of students of Lawrence Central. The plaintiff alleges that her suspension from school following a verbal altercation with another student violated her constitutional rights under (1) the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, (2) the Equal Pro-

tection Clause of the Fourteenth Amendment, and (3) the Freedom of Speech Clause of the First Amendment. (p. 791)

The plaintiff filed a motion for a preliminary injunction to prevent the defendants from requiring her to take her second-semester final examinations, for which she would not have had to sit but for her suspension. A school rule exempts second-semester seniors with perfect attendance and a C average from having to take final examinations. The court conducted a hearing on the preliminary injunction motion on May 21, 1996. In the course of the hearing, the court orally granted the plaintiff's motion to dismiss the complaint as to all defendants except MSD Assistant Superintendent of Schools Duane Hodgin, Lawrence Central Principal Caroline Hanna, Assistant Principal Mary Anne Burden, and Dean of Students Steve Hedrick. At the conclusion of the hearing, the court orally denied the plaintiff's motion for a preliminary injunction. (p. 791)

The disciplinary suspension that gave rise to the plaintiff's lawsuit followed an incident in the Lawrence Central High School cafeteria on February 29, 1996. During lunch period that day, Erica Murraye, an African-American sophomore at Lawrence Central, cut into a lunch line in the cafeteria's serving area designated for seniors only. The senior student in front of whom Erica cut in line told Erica that she could not stand in the seniors' line. The plaintiff, from a farther distance away, called out a similar complaint to Erica. Erica, in response, pointed her finger at the plaintiff and called her a "white ass fucking bitch." A war of words ensued during which, at one point, the plaintiff retorted with a shout that she was not a "white ass fucking bitch." The plaintiff testified that although Erica attempted to escalate the name-calling into a physical confrontation, the plaintiff withdrew, refusing to fight. Three faculty members (or administrators) were in the cafeteria at that time supervising the lunch room. Mr. Frank Sergi, a social studies teacher ("Mr. Sergi"), was located only twelve to fifteen feet from the confrontation and heard the outburst; he specifically heard the plaintiff repeat Erica's profane epithet in a voice strong enough to be heard by the eighty or ninety other students in the cafeteria's serving area. Mr. Sergi radioed (by walkie-talkie) Assistant Principal Burden, another faculty member proctoring the lunch period, and asked her to come to the location of the two quarreling students. Ms. Browner, the third proctor also came to the scene. As Ms. Burden approached the scene, she discovered the plaintiff crying and appearing to be more upset than Erica. Ms. Burden took charge of the plaintiff, leaving Erica to the other faculty members, and directed the

plaintiff to collect her belongings from the cafeteria and accompany her to the dean's office. At this time, Mr. Sergi informed Ms. Burden that the plaintiff had uttered obscenities. Over the heads of the students, Mr. Sergi mouthed to Ms. Burden the words, "She used the f-word." Ms. Burden testified that on the way to the dean's office, she and the plaintiff discussed the incident. Ms. Burden testified that the plaintiff recounted the incident to her and that Ms. Burden informed her that, if she had used the "f-word," she would be suspended for five days, but that, if she had not used the word, she would not be suspended. The plaintiff testified that she was very upset after the incident, but that she did not discuss the incident with Ms. Burden at all. The court finds Ms. Burden's testimony on this point substantially more credible than the plaintiff's, especially since it appears much more likely that an upset high school student would want to explain why she was crying than that she would remain entirely quiet in the aftermath of all that had happened. After a wait outside the dean's office, the plaintiff spoke with the dean, Steve Hedrick ("Mr. Hedrick"). The two spoke for five minutes, Mr. Hedrick asking the plaintiff to explain to him what had happened. During their discussion, Mr. Hedrick informed the plaintiff that she would be suspended. When asked why, Mr. Hedrick told the plaintiff to speak with Ms. Burden. When the plaintiff found Ms. Burden, the assistant principal told the plaintiff that she would be suspended for five days beginning the following school day for having used the "f-word." (pp. 791-792)

The plaintiff's mother, Mrs. Barbara Heller, had been waiting outside in her car to pick up her daughter after school. When the plaintiff came out, she told her mother that she was being suspended. The mother went into the school and spoke briefly with Ms. Burden as the assistant principal was heading to a meeting. Mrs. Heller decided to wait in order to speak with Ms. Burden following the meeting. After Ms. Burden emerged from her meeting, she spoke with Mrs. Heller. The plaintiff's mother told Ms. Burden that her daughter had been the victim of a racial attack and asked the assistant principal why her daughter was being suspended when in fact she had declined to fight. Ms. Burden explained that the plaintiff was being suspended for having used the "f-word." (p. 793)

The following week, while the plaintiff was serving her period of suspension, her parents met for approximately half an hour with Principal Hanna and Assistant Principal Burden to discuss the plaintiff's suspension. The parents defended their daughter's conduct. Ms. Burden and Ms. Hanna said that the plaintiff clearly violated school rules against the use of obscenity. At this

meeting, the parents were given a written notice of suspension, which stated that the plaintiff was being suspended for use of an obscenity and that the suspension would extend for a period of five school days, beginning February 29 and lasting through March 6. (p. 793)

The plaintiff introduced into evidence excerpts from Lawrence Central's 1995-1996 Student Services Handbook. Page 11 of the handbook states that "[o]bscene language" is a major violation of acceptable student behavior. Page 13 of the handbook states that the penalty for a major violation is based on two factors: (1) the degree of seriousness of the offense, and (2) the previous record of the student. Prior to her suspension, the plaintiff had had no disciplinary infractions. At the hearing, the parties stipulated that Erica Murraye, the other young woman involved in the cafeteria incident, had an "extensive disciplinary history." Ms. Burden testified that the school suspended both the plaintiff and Erica, each for five days, on the grounds that, under the school's policy, a student is suspended for five days whenever she uses "fighting words." Ms. Burden defended the penalty on the grounds that, in her mind, the "f-word" was patently obscene and the term "fighting words" included the "f-word," and that it was not inconsistent or unfounded to equate obscenities to "fighting words." Ms. Burden also stated that she, in fact, had considered the plaintiff's disciplinary record in determining the discipline to impose and that, while Erica Murraye had a more extensive disciplinary record, neither girl deserved the next higher level of punishment—a ten-day suspension. (p. 793)

Issues: In addition to Fourteenth Amendment issues concerning due process and equal protection, a major issue in this case focuses on the Free Speech Clause of the First Amendment. The particular legal question is whether a high school student's First Amendment right to free speech is violated if the student is suspended for using obscene language, when such language is merely being repeated and returned to another student who originally directed the words at the student. (p. 791)

Holding: The District Court for the Southern District of Indiana ruled that a high school student's First Amendment rights were not violated in suspension for uttering an obscenity, regardless of whether the student was merely repeating and returning words originally directed at her, particularly where the words were clearly disruptive as they were heard by 90 students in the cafeteria and, in the opinion of the assistant principal, were "fighting words." (p. 791)

Reasoning: Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736. They cannot be punished merely for expressing their personal views on the school premises unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students." Id. 89 S. Ct. at 789-40. The Supreme Court nevertheless has recognized that First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159, 3164 and must be "applied in light of the special characteristics of the school environment." See Tinker, 89 S. Ct. at 736. 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. See Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, 567. Accordingly, in Bethel School District No. 403 v. Fraser, supra, the Supreme Court held that a student could be disciplined for having delivered a speech that was "sexually explicit," but not legally obscene, at an official school assembly, because the school was entitled to "disassociate itself" from the speech in a manner that would demonstrate to others that such vulgarity is "wholly inconsistent with the fundamental values of public school education." 106 S. Ct. at 3165 (p. 797)

In Fraser, the Court noted that the speech was given at a high school assembly held during school hours as part of a school-sponsored educational program in self-government and was attended by approximately 600 students, many of whom were 14 years old. (106 S. Ct. at 3161) As the Court explained in the subsequent Hazelwood case, the circumstances of the speech, an official school program, implicated the question of the degree of authority educators have "over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." See Hazelwood, 108 S. Ct. at 570. (p. 797)

This court believes, however, that Fraser stands for a somewhat broader principle than what the court articulated in Hazelwood: namely, that some student language is not protectable speech regardless of the context in which it is uttered. As the high court stated in Fraser, "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and

lewd speech would undermine the school's basic educational mission." 106 S. Ct. at 3165 (p. 797)

The Ninth Circuit in Chandler v. McMinnville School District, 978 F.2d 524 (9th Cir. 1992), found that Fraser stands for this larger proposition:

> Hazelwood focused on two factors that distinguished Fraser from Tinker: (1) the speech was "'vulgar,' 'lewd,' and 'plainly offensive,'" and (2) it was given at an official school assembly. Whereas both of these factors were present in Fraser, we believe the deferential Fraser standard applies when the first factor alone is present. Therefore, school officials may suppress speech that is vulgar, lewd, obscene, or plainly offensive without a showing that such speech occurred during a school-sponsored event or threatened to "substantially interfere with [the school's] work." Such language, by definition, may well "impinge upon the rights of other students," and therefore its suppression is "reasonably related to legitimate pedagogical concerns." Id. at 529 (pp. 797-798)

Whatever provocation the plaintiff may have experienced and regardless of whether she was repeating and returning words originally directed at her, the plaintiff's words were plainly offensive, even vulgar. This fact alone justified the school in disciplining her. In addition to being vulgar, the plaintiff's words were also clearly disruptive. In Ms. Burden's opinion, the plaintiff's words were "fighting words." The plaintiff testified that she was upset and in tears at the time when the faculty members intervened. Lawrence Central has legitimate, pedagogical interests in forbidding the use of language that incenses students to fight, either physically or verbally, with one another. The court cannot say that the school's suspension of the plaintiff was wholly inconsistent with that interest. In short, the plaintiff's First Amendment argument is meritless. (p. 798)

The evidence at the hearing, including the plaintiff's own testimony, suggests that the plaintiff's comportment in the cafeteria was entirely inappropriate. While the plaintiff cannot control the language and actions of others, she can and must attempt to control her own. Civility, self-restraint, and respect for one's peers are lessons to be both taught and learned as part of a properly structured education. They are virtues to be fostered by a civilized society and hopefully mastered by every graduate of every high school in the land. (p. 799)

Disposition: The plaintiff's motion to dismiss the complaint as to all defendants except Duane Hodgin, Caroline Hanna, Mary Anne Burden, and Steve Hedrick was granted. The plaintiff's motion for a preliminary injunction was denied. (p. 799)

Citation: Lovell v. Poway Unified School District, 90 F.3d 367 (9th Cir. 1996)

Facts: Sarah Lovell, a student at Mt. Carmel High School in the Poway Unified School District ("PUSD"), allegedly threatened Linda Suokko, a school guidance counselor, that she would shoot her if Suokko did not make changes to Lovell's class schedule. Suokko filed a disciplinary report with school administrators, and the school suspended Lovell for three days. (p. 368)

In February 1993, Sarah Lovell was a 15-year-old tenth-grade student. On February 2, she visited Linda Suokko to request changes to her class schedule. Lovell was shuttled back and forth between the counselor's office and the administrative offices for several hours while she attempted to effect the changes. When Lovell finally arrived back at Suokko's office around 1:30 in the afternoon, she was frustrated and irritable. This visit to Suokko's office was to have been Lovell's final stop in this brouhaha; Suokko was to have simply entered the approved changes into the school's computer system. (p. 369)

As she entered the changes, however, Suokko noticed that Lovell had been approved for courses that were already overloaded. She told Lovell that she may not be able to make the changes. Lovell, at the end of her patience, made the remark that is the basis of this suit: Lovell claims she said "I'm so angry, I could just shoot someone," whereas Suokko claims she said "If you don't give me this schedule change, I'm going to shoot you." Lovell then apologized to Suokko for her inappropriate behavior. Suokko completed the requested schedule change, and Lovell left the office. (p. 369)

Later that day, Suokko reported Lovell's conduct to Assistant Principal Scott Wright. Suokko told Wright that she felt threatened by the statement and was concerned about some future reprisal by Lovell. Suokko filled out a Student Office Referral form and reported the threat as a disciplinary incident to Assistant Principal Mary Heath. (p. 369)

On February 4, two days after the incident, Heath called a meeting with Suokko and Lovell to discuss the matter. At that meeting, Lovell admitted making one of the statements given above, although there is some dispute as to what she admitted. But she also claimed

that she did not mean anything by it. Suokko said that Lovell was "angry, serious and emotionally out of control when the statement was made," and that she felt threatened. After Heath met with Lovell, Suokko, and Lovell's parents, Health decided to suspend Lovell for three days. (p. 369)

At first, the Lovells planned to accept the suspension. But when they received a copy of the Student Referral form submitted by Suokko, they were extremely upset by her portrayal of the events. Specifically, they felt that Suokko's version of events differed a great deal from their daughter's version, and that Suokko's report was too strongly worded for the events as they understood them. They wrote a letter to the school principal, Scott Fisher, demanding that the Referral be removed from Sarah's file. When the school refused to take any action, the Lovells filed this suit against PUSD, Mr. Fisher, and Ms. Heath (hereinafter referred to collectively as "PUSD"). (pp. 369-370)

Lovell asserted a variety of federal and state law claims that her rights were violated when PUSD suspended her from school. Among other complaints, she claimed that the suspension violated her First Amendment free speech rights, as guaranteed by the United States Constitution. Second, she asserted a supplemental state law claim that she was improperly suspended in violation of her free speech rights under California Education Code Section 48950. Third, she claimed that PUSD denied her adequate procedural and substantive due process. Finally, she claimed that PUSD violated Title 42 U.S.C. Section 1983 by imposing discipline on her in contravention of the rights set forth above. (p. 370)

The parties stipulated to a bench trial before a magistrate judge. The court found that PUSD had provided appropriate procedural and substantive due process. See Lovell v. Poway Unified School District, 847 F. Supp. 780, 785 (S.D. Cal. 1994). However, the court also held that PUSD had violated Lovell's free speech rights because her statement did not constitute "the requisite 'threat' required by law, under either contention as to the exact words spoken, to allow infringement on her right of free speech." Id. (p. 370)

Issues: The overriding First Amendment issue presented in this appeal is whether a statement made by an angry high school student to the school's guidance counselor can be considered a threat falling outside the First Amendment's protection of expression and speech. (p. 368)

Holding: The Court of Appeals for the Ninth Circuit held that the statement made by an angry high school student

to the school's guidance counselor was not a protected form of expression or speech under the First Amendment. (p. 367)

Reasoning: The California Education Code extends students' free speech rights while on campus to the same extent those rights may be exercised outside of the school context. Consequently, different outcomes may result when evaluating violations of students' free speech rights under federal and state law. (p. 371)

Nonetheless, in this case, this court finds that the outcome under both federal and state law is the same. Threats of physical violence are not protected by the First Amendment under either federal or state law, and as a result it does not matter to our analysis that Sarah Lovell uttered her comments while at school. To resolve the federal claim, this court need not rely upon the Supreme Court cases that limit students' free speech rights; because this court holds that threats such as Lovell's are not entitled to First Amendment protection in any forum, it does not matter that the statement was made by a student in the school context. Thus, our analysis focuses upon whether PUSD could punish Sarah Lovell based on her statement, without violating her First Amendment free speech rights, regardless of whether the conduct occurred on or off campus. (p. 371)

In general, threats are not protected by the First Amendment. This court has set forth an objective test for determining whether a threat is a "true threat" and, thus, falls outside the protection of the First Amendment: "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." See United States v. Orozco-Santillan, 903 F.2d 1262 (9th Cir. 1990). Furthermore, "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." Id. In light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students. (pp. 371-372)

Applying the tests set forth above, the magistrate judge found that no matter which statement Lovell made, it did not constitute a "true threat." Although the judge correctly stated the applicable law, this court finds that he erred when applying the law to the facts of this case in several respects. In reaching his conclusion, the judge lost sight of the fact that the ultimate inquiry is whether a reasonable person in Lovell's position would foresee that Suokko would in-

terpret her statement as a serious expression of intent to harm or assault. Considering only Suokko's version of the facts for a moment, there is no question that any person could reasonably consider the statement "If you don't give me this schedule change, I'm going to shoot you," made by an angry teenager, to be a serious expression of intent to harm or assault. A reasonable person in these circumstances would have foreseen that Suokko would interpret that statement as a serious expression of intent to harm. This statement is unequivocal and specific enough to convey a true threat of physical violence. This is particularly true when considered against the backdrop of increasing violence among school children today. (p. 372)

Furthermore, when considering the surrounding factual context, the magistrate judge focused too much on the actions taken or not taken by Suokko following Lovell's outburst. The court believes that the judge read too much into Suokko's reaction immediately following the incident. Suokko has stated repeatedly that she felt threatened when Lovell confronted her as she did. The fact that she chose not to seek help instantly is not dispositive. She did report the conduct to Assistant Principal Wright within a few hours, before she went home that day. Exhibiting fortitude and stoicism in the interim does not vitiate the threatening nature of Lovell's conduct, or Suokko's belief that Lovell threatened her. Therefore, under Suokko's version of the facts, the PUSD did not violate Lovell's First Amendment rights. (pp. 372-373)

It is a closer question, however, whether Lovell's version of the facts would merit the same response. When they are frustrated, people do utter expressions such as "I'm so frustrated I could just shoot someone." It is not clear that one should foresee that such a statement will be interpreted as a serious expression of intent to harm. In general, if the evidence is evenly balanced, such that a decision on the point cannot be made one way or the other, then the party with the burden of persuasion loses. As the plaintiff in this case, Lovell had the ultimate burden of proving that PUSD violated her First Amendment rights. This issue turns in part upon what she said. Because she did not preponderate in her version of the facts, she has failed to meet this burden. (p. 373)

Given the level of violence pervasive in public schools today, it is no wonder that Suokko felt threatened. Nonetheless, the court does not mean to suggest that one need only assert that he or she felt threatened by another's conduct in order to justify overriding that person's right to free expression. While courts may consider the effect on the listener when determining

whether a statement constitutes a true threat, the final result turns upon whether a reasonable person in these circumstances should have foreseen that his or her words would have this effect. (p. 373)

Based on the foregoing analysis, this court does not agree with the magistrate judge that it makes no difference which version of Lovell's statement was actually uttered. Lovell had the burden to prove that PUSD violated her free speech rights and she did not carry that burden. This court finds that her statement, as characterized by Suokko, was not entitled to First Amendment protection. Therefore, the PUSD did not violate Lovell's First Amendment right to free expression under either federal or state law when it suspended her for threatening a school guidance counselor. (p. 373)

The court recognizes that violence is prevalent in public schools today, and that teachers and administrators must take threats by students very seriously. It is for this reason that this court cannot ignore the fact that Sarah Lovell has failed to prove that she did not utter the statement that directly and unambiguously threatened physical harm to her guidance counselor. (p. 374)

Disposition: The judgement of the District Court for the Southern District of California was reversed. (p. 374)

Performances, Films, and Speakers

Citation: Wilson v. Chancellor, 418 F. Supp. 1358 (D.Or. 1976)

Facts: The plaintiffs, Dean Wilson, a teacher, and Vera Logue, a student, seek declaratory and injunctive relief from a school board order banning "all political speakers" from Molalla Union High School (MHS). They contend that the order violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, and is unconstitutionally vague and overbroad. (p. 1361)

Wilson teaches the political science class at MHS in which Logue was a student. This dispute arose when Wilson invited a Communist, Anton Kehmareck, to speak to that class. Wilson already, and without objection, had presented a Democrat, a Republican, and a member of the John Birch Society. The Communist was to be the last of this quadrumvirate through which Wilson hoped to present, in the words of the adherent, each of four points of view. (p. 1361)

Wilson followed customary procedure and reported this invitation to the principal. The principal approved. The defendant school board discussed the invitation at its November 1975 meeting and also approved. This procedure was neither unprecedented nor customary. (p. 1361)

The board's approval inspired mixed reviews. Two severe critics called a community meeting on December 4 where they circulated a petition asking the board to reverse the decision; approximately 800 persons eventually signed it. Several townsfolk, in letters to the local newspaper, mentioned the possibility of voting down all school budgets and voting out the members of the board. (p. 1361)

Faced with this petition and many outraged residents, the board on December 11 reversed its decision and issued orally an order banning "all political speakers" from the high school. (p. 1361)

Issues: Does a school board's order banning "all political speakers" from public high schools infringe upon the student's First Amendment right to hear the speech of others? (pp. 1358-1359)

Holding: With respect to the student's First Amendment claim, the District Court of Oregon held that the school board's order banning "all political speakers" from public high schools was unconstitutional insofar as it infringed upon the student's right to hear the speech of others and that the order was not reasonable in light of special circumstances of the school environment. (p. 1358)

Reasoning: Miss Logue contends the order violates her First Amendment right to hear the speech of others. (p. 1361)

The right to hear customarily is invoked by prisoners denied access to periodicals, members of a potential audience for a speaker prohibited from speaking, or the emerging right of privacy. (pp. 1361-1362)

Of these scenarios, only the potential audience scenario is applicable here. Recognition that the First Amendment exists to protect a broad range of interests persuade this court that Logue suffered an infringement of her First Amendment rights. (p. 1362)

The defendants have not shown that outside speakers impair high school education. If they did, the board still would lack justification for banning only outside political speakers. Moreover, the evidence demonstrated that the use of outside speakers is widely recommended,

widely practiced, and professionally accepted. (p. 1364)

The board cannot justify the ban by contending that political subjects are inappropriate in a high school curriculum. Political subjects frequently are discussed at Molalla High School and other schools throughout the country, as required by law. Nor does the board have a valid interest in suppressing, as it did, political expression occurring in the course of recognized extra-curricular activities. (p. 1364)

The board's only apparent reason for issuing the order which suppressed protected speech was to placate angry residents and taxpayers. The First Amendment forbids this; neither fear of voter reaction nor personal disagreement with views to be expressed justifies a suppression of free expression, at least in the absence of any reasonable fear of material and substantial interference with the educational process. (p. 1364)

The order, by granting school officials discretion to bar political speakers before those persons speak, creates a system of prior restraint. Prior restraints are not unconstitutional per se, but their invalidity is heavily presumed. They are valid only if they include criteria to be followed by school authorities in determining whether to allow or forbid the expression, and procedural safeguards in the form of an expeditious review procedure. (p. 1364)

The Molalla board order was completely bare; it failed to include either criteria by which to define "political speakers" or procedural safeguards in any form. The order, therefore, constitutes an invalid prior restraint. (p. 1364)

Disposition: Judgement was for the plaintiffs. (p. 1358)

Citation: Seyfried v. Walton, 668 F.2d 214 (3rd Cir. 1981)

Facts: Caesar Rodney High School, located in Dover, Delaware, sponsors autumn and spring theatrical productions each year. In December 1980, the director of the spring production, an English teacher at the school, selected the musical Pippin for presentation the following spring. Because the play contained certain sexually explicit scenes, the director consulted the assistant principal before reaching a final decision. After the director edited the script, she and the assistant principal agreed that the revised scenes, although still sexually suggestive, were appropriate for a high school production. (p. 215)

In March 1981, shortly after rehearsals for the spring production had begun, the father of a Pippin cast member complained to his brother, the president of the school board, that the play mocked religion. The board president directed the district superintendent to look into the matter. After reviewing the edited script, the superintendent determined that the play did not mock religion, but that it was inappropriate for a public high school because of its sexual content. He directed the principal to stop production of the play. After hearing the views of interested parents, the school board refused to overturn the superintendent's decision. As a result, the school did not present a spring play in 1981. (pp. 215-216)

Parents of three members of the Pippin cast and crew then filed a civil rights action under Title 42 U.S.C. Section 1983, claiming that the students' First Amendment rights of expression had been unconstitutionally abridged. After a two-day trial, the district court entered judgment in favor of the defendants. The plaintiffs appealed. (p. 216)

Issues: The First Amendment question in this appeal is whether the cancellation of a high school production of a musical play because of its sexual theme constitutes a violation of students' First Amendment right of expression. (p. 215)

Holding: The Court of Appeals for the Third Circuit held that the public school superintendent's decision to cancel a high school's dramatic production of a musical play because of its sexual theme did not violate the students' First Amendment right of expression. (p. 215)

Reasoning: The appellants' principal contention is that the students of the Pippin cast and crew had a First Amendment right to produce the play. Although we agree that, in general, dramatic expression is "speech" for purposes of the First Amendment, see Southeastern Promotions, Ltd. v. Conrad, 95 S. Ct. 1239, 1245-46, we also agree with the district court that the decision to cancel the production of Pippin in these circumstances did not infringe on the students' constitutional rights. (p. 216)

In his well-reasoned opinion, Judge Stapleton noted that a school community "exists for a specialized purpose—the education of young people," including the communication of both knowledge and social values, 512 F. Supp. at 237. The First Amendment, he concluded, must therefore be "applied in light of the special characteristics of the school environment." Id. (quoting Tinker v. Des Moines School District, 89 S. Ct. 733, 736). (p. 216)

This court believes that the district court properly distinguished student newspapers and other "non-program related expressions of student opinion" from school-sponsored theatrical productions. 512 F. Supp. at 238-239. The critical factor in this case is the relationship of the play to the school curriculum. As found by the district court, both the staff and the administration view the spring production at Caesar Rodney as "an integral part of the school's educational program." Participation in the play, though voluntary, was considered a part of the curriculum in the theater arts. 512 F. Supp. at 238 and n.5. (p. 216)

The district court also noted the likelihood that the school's sponsorship of a play would be viewed as an endorsement of the ideas it contained. A school has an important interest in avoiding the impression that it has endorsed a viewpoint at variance with its educational program. The district court cautioned that administrators may not so chill the school's atmosphere for student and teacher expression that they cast "a pall of orthodoxy" over the school community, Keyishian v. Board of Regents, 87 S. Ct. 675, 683-684, but it found no such danger here. 512 F. Supp. at 239. The court found that no student was prohibited from expressing his views on any subject; no student was prohibited from reading the script, an unedited version of which remains in the school library; and no one was punished or reprimanded for any expression of ideas. In light of these facts, the court could find no reasonable threat of a chilling effect on the free exchange of ideas within the school community. These findings are amply supported by the record. (p. 216)

This court agree with the district court that those responsible for directing a school's educational program must be allowed to decide how its limited resources can be best used to achieve the goals of educating and socializing its students. Because of the burden of responsibility given to school administrators, courts are reluctant to interfere with the operation of our school systems. As the Supreme Court has observed,

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. Epperson v. Arkansas, 89 S. Ct. 266, 270. (p. 217)

This court agrees with the district court that the conflict here does not "directly and sharply implicate" the First Amendment rights of the students. (p. 217)

Disposition: The judgment of the District Court of Delaware was affirmed. (p. 217)

Citation: Pratt v. Independent School District No. 831, Forest Lake, Minnesota, 670 F.2d 771 (8th Cir. 1982)

Facts: "The Lottery" is a short story by American author Shirley Jackson in which the citizens of a small town randomly select one person to be stoned to death each year. Since 1972, the curriculum of Independent School District No. 831, Forest Lake, Minnesota, has included the Encyclopedia Britannica Educational Corporation's film version of "The Lottery," and its accompanying "trailer" film which discusses the story and its themes. (p. 773)

During the 1977-1978 school year, a group of parents and other citizens became concerned about the use of the films in American literature courses taught in the senior high school, and sought to have them removed from the district's curriculum. The citizens' objections focused on the alleged violence in the films and their purported impact on the religious and family values of students. (p. 773)

After the citizens had pursued their complaints through the appropriate procedures for review and selection of instructional materials, the school board acceded to their demands and voted to remove the films from the district's curriculum. Legal action was then commenced in United States District Court for the District of Minnesota by three students enrolled in the junior and senior high schools operated by District No. 831. They sought to compel District No. 831 to reinstate the film version of "The Lottery" and its trailer film to the high school curriculum. (p. 773)

After a hearing, the District Court of Minnesota found that the board's objections to the films had "religious overtones" and that the films had been banned because of their "ideological content." It held the school board's decision violated the First Amendment and ordered the films reinstated to their prior place in the curriculum. The school board appealed. (p. 773)

Issues: At issue in Pratt is whether the First Amendment of free speech is implicated when a school board removes films from the district's curriculum because a majority of its members objected to the film's religious and ideological content. (p. 773)

Holding: The Court of Appeals for the Eighth Circuit decided that: 1) the board's removal of films from the curriculum violated the students' First Amendment free speech rights where the board had not removed films because they contained scenes of violence or distorted the short story, but because a majority of the board considered the films' ideological and religious themes to be offensive, and 2) placing restrictions on protected speech by removing the films from the curriculum could not be justified by the fact that the short story remained available in the library in printed form and in a photographic recording. (p. 772)

Reasoning: Local authorities are the principal policymakers for the public schools. Thus, school boards are accorded comprehensive powers and substantial discretion to discharge the important tasks entrusted to them. See Minarcini v. Strongsville City School District, 541 F.2d 577, 580 (6th Cir. 1976). (p. 775)

Necessarily included within the board's discretion is the authority to determine the curriculum that is most suitable for students and the teaching methods that are to be employed, including the educational tools to be used. These decisions may properly reflect local community views and values as to educational content and methodology. (p. 775)

Notwithstanding the power and discretion accorded them, school boards do not have an absolute right to remove materials from the curriculum. See Minarcini v. Strongsville City School District, 541 F.2d at 581. See Right to Read Defense Committee of Chelsea v. School Committee of City of Chelsea, 454 F. Supp. 703, 711 (D. Mass. 1978). Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." See Tinker v. Des Moines Independent School District, 89 S. Ct. 733, 736. At the very least, the First Amendment precludes local authorities from imposing a "pall of orthodoxy" on classroom instruction which implicates the state in the propagation of a particular religious or ideological viewpoint. (p. 776)

There has been a flurry of cases recently in which the federal courts have considered First Amendment challenges to the removal of books from school libraries. Those courts have generally concluded that a cognizable First Amendment claim exists if the book was excluded to suppress an ideological or religious viewpoint with which the local authorities disagreed. (p. 776)

Opponents of "The Lottery" focused primarily on the purported religious and ideological impact of the films. They contended that the movies must be removed from the curriculum because they posed a threat to the

students' religious beliefs and family values. (pp. 776-777)

In contrast to these value-laden objections, several teachers testified that "The Lottery" is an important American short story, that the film was faithfully adapted from the short story, that the story stimulates students to consider new ideas, and that the films are an effective teaching tool and involve students who might not otherwise read the story. (p. 777)

After hearing these contrasting points of view, the Challenge Committee set up to evaluate the dispute recommended that the films be retained in the high school curriculum. But the board, obviously in response to the citizens' objections and without offering any reasons for its action, decided to remove the films from all of the district's schools. (p. 777)

Therefore, to avoid a finding that it acted unconstitutionally, the board must establish that a substantial and reasonable governmental interest exists for interfering with the students' right to receive information. Bare allegations that such a basis existed are not sufficient. (p. 777)

First, the contention that the films graphically emphasize violence is simply not supported by the facts. (p. 778)

Second, no systematic review of violence in the curriculum has been undertaken by the board. (p. 778)

Third, and most importantly, parents and citizens sought to have the films removed largely on the basis of the purported negative impact the material would have on the religious and family values of students. (p. 778)

The board—not this court—has the authority to determine that a literary or artistic work's violent content makes it inappropriate for the district's curriculum. But after carefully reviewing the record, it is clear that the board eliminated the films not because they contained scenes of violence or because they distorted the short story, but rather it so acted because the majority of the board agreed with those citizens who considered the films' ideological and religious themes to be offensive. (p. 778)

Moreover, the First Amendment requires, in a situation such as the instant one, that the school board act so that the reasons for its decision are apparent to those affected. (p. 778)

In this case, the board, in response to citizens' complaints that centered on their ideological and religious beliefs, banned the films without giving any reasons for its actions. (p. 778)

The board seeks to justify its action by pointing out that the short story remains available to teachers and students in the library in printed form and a photographic recording. Restraint on protected speech generally cannot be justified by the fact that there may be other times, places or circumstances for such expression. The symbolic effect of removing the films from the curriculum is more significant than the resulting limitation of access to the story. The board has used its official power to perform an act clearly indicating that the ideas contained in the films are unacceptable and should not be discussed or considered. This message is not lost on students and teachers, and its chilling effect is obvious. (p. 779)

In sum, while this court is mindful that its role in reviewing the decisions of local school authorities is limited, the court also has an obligation to uphold the Constitution to protect the fundamental rights of all citizens. (p. 779)

Disposition: The United States Court of Appeals for the Eighth Circuit affirmed the decision of the district court. (p. 780)

Citation: Bowman v. Bethel-Tate Board of Education, 610 F. Supp. 577 (D.C.Ohio 1985)

Facts: The Ebon C. Hill Elementary School is located in the Bethel-Tate School District in Clermont County, Ohio. The Bethel-Tate Local School District Board of Education has immediate supervisory power over schools within the Bethel-Tate School District and was the governing body that made the decision to halt production of the play Sorcerer and Friends. (p. 579)

Third graders at the Ebon C. Hill Elementary School had been rehearsing the above-mentioned play in anticipation of performance on May 13, 1985, the date of the final Parent-Teachers Association (PTA) gathering. Third graders entertaining at the final PTA meeting of the year is customary. Sorcerer was selected as this year's play because it is a musical-comedy, has a large number of parts no one of which requires a great deal of memorization, and was thought to be, in the teachers' view, a suitable undertaking for third graders. (p. 579)

Sorcerer began rehearsal during the first week of March, 1985. Rehearsals were held both before and after

regular school hours. In addition, the songs in the play were practiced during music class, a portion of the school's normal class schedule. On or about March 28, 1985, questions were raised about the content of the play. In response, the school's principal communicated with third-grade parents and asked that, upon review of the play's synopsis and lyrics, they advise him whether they favored production of the play. This survey yielded a result of 44 parents in favor and 7 opposed, with 3 parents expressing no opinion. At the behest of the board, during the week of April 11, 1985, the entire play was submitted to third-grade parents. This second survey yielded 90 parents for Sorcerer, 23 against, and 2 without opinion. (p. 579)

On April 18, 1985, the board, in receipt of the second survey results, voted to halt production of the play. The board's vote was prompted by its disagreement with the ideas contained therein. Specifically, in the opinion of the board, Sorcerer glorifies cowardice, denigrates patriotism, and disparages the aged. (p. 579)

Both student and teacher participants in Sorcerer, or in whatever play is produced by the third grade for performance at the May PTA meeting, is completely voluntary. "Voluntary" means that a student could decline to participate because no letter grade was given and no sanction imposed against non-participants. In addition, voluntariness is evidenced by the fact that rehearsals are held before, after, but not during, regular school hours. (p. 579)

Issues: Do the local school board's actions in halting rehearsals for a voluntary, extracurricular play, to be performed by third-grade students at a parent-teacher association gathering, taken because of the school board's disagreement with some ideas expressed in the play, violate the students' First Amendment rights of free expression and speech? (p. 578)

Holding: The District Court for the Southern District of Ohio, Western Division, determined that the local school board's actions in halting rehearsals for a voluntary, extracurricular play, to be performed by third graders at a parent-teacher association gathering, because, in the opinion of the board, some of the ideas expressed in the play glorified cowardice, denigrated patriotism, and disparaged the aged, violated the students' First Amendment rights. Further, the fact that the board considered the play's message to be in derogation of the board's curriculum philosophy was of no moment legally once it was concluded that an extracurricular activity was at issue, and the board's fear that the community would perceive the board as endors-

ing the play's message was insufficient justification for suppression of First Amendment freedoms. (p. 578)

Reasoning: By all counts, participation in Sorcerer and Friends is voluntary. And because participation is invited rather than compelled, the play at issue falls not within the confines of curriculum, an area over which a local board of education has an exceptional amount of discretion. Instead, rehearsal for and presentation of Sorcerer is an extra-curricular activity and shall be so analyzed. (p. 580)

Plainly the Supreme Court instructs that neither "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736. But Supreme Court precedent offers us more than general guidance in this instance. Given the instant facts, we believe Board of Education, Island Trees Union Free School District No. 26 v. Pico, 102 S. Ct. 2799, controls our decision and mandates that it be in favor of the plaintiffs. (p. 580)

A number of parallels can be drawn between Island Trees and the instant case. Visits to the library to check out books for pleasure reading is a voluntary activity and not part of the school's curriculum. (102 S. Ct. at 2809) The board's president testified that preparation for and performing in Sorcerer also is voluntary. But defendants' counsel argued that, notwithstanding its voluntariness, the play is part of the school's offerings of avenues of personal development, necessary adjuncts to the curriculum and thus controllable as within the board's nearly plenary discretion. As a matter of law, this court concludes otherwise. Surely no one would dispute that a library and its contents make available unlimited opportunities for personal development, and yet the Supreme Court found its existence to be outside the school's curriculum. Thus we decide that, as with the Island Trees library, participation in Sorcerer is voluntary and not part of the school's curriculum. (pp. 580-581)

The Island Trees Board removed the books from the libraries under their supervision because they were "'irrelevant, vulgar, immoral, and in bad taste.'" (102 S. Ct. at 2804) Bethel-Tate has shut down production of Sorcerer because the play allegedly glorifies cowardice, denigrates patriotism, and disparages the aged. Island Trees removed the books in the face of contrary views of teachers and librarians in their own school system, the Superintendent of Schools, publications that specialize in rating books for students of the ages involved, and literary experts. (102 S. Ct. at

2811) Bethel-Tate's board has acted despite contrary opinions expressed by the principal and four other third-grade teachers, the president of the PTA, the play's author, and the vast majority of the surveyed parents, not to mention the plaintiffs. (p. 581)

In Island Trees, Justice Brennan, who announced the judgment of the court, cited motivation as a key factor. "If [the Board] intended by their decision to deny [students] access to ideas with which [the Board] disagreed, and if this intent was the decisive factor in [the Board's] decision, then [the Board has] exercised [its] discretion in violation of the Constitution." (102 S. Ct. at 2810) The court defines "decisive factor" as a substantial factor, "in the absence of which the opposite decision would have been reached." (102 S. Ct. at 2810 n. 22) The facts now before this court suggest that the Bethel-Tate Board ordered a halt to production solely because it did not approve of the content of the play. Under the authority of Island Trees, this court believes that the defendants, the Bethel-Tate Local School District Board of Education and its individual members, have acted unconstitutionally in forcing their judgment upon others concerning an event that is extra-curricular. (p. 581)

To sum up, the court concludes, as a matter of law, that the Bethel-Tate Local School District of Education halted rehearsal for performance of Sorcerer and Friends, a voluntary, extra-curricular theatrical production, because it disagreed with some of the ideas expressed therein; consequently, this court finds the board's actions to be in violation of the participants' First Amendment rights. (p. 582)

Disposition: The defendants were permanently enjoined from interfering in any way with the rehearsal and presentation of the play Sorcerer and Friends. However, no part of the rehearsal or staging of the play was to be included in any regular classroom time, that is, during normal school hours of the third grade at the Ebon C. Hill Elementary School. (p. 582)

Citation: Bell v. U-32 Board of Education, 630 F. Supp. 939 (D.Vt. 1986)

Facts: The play at issue, Runaways, focuses on the emotions and reflections of several child runaways concerning the problems at home from which they fled and the problems they face alone in the city. Some scenes concern child abuse, child prostitution, alcohol and drug abuse, and rape. In one scene, the actors simulate a rape and murder. The play has little profane language, and there is sporadic humor. (p. 941)

Each spring, U-32 High School sponsors a spring musical, which its students perform both for the school community and for the community at large. The school funds the production initially, covers costs not reimbursed by ticket sales, provides facilities for rehearsals and performances, publicizes the performances, and allows its name to be used as the sponsor of the play in this publicity. (p. 941)

Most of the performers and crew for these productions are selected from the student body, which consists of grades 7-12. The student participants receive grades and academic credit for their participation, and the play is considered to be part of the curriculum. The school employs and specifically compensates various faculty members to direct the play and to supervise different aspects of its production. A group of faculty members choose the play each January, and the school board commonly approves the choice implicitly by appropriating funds for the production. (p. 941)

On or about January 16, 1984, the director of curriculum expressed concern to the high school principal about the appropriateness of the choice of Runaways for the 1984 spring musical. After reading the play and discussions with the school administrative team, the faculty members who had selected the play, the director, and other interested staff members, the principal and the superintendent of schools agreed that they could not support production of the play. (p. 941)

The director of performing arts appealed to the school board, and a special board meeting was scheduled for three days later, Monday, January 23, a time which would allow a decision to be made before auditions, which were scheduled to begin on Tuesday. Several staff members and students attended and were accorded an opportunity to be heard. Without stating its reasons, the board voted that the play should not be produced. (p. 941)

The parties have stipulated that the board disapproved the play because the play refers to, describes, or depicts sexual activity, child abuse, physical violence, sexual violence, drug abuse, alcohol abuse, and child prostitution. Although the board did not find that Runaways advocates or glamorizes any of these activities, it concluded that the play involved inappropriate activity for the students who would be involved in performing and producing the play and would be inappropriate viewing as a school-sponsored event for the school community and the community at large. (p. 942)

> Runaways is available to the entire student body in the U-32 school library, and it is used as a text in a humanities course at the school. The board's decision not to produce the play as the spring musical had no effect on the play's availability in the library nor on its use in the humanities course. (p. 942)

Issues: The salient First Amendment issue is whether the school board may act within its authority to safeguard the well-being of students by refusing to sponsor a play it considers inappropriate or if such action abridges students' rights to free expression and speech. (p. 940)

Holding: The District Court of Vermont's ruling in regard to the First Amendment issue stated that: (1) the school board's determination that the play was inappropriate would not be interfered with; (2) the school board's determination did not violate the First Amendment rights of students; and (3) the school board's action did not have a chilling effect on the First Amendment rights of students. (p. 939)

Reasoning: The plaintiffs' first cause of action asserts that the board's decision not to produce Runaways directly abridged their First Amendment rights to free speech and communication. The defendants argue that the decision was one concerning the school's curriculum, over which they have unfettered discretion in this situation; they did not bar access to the ideas in the play; and their decision was motivated by a proper purpose; thus, they did not abridge the plaintiffs' First Amendment right. The plaintiffs respond that because the decision was an "exclusionary" one, it more clearly implicates constitutional values and that the material is not actually inappropriate for children, and therefore should not have been censored. (p. 942)

> Both parties couch their arguments in terms of whether the board's decision "directly and sharply implicates" the students' First Amendment rights. The issue of whether constitutional rights are implicated is a threshold issue concerning whether a federal court should intervene in conflicts that arise in the day-to-day operation of the schools in light of the state's control of public education generally and the local school board's broad discretion in the management of school affairs. This court believes that First Amendment values are sufficiently implicated to warrant minimal intervention through judicial review of the board's actions. (pp. 942-943)
>
> Nonetheless, once this court has decided that judicial review is warranted, it still must evaluate whether the defendants' actions actually abridged the plaintiffs'

rights. This court finds they did not. Our analysis begins with a recitation of some underlying and controlling principles. (p. 943)

First, the speech at issue is protected by the First Amendment. The degree of protection to which speech is entitled, however, varies depending upon the type of speech and the context in which it is spoken or presented. Here, we are treating speech that is not obscene, but it does have integral parts that are vulgar, offensive, or indecent; it concerns mature themes that our society generally considers to be inappropriate for young children. Second, the board's decision was based on the content of the speech. Although restraints based upon content are viewed with greater suspicion, content regulation does not, in and of itself, violate the First Amendment. (p. 943)

Third, the plaintiffs are school children who seek a forum for their speech in school. Although school children certainly do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Supreme Court has consistently recognized and upheld "the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." See Tinker v. Des Moines Independent School District, 89 S. Ct. 733, 736. A student's First Amendment rights are subject to some limitation, in light of the "special characteristics of the school environment." (89 S. Ct. at 736) See Fraser v. Bethel School District No. 403, 106 S. Ct. 56. (p. 943)

Fourth, the state has an interest in the well-being of its youth, Ginsburg v. New York, 88 S. Ct. 1274, 1281, and may adopt more stringent controls on communicative materials available to youths than on those available to adults. Moreover, those charged with responsibility for educating youth have a primary responsibility for their well-being, including a duty to protect them from exposure to material that is considered inappropriate for them. (p. 943)

Fifth, in our system, public education is committed to the control of state and local authorities. See Board of Education, Island Trees Union Free School District No. 26 v. Pico, 102 S. Ct. 2799, 2806. Local school boards have broad discretion in the management of school affairs, particularly in matters of curriculum, and have a duty to transmit community values. (102 S. Ct. at 2806) But, this discretion must be exercised in a manner that comports with the "transcendent imperatives of the First Amendment." (102 S. Ct. at 2806) School boards may establish their curriculum in such a way as to transmit community values, but it may not

deny access to ideas in a way that prescribes an orthodoxy in matters of opinion. (102 S. Ct. at 2809) Thus, when a school board's actions are challenged on First Amendment grounds, the court must look to the board's motivation or reasons for the restriction to determine if there has been a constitutional violation. (pp. 943-944)

Applying these principles to the controversy at hand, we first note that the board does not have unfettered discretion in any matter; its actions are always subject to constitutional restrictions, whether the decision is "curricular" or not. Moreover, the decision at issue was not solely or even primarily a matter of curriculum. The value of the play as a part of the schools' curriculum was not challenged, and the play continued to be read and discussed in the school's humanities course. Instead, the play was challenged for its appropriateness as a school-sponsored theatrical production and as an activity for the students, some of whom were quite young. Because that activity was part of the curriculum, the decision was also "curricular." Nonetheless, the distinction between curricular and extra-curricular activities is not particularly pertinent in this context. It is enough that the activity at issue is a school-sponsored program. (p. 944)

Not only do school boards have broad discretion in their choice of curriculum and a responsibility to transmit societal values, but they also have primary responsibility for the well-being of their students. This means that, when confronted with activities or materials that are sexually explicit or contain mature themes, the board has a duty to determine what, according to societal values, is inappropriate for students in the context of school-sponsored activities and to protect its students from inappropriate activities. The plaintiffs ask us to declare that the play is patently appropriate. This we cannot do. The board is vested with the authority and discretion to make this determination, and unless we can find its determination is clearly erroneous, we will not disturb its determination that the play is inappropriate in these circumstances. Because the board's determination generally comports with societal values concerning what is appropriate for children, we will not disturb its determination. (pp. 944-945)

Finally, we turn to the issue of whether the board's decision abridged the plaintiffs' free speech rights. This determination depends upon the board's motives in prohibiting production of the play. The parties have stipulated that the board was motivated by the board's belief that the play was inappropriate as a school-sponsored theatrical production, both as an activity

for the students and as viewing for the school community for which it would be performed. We believe this motive is permissible, based on the school board's responsibility for its students' physical and psychological well-being. Moreover, a student's First Amendment rights are somewhat limited, in light of the special circumstances of the school environment. Thus, we hold that in this instance, the students' rights to free expression must give way to the board's responsibility for the well-being of the larger student body that would be affected by production of the play. (p. 945)

Disposition: The district court granted the defendants' motion for summary judgment, denied the plaintiffs' motion for summary judgment, and directed that judgment be entered for the defendants on all claims. (p. 947)

Citation: Borger v. Bisciglia, 888 F. Supp. 97 (E.D.Wis. 1995)

Facts: On August 18, 1994, sixteen-year-old Benjamin Borger ("Borger") filed this First Amendment civil rights suit (by his father, Darrell Borger) against the Kenosha School District, Superintendent Bisciglia, and the board of education ("School Board") because they refused to allow the movie "Schindler's List" to be shown as part of his high school curriculum. Borger now seeks summary judgment and a declaration that the defendants' decision to prevent the viewing of any R-rated film, including "Schindler's List," as part of the curriculum at his school violated Borger's and other students' rights under the First and Fourteenth Amendments. He also asks for an injunction barring the defendants from enforcing the portion of the School Board's policy prohibiting the instructional use of any film which the Motion Picture Association has rated "R." The School Board and superintendent have filed a cross motion for summary judgment. (p. 98)

Issues: Does the refusal of school authorities to allow the showing of an award-winning historical film solely because that film is rated "R" impinge upon the First Amendment rights of students? (p. 97)

Holding: The District Court for the Eastern District of Wisconsin held that the school district's policy against showing films rated "R" by the movie industry's rating system was rationally related to a legitimate pedagogical goal and did not violate the First Amendment rights of students. (p. 97)

Reasoning: Students do not lose their First Amendment rights when they walk through the schoolhouse door. See Tinker v. Des Moines Independent Community School District, 89

S. Ct. 733, 736. However, courts have decided that the scope of the First Amendment within the classroom must be tempered, and that the content of the curriculum is within the sound discretion of school officials, with exceptions in rare cases. See Zykan v. Warsaw Community School Corporation, 631 F.2d 1300, 1306 (7th Cir. 1980). Courts should not interfere with local educational discretion unless "local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute." Only a "flagrant abuse of discretion" merits judicial intervention. (p. 99)

Thus, school officials have abundant discretion to construct curriculum, and they only violate the First Amendment when they limit access to materials "for the purpose of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials disapproval of the ideas involved." See Board of Education v. Pico, 102 S. Ct. 2799, 2814. Thus, the court must consider whether or not the defendants' decision bore a reasonable relationship to a legitimate pedagogical concern. See Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, 571. (pp. 99-100)

This is not a case in which the plaintiff alleges that school officials acted pursuant to political or religious beliefs. The undisputed facts establish that the superintendent and School Board decided not to allow "Schindler's List" to be shown solely because it was R-rated and banned by policy 6161.11. The defendants have presented an unrebutted "legitimate pedagogical concern"—that its students not be subjected to movies with too much violence, nudity, or "hard" language. This is a viewpoint-neutral, non-ideological reason for a facially neutral policy and a viewpoint-neutral application of that policy. Borger does not dispute that the school has a legitimate policy to try to keep harsh language, violence, and nudity out of the history or government classroom curriculum. (p. 100)

Nor is this a case in which a student asks that the court force the school to add a film to the curriculum. Such a case would doubtlessly fail under Pico, 102 S. Ct. at 2810, in which Justice Brennan's plurality opinion doubted that students would be able to force the School Board to add new school materials even though they might be able to stop the School Board from eliminating materials already at school. Id. (p. 100)

Instead, this case is about whether the defendants can rely on the MPAA rating system, instead of upon their own viewing of the film, in order to exclude it from

the curriculum due to language, violence, and nudity. In other words, Borger argues that the use of the MPAA ratings system is not reasonably related to the School Board's admittedly legitimate concern. (p. 100)

It is true that a private organization's rating system cannot be used to determine whether a movie receives constitutional protection. However, that does not mean that the School Board cannot choose to use the ratings system as a filter of films. The Supreme Court has said that schools and classrooms are nonpublic forums, outside the general marketplace of expression, and school boards have more discretion to censor within that environment than do bodies governing the public sphere. See Hazelwood, 108 S. Ct. 562. The grounds for school board curriculum decisions need only bear a reasonable relationship to their legitimate purpose. Id. The School Board has established, through literature on the MPAA, that relying on the ratings is a reasonable way of determining which movies are more likely to contain harsh language, nudity, and inappropriate material for high school students. "R" ratings are the threshold which the School Board has chosen as movies that will not even be considered. An R-rating indicates that reasonable people could determine that high school students should not view the film. See Krizek, 713 F. Supp. at 1139. That "reasonableness" is all that is necessary in a high school setting. This is a constitutional exercise of school board discretion. (pp. 100-101)

Disposition: The court ordered that the plaintiff's motions for summary judgment, preliminary injunction, and class certification be denied and that the defendants' motion for summary judgment be granted. (p. 101)

Citation: Bauchman by and through Bauchman v. West High School, 900 F. Supp. 254 (D.Utah 1995)

Facts: A Jewish student sued the public high school, the school district, individual school officials, school board members, and the music teacher under Section 1983 alleging that the music teacher's choice of explicitly Christian religious music and Christian religious sites for performance of the high school's a'cappella choir violated her rights under United States and Utah Constitutions. The defendants filed motion to dismiss. (pp. 254-255)

Plaintiff Rachel Bauchman is a Jewish student enrolled at defendant West High School, a public secondary school within the defendant Salt Lake City School District. At times relevant in the complaint, during the 1994-1995 school year, the plaintiff was enrolled in the tenth grade. The plaintiff was a member of West

> High School's A'Cappella Choir, an elective class offered for credit. Admittance to the choir is by audition, which the plaintiff successfully accomplished. (pp. 259-260)
>
> Defendant Richard Torgerson ("Torgerson") is the choir instructor at West High School, and in that position is an employee of the defendant Salt Lake City School District. Defendant William Boston is the principal of West High School, and defendants Gene Bonella and Teresa Piele are assistant principals. Defendant Dolores Riley is the school district's Minority Liaison Coordinator. Defendant Dale Manning was the school district's interim acting superintendent from August 1994 until January 1995. Defendant Mary Jo Rasmussen is the president of the Salt Lake City School Board. (p. 260)
>
> During the time that the plaintiff has been a member of the A'Cappella Choir, Torgerson has selected some songs of an explicitly religious derivation for performance by the choir. The works of contemporary Christian songwriters constituted a preponderance of the choir's musical curriculum. Torgerson required the plaintiff, as well as other choir members, to perform in public such songs of a religious character in connection with the choir's activities. (p. 260)
>
> Torgerson also has required the plaintiff and other choir members to perform at religious sites as part of the choir's regular curriculum. For some performances, Torgerson selected explicitly Christian religious sites. Performance at these sites was in conjunction was a "Christmas Concerts" program that was part of the regular curriculum of the West High A'Cappella Choir class. (p. 260)
>
> In response to complaints by the plaintiff and her parents, Torgerson refused to alter the choir class curriculum, or to change the sites for performance. Defendant Boston supported Torgerson in the face of opposition to the curriculum by the Bauchman family. Torgerson personally spoke to the plaintiff about the matter, and gave her the choice of either (1) continuing to participate in the choir's scheduled performances and curriculum, or (2) voluntarily resigning from participation in the choir for the period of the Christmas Concerts program, with the entry of an automatic "A" grade and an "Honors" citizenship mark for choir class on her high school transcript. (p. 260)

Issues: Several First Amendment issues are involved in this case, including those related to the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause. The specific free speech issue is whether a

public high school music teacher's selection of explicitly Christian music for the high school choir and performance at explicitly Christian religious sites violates a Jewish student's right to free speech where the Jewish student is expressly permitted to avoid classroom practice and performance of religious songs to which she objects. (p. 258)

Holding: Regarding the free speech issue, the District Court of Utah, Central Division, determined that the choice of explicitly Christian religious music and Christian religious sites did not violate the Free Speech Clause. (p. 255)

Reasoning: In this case, the plaintiff claims that Torgerson's actions have prevented her "from freely exercising her own religion by compelling her to participate in religious exercises of a religion different from her own in violation of the First Amendment." This court does not perceive that the songs of a religious nature in the West High A'Cappella Choir's repertoire are a burden on the exercise of Judaism by the plaintiff. However, the Supreme Court has cautioned that "[c]ourts are not arbiters of scriptural interpretation" or of the mandates of any religion, Thomas, 101 S. Ct. at 1430-1431, and this court does not attempt to refute the plaintiff's claim that the songs are offensive to her religious beliefs. (p. 270)

Offense to the plaintiff's religious sensibilities does not automatically render the inclusion in the choir's performance repertoire of religious songs as violative of the plaintiff's free exercise rights. In order to state a claim, the plaintiff must allege facts that, if true, would demonstrate a state compulsion to act in such a way as to trample the plaintiff's religious beliefs or non-beliefs. The plaintiff's complaint does not include such factual allegations. Indeed, her allegations of Torgerson's proposal that the plaintiff be excused from the practice and performance of any songs she found offensive compels the contrary conclusion. Based on the plaintiff's allegations, it appears that the burden on the plaintiff's free exercise was minimal in this case and that no state coercion existed. The plaintiff was expressly permitted to avoid classroom practice and performance of religious songs to which she objected. (p. 270)

The Supreme Court has clearly stated that the First Amendment protects the right to speak freely and the right to refrain from speaking. See, e.g., Wooley v. Maynard, 97 S. Ct. 1428, 1435. Therefore, the state is prohibited from compelling speech. For the reasons discussed concerning the plaintiff's free exercise rights, however, no state compulsion of speech exists

in this case under the facts alleged in the plaintiff's complaint. (pp. 270-271)

Disposition: The plaintiff's requests for relief in the form of declaratory relief, injunctive relief, and compensatory and punitive damages were denied. The defendants' motion to dismiss was granted. (p. 272)

Pledge of Allegiance, National Anthem, and Flag Salute

Citation: West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178 (1943)

Facts: The West Virginia State Board of Education on January 9, 1942, adopted a resolution ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly." (p. 1179)

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile, the expelled child is "unlawfully absent" and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and, if convicted, are subject to fine not exceeding $50 and jail term not exceeding thirty days. (p. 1181)

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it. Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecution for causing delinquency. (p. 1181)

The cause was submitted on the pleadings to a district court of three judges. It restrained enforcement as to the plaintiffs and those of that class. The board of education brought the case to the Supreme Court by direct appeal. (pp. 1179-1181)

Issues: In regard to students' First Amendment freedom of speech, the salient issue before the Supreme Court is whether the resolution of the West Virginia State Board of Education requiring all public school students to salute the American flag and give the pledge denied students their right to free speech. (p. 1178)

Holding: The Supreme Court held that the resolution of the West Virginia State Board of Education requiring children, as a prerequisite to continued attendance at public school, to salute the American flag and give the pledge, was invalid as applied to children of Jehovah Witnesses because it denied "freedom of speech" as well as "freedom of worship." (p. 1178)

Reasoning: The freedom asserted by the Jehovah Witnesses does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time, to coerce attendance by punishing both parent and child. The latter stand on the right of self-determination in matters that touch individual opinion and personal attitude. There is no doubt that, in connection with pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is now commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. Here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. (pp. 1181-1183)

> To sustain the compulsory flag salute, this Court is required to say that a Bill of Rights, which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind (p. 1183). Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction (p. 1185).
>
> National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion, as here employed, is a permissible means for its achievement. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those the Court deals with in this case, the price is not too great. (pp. 1186-1187)
>
> Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. 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. Accordingly, this Court believes that 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. (p. 1187)

Disposition: The judgement of the district court enjoining the enforcement of the West Virginia Regulation requiring children in public schools to salute the American flag and recite the pledge was affirmed by the Supreme Court. (p. 1187)

Citation: Sheldon v. Fannin, 221 F. Supp. 766 (D.Ariz. 1963)

Facts: On September 29, 1961, the plaintiffs were suspended from Pinetop Elementary School for insubordination, because of their refusal to stand for the singing of the National Anthem. This refusal to participate, even to the extent of standing, without singing, is said to have been dictated by their religious beliefs as Jehovah's Witnesses, requiring their literal acceptance of the Bible as the Word of Almighty God Jehovah. (p. 768)

The plaintiffs were expelled from Pinetop Elementary School solely because of their refusal to stand for the National Anthem. They were not accused of any other misconduct of any kind, and were in no scholastic difficulty. They have since continued their education at home, and are therefore subject to a charge of truancy and delinquency under Arizona law for failing to attend school until they have passed the compulsory education age. Their parents, too, face possible prosecution for a violation of Arizona's school laws. (p. 768)

For these reasons and because they have not the financial means to obtain an adequate education otherwise than in the public schools of the State, the plaintiffs allege irreparable damage and the lack of an adequate remedy at law, and hence seek the injunctive relief of this Federal court of equity against continued refusal of the defendant trustees to readmit them to Pinetop Elementary School, asserting that such action of the trustees infringes First Amendment rights protected against State action by the Fourteenth Amendment. (p. 768)

The plaintiffs also allege that their conduct does not present any clear or present danger to the orderly operation of the school, which the State has the Constitutional power to prevent, and they deny that their refusal to stand while other pupils sing the Star Spangled Banner is conduct which is contrary to morals, health, safety or welfare of the public, the State, or the Nation. (p. 768)

The plaintiffs further allege that they have exhausted administrative remedies by appealing to the Board of Trustees of Pinetop Elementary School for an order exempting them from participation in the National Anthem ceremony, that such relief has been denied them, and that further appeal to the State Board of Education, or to the Superintendent of Public Instruction, would be futile, because it must be presumed that those officials would enforce the State statutes here involved, which make no provision for any exemption from the ceremony. (p. 768)

Finally, the plaintiffs allege that the Pinetop Board of Trustees instituted a musical program for general assemblies which included the playing of the National Anthem; that pupils were required to stand during the singing of the National Anthem by the assembled group; that it was at one of these assemblies that the plaintiffs refused to stand and were ordered by the principal to leave school; that this order was specifically authorized by the Pinetop Board of Trustees with full knowledge of the plaintiffs' conscientious objection; and that the following expulsion of the children and refusal of the principal to readmit them, the defendant Dick, acting in his dual capacity of State Superintendent of Public Instruction and as Chief Executive Officer of the State Board of Education, made a special visit to the Pinetop school and ratified the actions of the principal and the trustees. The plaintiffs filed suit under the Civil Rights Act for injunctive relief claiming violation of the First Amendment right of free expression. (p. 770)

Issues: The relevant First Amendment issue centers on freedom of expression. Specifically, is the First Amendment right of freedom of expression abridged when public school students are suspended for insubordination because they refuse to stand for the singing of the National Anthem in accordance with their religious beliefs as Jehovah's Witnesses? (p. 766)

Holding: The District Court of Arizona held that the suspension for insubordination of the students who refused to stand because of their religious beliefs as Jehovah's Witnesses was violative of their First Amendment right to free expression. (p. 766)

Reasoning: The founding fathers inscribed upon the Great Seal of the United States the Latin phrase meaning "a new order of the ages." (p. 772)

The keystone of this "new order" has always been freedom of expression—the widest practicable individual freedom to believe, to speak, to act. (p. 772)

This principle of freedom of belief and expression was so esteemed by the founding fathers that it was embodied in the First Amendment to the Constitution of the United States. These freedoms have been held protected against State action by the Fourteenth Amendment. (pp. 772-773)

However, the unqualified declaration of the First Amendment has never been literally enforced. The right to believe, to speak, to act, in the exercise of freedom of expression, like all legal rights under our common-law system of justice, presupposes the correla-

tive legal duty always to do whatever is reasonable, and to refrain from doing whatever is unreasonable, under the circumstances; and hence these fundamental rights are ever subject to such abridgements or restraints as are dictated by reason. But we so prize freedom of expression that the bounds of restraint upon First Amendment rights which will be tolerated as reasonable are narrow in the extreme. (p. 773)

The standard of permissible restraint upon freedom of speech applies as well to freedom of religion. Thus, although the State may not establish a religion, it may curtail religious expressions by word or deed which create a clear and present danger of impairing the public health or safety, or of offending widely accepted moral codes, or of resulting in a more-than-negligible breach of the peace.

Where, however, a particular application of a general law not protective of some fundamental State concern materially abridges free expression or practice of religious belief, then the law must give way to the exercise of religion. (pp. 773-774)

Clearly if the refusal to participate in the ceremony attendant upon the signing or playing of the National Anthem had not occurred in a public-school classroom, but in some other public or private place, there would be not the slightest doubt that the plaintiffs were free to participate or not as they choose. Every citizen is free to stand or sit, sing or remain silent, when the Star Spangled Banner is played. But this case involves refusal to participate in a public-school-classroom ceremony. (p. 774)

All who live under the protection of our flag are free to believe whatever they may choose to believe and to express that belief, within the limits of free expression, no matter how unfounded or even ludicrous the professed belief may seem to others. While implicitly demanding that all freedom of expression be exercised reasonably under the circumstances, the Constitution does not require that the beliefs or thoughts expressed be reasonable, or wise, or even sensible. The First Amendment thus guarantees to the plaintiffs the right to claim that their objection to standing is based upon religious belief, and the sincerity or reasonableness of this claim may not be examined by this or any other court. (p. 775)

Accepting, then, the plaintiffs' characterization of their conduct as religiously inspired, this case is ruled by West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178, where the Supreme Court held unconstitutional the expulsion of Jehovah's Witnesses

from a public school for refusal to recite the Pledge of Allegiance to the Flag. The decision there rested not merely upon the 'free-exercise clause,' but also upon the principle inherent in the entire First Amendment: that governmental authority may not directly coerce the unwilling expression of any belief, even in the name of 'national unity' in time of war. Manifestly, the State's interest was much stronger in Barnette than in the present case. The sole justification offered by the defendants here is the opinion of the school authorities that to tolerate refusal of these plaintiffs to stand for the National Anthem would create a disciplinary problem. Evidence as to this is speculative at best and pales altogether when balanced against the 'preferred position' of First Amendment rights. Indeed, there is much to be said for the view that, rather than creating a disciplinary problem, acceptance of the refusal of a few pupils to stand while the remainder stand and sing of their devotion to flag and country might well be turned into a fine lesson in American Government for the entire class. (p. 775)

This is not to suggest, however, that freedom of expression permits any unruly or boisterous conduct of word or deed which is in fact disruptive of order or discipline in the classroom or the school, or to suggest that the school must award a passing mark or grade to a student who refuses or fails to do required school work. (p. 775)

It appears that the conduct of the pupils involved here was not disorderly and did not materially disrupt the conduct and discipline of the school, and there is a lack of substantial evidence that it will do so in the future. (p. 775)

Disposition: The district court issued a writ of injunction permanently restraining the Board of Trustees of Pinetop Elementary School from excluding the plaintiffs from attendance at the school solely because they silently refuse to rise and stand for the playing or singing of the National Anthem. (p. 775)

Citation: Banks v. Board of Public Instruction of Dade County, 314 F. Supp. 285 (S.D.Fla. 1970)

Facts: The plaintiff, Andrew Robert Banks, a senior at Coral Gables High School, filed an amended complaint by his guardian alleging he was suspended from school as a result of his refusal to stand during the Pledge of Allegiance. The complaint seeks class relief. The plaintiff challenges the constitutionality of School Board Policy-Regulation 6122, titled "Guidelines for Instruction Pertaining to the Flag, Pledge of Alle-

giance, and National Anthem," asserting that the regulation violates the free speech and expression guarantee of the First Amendment as applied to the states through the Fourteenth Amendment to the United States Constitution. (p. 287)

The facts essential to the disposition of the case are not in dispute. Andrew Robert Banks was suspended from school on January 29, 1970, for a period of ten days, and again suspended for a like term on February 9, 1970, for his refusal to stand in accordance with the procedure contained in School Board Policy-Regulation 6122 during the flag salute ceremony conducted each morning in the homeroom period. The regulation states that "students who for religious or other deep personal conviction, do not participate in the salute and pledge of allegiance to the flag will stand quietly." (p. 294)

The plaintiff asserts that he has the constitutional right to refuse to stand for the pledge and salute and that his suspension constituted a penalty imposed upon him for the exercise of his constitutional right of free speech and expression. The defendant has denied that the plaintiff's refusal to stand was an exercise of his constitutional right of free speech and expression and has asserted that there is a compelling governmental purpose to be served in requiring students to stand during the pledge. (p. 294)

Issues: Does a public school board policy regulation requiring students to recite the Pledge of Allegiance or to stand quietly during the flag salute ceremony conflict with the free speech and expression guarantees of the First Amendment? (p. 287)

Holding: The District Court for the Southern District of Florida held that the regulation requiring students to recite the Pledge of Allegiance or to stand quietly during the ceremony was in direct conflict with the free speech and expression guarantees of the First Amendment as applied to the states through the Fourteenth Amendment. (p. 285)

Reasoning: In West Virginia State Board of Education v. Barnette, 1943, 63 S. Ct. 1178, the Supreme Court held that a West Virginia State Board of Education resolution which required children, as a prerequisite to their continued attendance at public school, to salute the flag and recite the pledge, was unconstitutional as applied to children of Jehovah's Witnesses since it denied them freedom of speech and freedom of worship. In rejecting the resolution the court held that the state could not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of

opinion," nor can the state "force citizens to confess by word or act their faith therein." See Barnette at 63 S. Ct. at 1187. In holding that the state could not compel obedience to its symbol at the expense of First Amendment rights, save "grave and immediate dangers to interests which the state may lawfully protect," the Court observed that:

> Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of substance is the right to differ as to things that touch the heart of the existing order. See Barnette, 63 S. Ct. at 1187. (pp. 294-295)

Andrew Banks was suspended for his refusal to act in accordance with a regulation, the operation of which prevented him from exercising his First Amendment rights. Yet, the tenor of Barnette is negative. It prohibits the state from compelling individuals to act in a certain manner; it is not a recognition of student's rights. On the other hand, the Supreme Court's decision in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, speaks affirmatively. There the court held that public school students could not be suspended for wearing black arm-bands to protest American involvement in Vietnam, a form of silent protest and non-disruptive First Amendment expression in the classroom. In writing for the majority, Mr. Justice Fortas stated that:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either teachers or students shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. See Tinker, 89 S. Ct. at 736. (p. 295)

The Court recognized that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." See Tinker at 89 S. Ct. at 739. However, the Court was careful to point out that:

> [c]onduct 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 free speech. See Tinker at 89 S. Ct. at 740. (p. 295)

> The conduct of Andrew Banks in refusing to stand during the pledge ceremony constituted an expression of his religious beliefs and political opinions. His refusal to stand was no less a form of expression than the wearing of the black arm-band was to Mary Beth Tinker. He was exercising a right "akin to pure speech." (p. 295)
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> The unrefuted testimony clearly reflects that the plaintiff's refusal to stand has not caused any disruption in the educational process. While there may be some who would question the sincerity with which this plaintiff holds his religious and political views, such inquiry is not a proper consideration for a court. The First Amendment guarantees to the plaintiff the right to claim that his objection to standing during the ceremony is based upon religious and political beliefs. (pp. 295-296)
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> The same conclusion has been reached on facts virtually identical to those presented in the instant case in Sheldon v. Fannin, 221 F. Supp. 776. There the court issued a permanent injunction restraining the state board of education from suspending for insubordination students who, because of their religious beliefs as Jehovah's Witnesses, refused to stand during the singing of the National Anthem. That court, relying heavily upon West Virginia v. Barnette, recognized that the First Amendment guarantee protects even the expressions of beliefs which appear to be ludicrous and unfounded. The court stated that "[w]hile implicitly demanding that all freedom of expression be exercised reasonably under the circumstances, the Constitution fortunately does not require that the beliefs or thoughts expressed be reasonable, or wise, or even sensible." (p. 296)
>
> The right to differ and express one's opinions, to fully vent his First Amendment rights, even to the extent of exhibiting disrespect for our flag and country by refusing to stand and participate in the Pledge of Allegiance, cannot be suppressed by the imposition of suspensions. It is, therefore, clear that School Board Policy-Regulation 612 is in direct conflict with the free speech and expression guarantee of the First Amendment as applied to the states through the Fourteenth Amendment to the United States Constitution. (p. 296)

Disposition: The defendants' motion to dismiss the plaintiff's application for class relief was denied. School Board Policy-Regulation 6122 was declared unconstitutional as violative of the First and Fourteenth Amendments, and the Dade County Board of Public Instruction

was permanently enjoined from enforcing its provisions. (pp. 296-297)

Citation: Goetz v. Ansell, 477 F.2d 636 (2nd Cir. 1973)

Facts: Plaintiff Theodore Goetz, a senior at Shaker High School in Latham, New York, an honor student and the president of his class, refuses to participate in the Pledge of Allegiance because he believes "that there [isn't] liberty and justice for all in the United States." Defendants George S. Ansell, President of the Board of Education of North Colonie Central School District, Charles Szuberla, Superintendent of Schools in that district, the Board of Education of the district, and Arthur E. Walker, principal of Shaker High School, have offered plaintiff the option of either leaving the room or standing silently during the pledge ceremony. But the plaintiff maintains that he has a First Amendment right to remain quietly seated, even though if he adheres to that position, he faces suspension from school. This is the basis of his action brought by his next friend Jane Sanford in the United States District Court for the Northern District of New York under Title 42 U.S.C. Section 1983. After a hearing before the district court on plaintiff's application for a preliminary injunction, the judge ruled against the plaintiff. The plaintiff appealed the ruling to the United States Court of Appeals for the Second Circuit. (pp. 636-637)

Issues: The First Amendment issue in question is based on a New York State Regulation requiring students to stand while reciting the Pledge of Allegiance. In particular, the question is whether the regulation denies a high school student the right of freedom of expression by compelling him to stand or leave the classroom during the flag pledge ceremony. (p. 636)

Holding: The Court of Appeals for the Second Circuit held that the regulation mandating that students stand or leave the classroom during the Pledge of Allegiance violated the First Amendment's protection of free expression. Therefore, the regulation was invalid, and school officials were enjoined from disciplining the student for remaining seated while the pledge is recited. (p. 636)

Reasoning: In West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178, the court made clear 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. Id. (63 S. Ct. at 1187) It is true that the court dealt in that case with the compulsion of saluting the flag and reciting

the pledge, whereas here plaintiff is given the option of standing silently. But the Court in Barnette was aware that the state might demand other "gestures of acceptance or respect: . . . a bowed or bared head, a bended knee," Id. (63 S. Ct. at 1182) and reiterated that the state may not compel students to affirm their loyalty "by word or act." Id. (63 S. Ct. 1178) In this case, the act of standing is itself part of the pledge. Standing "is no less a gesture of acceptance and respect than is the salute or the utterance of the words of allegiance." See Banks v. Board of Public Instruction, 450 F.2d 1103 (5th Cir. 1971). Therefore, the alternative offered plaintiff of standing in silence is an act that cannot be compelled over his deeply held convictions. It can no more be required than the pledge itself. (pp. 637-638)

The defendants point out, however, that the plaintiff has the option of leaving the classroom; he is not, as in Barnette, excluded from the school. While the court agrees that the effect upon the plaintiff of adhering to his convictions is far less drastic than in Barnette, this court does not believe that this disposes of the case. If the state cannot compel participation in the pledge, it cannot punish non-participation. Being required to leave the classroom during the pledge may reasonably be viewed by some as having that effect, however benign the defendants' motives may be. (p. 638)

Recognizing the force of Barnette and of Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, the defendants concede that plaintiff has a protected First Amendment right not to participate in the pledge. They argue, however, that the other students also have rights and that Tinker does not protect conduct that

> materially disrupts classwork or involves substantial disorder or invasion of the rights of others. . . . (89 S. Ct. at 740)

The argument is sound, but the facts of this case do not justify applying it. There is no evidence here of disruption of classwork or disorder or invasion of the rights of others. If such disruptive acts should occur, the court would have no hesitancy in holding them unprotected. But this court does not believe that a silent, non-disruptive expression of belief by sitting down may similarly be prohibited. (p. 638)

Disposition: The judgment of the district court was reversed. (p. 639)

Citation: Lipp v. Morris, 579 F.2d 834 (3rd Cir. 1978)

Facts: The plaintiff, Deborah Lipp, a 16-year-old, alleged that because the statute directed that she stand during the recitation of the pledge of allegiance to the flag, compelling her to make what she termed a "symbolic gesture," it violated her rights under the First and Fourteenth Amendments. The action was brought under Title 42 U.S.C. Section 1983. The plaintiff was a student at Mountain Lakes High School, New Jersey. The defendants were Harry Morris, principal of the high school; Robert Lautenstack, president of the board of education; and William F. Hyland, attorney general of New Jersey. The plaintiff emphasized that in her belief, the words of the pledge were not true and she stood only because she had been threatened if she did not do so. (p. 835)

Issues: Is a provision of a New Jersey statute requiring students to stand at attention while the Pledge of Allegiance is being given an unconstitutional abridgement of their First Amendment right of freedom of speech? (p. 834)

Holding: The Court of Appeals for the Third Circuit ruled that the provision was an unconstitutional requirement that students engage in a form of speech and may not be enforced. (p. 834)

Reasoning: The defendant asserts that being required to stand while others engage in the flag salute ceremony is in no way a violation of the First and Fourteenth Amendments. The attorney general of New Jersey argues that mere standing does not rise to the level of "symbolic speech." The defendant suggests that standing silently is the same as just remaining seated, and that by the simple act of standing, the plaintiff in no way engages in protected activity. (p. 836)

Citing Board of Education v. Barnette, 63 S. Ct. 1178; Goetz v. Ansell, 477 F.2d 636 (2nd Cir. 1973); and Banks v. Board of Public Instruction, 314 F. Supp. 285 (S.D.Fla. 1970), Deborah Lipp urges that her right to remain silent and not to be forced to stand springs directly from the precise First Amendment right against compelled participation in the flag ceremony recognized in Barnette. (p. 836)

Banks and Goetz are precisely on point. They interdict the state from requiring a student to engage in what amounts to implicit expression by standing at respectful attention while the flag salute is being administered and being participated in by other students. See Wooley v. Maynard, 97 S. Ct. 1428. (p. 836)

In the words of Judge Meanor: "I find this statute to be severable, that is, the portion thereof attacked as unconstitutional may rationally be severed from the remainder of the statute. This mandatory condition upon the student's right not to participate in the flag salute ceremony is an unconstitutional requirement that the student engage in a form of speech and may not be enforced. The unconstitutionality of this severable portion of the statute is declared at this time." (p. 836)

Disposition: The judgment of the District Court of New Jersey was affirmed. (p. 836)

Citation: Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992)

Facts: The father of a minor individually and as natural guardian for his son sued school district for damages and for declaration that state statute requiring recitation of Pledge of Allegiance in public elementary schools was unconstitutional. The United States District Court for the Northern District of Illinois, 758 F. Supp. 1244, granted summary judgment for defendant. The plaintiffs appealed. (p. 437)

Issues: The free expression question in this case concerns the Pledge of Allegiance. In specific, may the public schools in Illinois lead the Pledge of Allegiance daily without violating the First Amendment if students are free not to participate? (p. 439)

Holding: The Court of Appeals for the Seventh Circuit held that public schools in Illinois could lead the Pledge of Allegiance daily without violating the First Amendment so long as students were free not to participate. (p. 437)

Reasoning: "[N]o 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." See West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178, 1187. A state, therefore, may not compel any person to recite the Pledge of Allegiance to the flag. On similar grounds, Wooley v. Maynard, 97 S. Ct. 1428, adds that a state may not compel any person to display its slogan. Does it follow that a pupil who objects to the content of the Pledge may prevent teachers and other pupils from reciting it in his presence? (p. 439)

In 1979, Illinois enacted this statute: "The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or

maintained in whole or in part by public funds." We held in Palmer v. Board of Education, 603 F.2d 1271 (7th Cir. 1979), that states may require teachers to lead the Pledge and otherwise communicate patriotic values to their students. The right of the school board to decide what the pupils are taught implies a corresponding right to require teachers to act accordingly. See also Webster v. New Lenox School District, 917 F.2d 1004 (7th Cir. 1990). Richard Sherman, who attends elementary school in Wheeling Township, Illinois, and his father Robert challenge the premise of Palmer that schools may employ a curriculum including the Pledge of Allegiance among its exercises. (p. 439)

What the law requires of principals, teachers, and pupils depends on the language it contains rather than the penalty it omits. And what the statute says is that the Pledge "shall be recited each school day by pupils" in public schools. Some pupils? Willing pupils? All pupils? It does not specify. If it means "all pupils" then it is blatantly unconstitutional; if it means "willing pupils" then the most severe constitutional problem dissolves. Given Barnette, which long predated enactment of this statute, it makes far more sense to interpolate "by willing pupils" than "by all pupils." School administrators and teachers satisfy the "shall" requirement by leading the Pledge and ensuring that at least some pupils recite. Leading the Pledge is not optional, see Palmer, but participating is. (p. 442)

This understanding is consistent with the practice in the Wheeling schools. The superintendent of schools, the principal of Riley School (which Richard attends), and his first-grade teacher when this suit began, all filed affidavits stating that neither Richard nor any other pupil is compelled to recite the Pledge, to place his hand over his heart, to stand, or to leave the room while others recite. (p. 443)

So long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises. Objection by the few does not reduce to silence the many who want to pledge allegiance to the flag "and to the Republic for which it stands." (p. 445)

Disposition: In reference to the First Amendment question, the judgment of the District Court for the Northern District of Illinois was affirmed. (p. 448)

Prayer in School

Citation: Stein v. Oshinsky, 348 F.2d 999 (2nd Cir. 1965)

Facts: Action was taken by parents to enjoin school officials from preventing the recitation of prayers on the children's initiative. The United States District Court for the Eastern District of New York, 224 F. Supp. 757, granted summary judgment to the parents, and the school officials appealed.

The complaint, filed in March, 1963, in the District Court for the Eastern District of New York, made the following allegations: The fifteen plaintiffs, of varying religious faiths, are parents of twenty-one children, ranging from five to eleven years in age. The children attend Public School 184, at Whitestone, New York, in grades ranging from kindergarten to the sixth. The defendants are Elihu Oshinsky, principal of the school; the members of the Board of Education of New York City; and the Board of Regents of the University of the State of New York. On October 5, 1962, Mr. Oshinsky "ordered his teachers to stop the saying of any prayer in any classroom in P.S. 184, Whitestone, New York." The Board of Education and the Board of Regents have instituted a policy banning prayers in the public schools even when the opportunity to pray is sought by the students themselves, and by so doing have "condoned and/or directed" Mr. Oshinsky's actions. The plaintiffs had joined in a written demand to the defendants "that our children be given an opportunity to acknowledge their dependence and love to Almighty God through a prayer each day in their respective classrooms"; the defendants had ignored this. (pp. 999-1000)

Issues: In addition to the issues of the free exercise of religion and the establishment of religion, another First Amendment issue arises in this case. Specifically, does the right to freedom of speech require a state to permit "student-initiated" prayers in public schools? (p. 999)

Holding: The Court of Appeals for the Second Circuit determined that the constitutional rights to the free exercise of religion and to freedom of speech did not require a state to permit "student-initiated" prayers in public schools. (p. 999)

Reasoning: The plaintiffs say that Engel v. Vitale, 82 S. Ct. 1261, and the later decisions in Abington Tp. School District v. Schempp and Murray v. Curlett, both at 83 S. Ct. 1560, held only that under the Establishment Clause of the First Amendment a state may not direct the use of public school teachers and facili-

ties for the recitation of a prayer, whether composed by a state official as in Engel or not so composed but having a religious content as in Abington and Curlett; they argue that these decisions did not hold that a state could not permit students in public schools to engage in oral prayer on their own initiative. This may be true enough; if the defendants could prevail only by showing that permitting the prayers was prohibited by the Establishment Clause, the question would be whether the use of public property as a situs for the prayers, the consumption of some teacher time in preserving order for their duration, and the possible implication of state approval therefrom would attract the condemnation of People of State of Illinois ex rel. McCollum v. Board of Education, 68 S. Ct. 461, or the benediction of Zorach v. Clauson, 72 S. Ct. 679, and Sherbert v. Verner, 83 S. Ct. 1790. Although the court notes in this connection the defendants' serious contention that in the context of closely organized schooling of young children, "student-initiated" prayers are an illusion and any effective routine requires the active participation of the teachers, this court shall assume in the plaintiffs' favor that the Establishment Clause would not prohibit New York from permitting in its public schools prayers such as those here at issue. Nevertheless, New York is not bound to allow them unless the Free Exercise Clause or the guarantee of freedom of speech of the First Amendment compels. (p. 1001)

Neither provision requires a state to permit persons to engage in public prayer in state-owned facilities wherever and whenever they desire. See Poulos v. State of New Hampshire, 73, S. Ct. 760. (p. 1001)

Determination of what is to go on in public schools is primarily for the school authorities. Against the desire of these parents that their children "be given an opportunity to acknowledge their dependence and love to Almighty God through a prayer each day in their respective classrooms," the authorities were entitled to weigh the likely desire of other parents not to have their children present at such prayers, either because the prayers were too religious or not religious enough; and the wisdom of having public educational institutions stick to education and keep out of religion, with all the bickering that intrusion into the latter is likely to produce. The authorities acted well within their powers in concluding that the plaintiffs must content themselves with having their children say these prayers before nine or after three. (p. 1002)

Disposition: The judgment of the District Court for the Eastern District of New York was reversed, with directions to dismiss the complaint. (p. 1002)

Citation: Collins v. Chandler Unified School District, 644 F.2d 759 (1981)

Facts: The facts in this case are not in dispute. Chandler High School is a public school in Chandler, Arizona. Periodically during the year, the Student Council plans and schedules student assemblies and the school administration adjusts the regular class schedule so that the assembly can be held within the school day. Student Council officers conduct the assemblies and students not wishing to attend may report to a supervised study hall. (p. 760)

During the 1977-1978 and 1978-1979 school years, the Chandler Student Council requested permission to open assemblies with prayer. The principal approved these requests with the knowledge and concurrence of the superintendent and the board of education. (p. 761)

In the spring of 1978, Collins, a mother of two students then enrolled at Chandler High School, sought a legal opinion about the constitutionality of this practice. Deciding such prayers violated the First Amendment, Collins' attorneys attempted to convince school officials to withdraw permission and terminate the prayers. The officials indicated, however, that they intended to continue the practice unless otherwise advised by the county attorney's office or ordered by the court. (p. 761)

When the county attorney advised Chandler officials that prayers at student assemblies were permissible and further agreed to represent the Chandler School District, Collins filed suit in district court seeking an injunction, a declaratory judgment, and attorneys' fees and expenses. The district attorney granted summary judgment for Collins, finding that the conduct of the Chandler officials had violated the First and Fourteenth Amendments to the Federal Constitution; it issued an order permanently enjoining them from "permitting, authorizing, or condoning the saying of public prayers by the students" at student assemblies. (470 F. Supp. at 964) The district court denied Collins' request for attorneys' fees, however, and Collins appeals. Chandler cross-appeals. (p. 761)

Issues: The salient First Amendment issue implicated in this appeal pertains to the relationship between the Free Speech Clause and the Establishment Clause as applied to public schools. Namely, does the Establishment Clause prescription against prayer in public

schools override students' free speech interests? (p. 760)

Holding: The Court of Appeals for the Ninth Circuit held that where the high school principal, with concurrence of the superintendent, granted permission for the student council to recite prayers and Bible verses of their choosing during school hours, there was a violation of the Establishment Clause, and such permission for students to conduct prayers could not be saved from constitutional attack merely because attendance at school assemblies was voluntary (p. 759). The court concluded that students have First Amendment rights to free speech in public schools, but when explicit Establishment Clause prescription against prayer is considered, protections of political and religious speech are inapposite (p. 760).

Reasoning: Chandler argues that denial of permission to open assemblies with prayer would violate the students' rights to free speech. But, as the Brandon court (Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d. Cir. 1980) persuasively explains, although students have First Amendment rights to political speech in public schools, Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, "[w]hen the explicit Establishment Clause proscription against prayer in the public schools is considered, the protections of political and religious speech are inapposite." (635 F.2d at 980) (pp. 762-763)

Disposition: With respect to the First Amendment issue, the decision by the District Court of Arizona to enjoin the school district from permitting voluntary prayer at school assemblies was affirmed. (p. 764)

Citation: Lundberg v. West Monona Community School District, 731 F. Supp. 331 (N.D.Iowa 1989)

Facts: Plaintiff Duane Lundberg is a duly ordained minister of the Evangelical Free Church of America and is a pastor of that church in Onawa, Iowa. Plaintiff Eric Lundberg is Pastor Lundberg's son, and a senior at Onawa High School. Plaintiffs Orville Ives and Bernadette Ives are parents of another graduating senior at Onawa High School. Defendant West Monona Community School District includes within its jurisdiction Onawa High School. (p. 334)

The West Monona Community School District School Board (hereinafter "the School Board") voted in late spring to ban invocation and benediction at the 1989 graduation ceremonies at Onawa High School. The testimony at the hearing in this matter established that individual

members of the School Board (possibly all of them), as well as the superintendent, Donald Southwick, personally wanted the prayer services to continue at the graduation ceremonies. Nevertheless, after considering several letters from, among others, their insurance carriers, the Iowa Attorney General's office, the Iowa Department of Education, and several reports and a newsletter, the School Board became convinced that continuation of prayer at graduation ceremonies would probably violate the Establishment Clause of the First Amendment to the United States Constitution. (pp. 334-335)

The risk of personal liability in any suit brought under the Establishment Clause served as the primary motivation for School Board members to vote against inclusion of prayer. (p. 335)

The plaintiffs have brought suit seeking to force the School Board to reverse its decision and include prayer at the graduation ceremony to be held on May 21, 1989. (p. 335)

Issues: This case addresses a number of First Amendment issues, such as the free exercise of religion, the establishment of religion, and free speech. The particular free speech issue is whether a high school graduation ceremony is a public forum which would permit a parent or a student to force the school board to allow prayer in order to satisfy the free speech rights of that parent or student. (p. 332)

Holding: With respect to the issue of free speech, the District Court for the Northern District of Iowa, Western Division, held that a high school graduation ceremony was not a public forum which would permit a parent or a student to force the school board to allow a prayer to satisfy the First Amendment's guarantee of free speech. Hence, the plaintiffs failed to demonstrate a violation of their right to free speech. In addition, the court ruled that the plaintiffs failed to demonstrate a violation of their free exercise of religion and that public prayer at graduation ceremonies violated the Establishment Clause. (p. 332)

Reasoning: The key to understanding this case is the knowledge that this is not an Establishment Clause case; the Establishment Clause became an issue only tangentially. Rather, the plaintiffs bring their claims under the Free Speech and Free Exercise-of-Religion Clauses of the First Amendment. Only if the plaintiffs could establish a violation of their rights to free speech and free exercise of religion does the establishment-clause issue arise, for it is only then

that this court would have to balance the clauses against each other. (pp. 335-336)

This court finds that the defendant has not violated the plaintiffs' right to free speech because the plaintiffs have failed to establish that a high school graduation ceremony is a public forum. This court also finds that the plaintiffs have not established that the defendant violated their free exercise-of-religion rights because the plaintiffs failed to present competent evidence sufficient to persuade this court that public prayer at the graduation ceremony constitutes a central part of their religious beliefs. Because the court did not find that the defendant violated either the plaintiffs' free speech or free exercise-of-religion rights, the court need not address Establishment-of-Religion Clause concerns. Nevertheless, in the event a higher court may disagree with this court's legal conclusions, this court has taken the analysis a step further to consider alternative holdings. Even if the court deemed the plaintiffs' free speech and free exercise rights violated, the court still concludes that the plaintiffs are not entitled to force the School Board to include prayer at graduation ceremonies. The law fairly clearly holds that prayer at graduation ceremonies violates the Establishment Clause of the First Amendment. (p. 336)

The plaintiff asserts that the defendant School Board's decision to drop prayer from graduation ceremonies violates their First Amendment right to free speech. Freedom of speech forms the vanguard of our democratic freedoms. Nevertheless, no constitutional right is absolute and the right of free speech is not excluded from this rule of necessity. There exist essentially three broad types of forums in which one's right to free speech varies in scope and intensity. See Perry Education Association v. Perry Local Educators' Association, et al., 103 S. Ct. 948, 954-956. (p. 336)

The first of the three forums, the one to which the First Amendment confers the greatest protections, consists of those places, such as "streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" See Perry, 103 S. Ct. at 954. In these ultimately public forums, the state's ability to restrict or control speech is strictly limited, requiring the state to show that its content-based restriction is necessary to serve a compelling state interest, and that its restriction is narrowly drawn to achieve that end. (p. 336)

A second forum under the First Amendment consists of public property which the state has opened to public use for expressive activity. See Perry, 103 S. Ct. at 954. The Constitution forbids a state to limit some speech from a forum generally open to the public, although the state never had to create the forum in the first place. So long as the state maintains the open character of the facility, the same limitations on a state's ability to restrict speech, present in the first type of forum, also limits the state's power in the second type of forum. See Widmar v. Vincent, 102 S. Ct. at 274-275. (p. 337)

The final forum consists of public property which is not, by tradition or designation, a forum for public communication. See Perry, 103, 2. Ct. at 955. The state may establish reasonable time, place, and manner regulations in this last forum. See id. Further, the state may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Id. The "first amendment does not guarantee access to property [in order to provide for free expression] simply because it is owned or controlled by the government." See United States Postal Service, 101 S. Ct. at 2685. (p. 337)

The court finds that a high school graduation ceremony falls within the third forum, that in which the public's right to free speech is subject to the greatest amount of government restrictions. The evidence at the hearing established that the West Monona Community School District organizes, authorizes, and sponsors the Onawa High School commencement program. The event is conducted on school property using school facilities, which event school employees carry out. The school sets the program for the commencement ceremony, having the sole discretion to dictate its content. While the school cannot dictate the actual words spoken, the school does retain control over the type of speech admissible at the ceremony. It is altogether fitting and proper that the school have the power to control what occurs at graduation of its seniors. (p. 337)

The bottom line is that while the school could have, it did not create the graduation ceremony "for the purpose of providing a forum for expressive activity. That such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for first amendment purposes." See Cornelius v. NAACP Legal Defense and Educational Fund, 105 S. Ct. 3439, 3450. The School Board is allowed to ban prayer in this nonpublic forum "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." See Perry, 103 S. Ct. at 955. The School Board acted reasonably, given legitimate and real concerns that prayer at the graduation ceremony may violate the Establishment Clause and open individual members of the School Board to personal liability; the School Board did not ban prayer because of its content, but because of the subject matter. The superintendent, for example, testified that he would equally ban a Buddhist from giving prayer at the ceremony, explaining that the program did not include the subject of religious worship. The School Board's ban would be content-based if they had banned only Christian or only Buddhist prayer, for example. (pp. 337-338)

This court cannot hold that the plaintiffs' First Amendment right to free speech entitles them to force the School Board to provide a stage upon which the plaintiffs may express their views concerning religion. The plaintiffs' right to free speech, while a precious right, is not so powerful as to call for the resources of the state to further that right. The First Amendment, it must be remembered, reads in the negative, not in the affirmative; "Congress shall make no law abridging the freedom of speech." The First Amendment does not read "Congress shall provide forums through which the populace may express their views." (p. 339)

Disposition: The plaintiffs' motion for a preliminary injunction was denied. (p. 348)

Citation: Brody by and through Sugzdinis v. Spang, 957 F.2d 1108 (3rd Cir. 1992)

Facts: This suit derives from a dispute over whether and to what extent religious speech may be included in a public high school graduation ceremony, and requires the court to evaluate the competing interests of students under the Free Speech and Establishment Clauses of the First Amendment. The underlying action was filed by two members of the Class of 1990 at the Downingtown Area Senior High School by and through a next friend (the "Brody group"). Among other allegations, the complaint asserted that the inclusion of prayer at commencement exercises violated the Establishment Clause. (p. 1111)

The question raised on the present appeal is whether the district court erred in denying the motion of another group of students and their parents either to intervene as of right or in the alternative for permissive intervention. This second group, (the "Fitzger-

ald group") asserts that students possess a free speech right to discuss religion in graduation speeches. (p. 1111)

The plaintiffs in the underlying suit are Drew Brody and Jennifer Hohnstine (the "Brody group"), two students in the Class of 1990 at Downingtown Area Senior High School. The defendants are the president and members of the school board, and the principal and superintendent of the school (the "school officials"). The central claim of the plaintiffs' complaint alleged that the school officials' sponsorship of an official baccalaureate service, inclusion of religious benedictions and invocations at graduation ceremonies, and requirements that students write essays on religious subjects in English class, all violated students' rights under the Establishment Clause. The Brody group also challenged the school's denial of permission for the formation of a student group to discuss the constitutionality of the baccalaureate and graduation ceremonies on free speech grounds and under the Equal Access Act. (p. 1111)

Issues: Does a high school graduation ceremony qualify as a First Amendment public forum, which would confer on students a free speech right to pray at commencement exercises? (p. 1111)

Holding: The Court of Appeals for the Third Circuit stated that the factual record as to the nature and history of commencement exercises at Downingtown Senior High School was inadequate to decide the aforementioned question. (p. 1111)

Reasoning: The Supreme Court has adopted a framework of forum analysis to assess whether a government entity must permit speech or expressive activity on its property. In Perry Education Association v. Perry Local Educators' Association, 103 S. Ct. 948, the Court set forth three types of forums that a government may establish. First, are "quintessential public forums" such as streets and parks in which the state can only enforce time, place, and manner restrictions, or content-based restrictions that are necessary to serve a compelling state purpose. Id. 103 S. Ct. at 954. Second, are "designated public forums," which the state creates by deliberately opening them to the public. As long as a government entity maintains such a forum, it is subject to the same restrictions as a quintessential public forum. Id. 103 S. Ct. at 954-956. Thus, in either type of public forum, a content-based restriction is only permissible if it can survive strict scrutiny. (p. 1117)

The third and final category is the "nonpublic forum." Here, the state may enforce not only time, place, and manner restrictions, but also any other reasonable restriction that is not based on an attempt to suppress a particular viewpoint. Id. 103 S. Ct. at 955. Thus, these restrictions may exclude certain categories of speech by subject matter and type of speaker, provided that the rules are reasonable and viewpoint neutral. See Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 105 S. Ct. 3439, 3451. (p. 1117)

There is no question that the Downingtown Senior High School graduation ceremony is not a quintessential public forum. Rather, the present dispute centers on whether the commencement is a designated public forum or a nonpublic forum. The determination of whether the government has designated a public forum is based upon two factors: governmental intent and the extent of use granted. See Gregoire v. Centennial School District, 907 F.2d 1366, 1371 (3d Cir.) This court must also bear in mind that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." See Cornelius, 105 S. Ct. at 3449. (p. 1117)

The court is guided in this inquiry by several prior cases that have considered whether a given facility owned and operated by a public school constitutes a designated public forum. Most significantly, in Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, the Supreme Court held that a public high school's student newspaper was not a designated public forum. The student plaintiffs in Hazelwood alleged that the decision of school officials to censor and delete certain articles concerning the subjects of pregnancy and divorce violated their First Amendment free speech rights. (p. 1118)

En route to its holding in Hazelwood that the newspaper was a nonpublic forum, the Supreme Court distinguished its prior decision in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 73, which had permitted a broad scope for student free speech. The Hazelwood court found that Tinker had simply raised the question of whether a school must tolerate certain expressive activity whereas the case before it asked "whether the First Amendment requires a school affirmatively to promote particular student speech." See Hazelwood, 108 S. Ct. at 569. In the latter context, it held, forum analysis was appropriate. (p. 1118)

It appears unlikely that the commencement exercises at Downingtown Senior High School have been designated as

a public forum. The process for setting the format and contents of a graduation ceremony are more likely to resemble the tightly controlled school newspaper policies at issue in Hazelwood than the broad group access policies considered in Widmar, 102 S. Ct. 269, and Gregoire, 907 F.2d 1366 (3rd Cir.). Moreover, at least one court has considered the issue of whether a high school graduation ceremony is a public forum and found that the particular graduation at issue was a non-public forum. See Lundberg v. West Monona Community School District, 731 F. Supp. 331 (N.D.Iowa 1989). (p. 1119)

Nonetheless, it is certainly possible that the commencement exercises at Downingtown Senior High School could qualify as a public forum, and nothing in the present record demonstrates otherwise. More specifically, any forum created is a limited one, and does not preclude a finding that the ceremony has been designated as a public forum. See Hazelwood, 108 S. Ct. at 568 (school facilities may become public forums if "'by policy or by practice' [school officials have] opened those facilities 'for indiscriminate use by some segment of the public, such as student organizations'"). (p. 1120)

If, for example, school officials have authorized students to choose which of them will speak, and have permitted these speakers to select their own topics, including controversial subject matters, then officials may have created a limited public forum. Not only would such a practice demonstrate an intent to foster public discourse, but it would avoid attaching the imprimatur of the school to the views expressed in students' speeches. Moreover, this court must reiterate its cautionary admonishment from Gregoire, that an assessment of school officials' intent should be governed by their acts and not by their bald assertions that they had no desire to create a public forum, 907 F.2d at 1374. (p. 1120)

The present record is insufficient to make any final decision on the public forum issue. In fact, counsel for the Brody group conceded this point at oral argument. Consequently, this case must be remanded for development of the relevant facts and a decision by the district court as to whether the Downingtown Senior High School graduation ceremony constitutes a designated public forum. The outcome of this assessment on remand will determine which of two alternate paths must then be followed. (pp. 1120-1121)

As this court has noted above, if the district court determines that the graduation ceremony is a designated public forum, then any restrictions imposed on

speech which falls within the scope of that forum must survive strict scrutiny through a showing that these restrictions are narrowly drawn to further a compelling state purpose. See Perry Educational Association v. Perry Local Educators' Association, 103 S. Ct. 948, 954-956. The allegedly compelling interest asserted by the Brody group and the school officials is that permitting religious speech at graduation would violate the Establishment Clause. If such a violation can be demonstrated, this would constitute a compelling interest. Consequently, if the regulations are narrowly drawn to further this interest, restrictions against religious speech could be permissible even in a public forum. (pp. 1120-1121)

If the speech limitations at issue can meet this test, the Fitzgerald group would not possess a cognizable legal interest. If, however, the restrictions on speech could not survive strict scrutiny, then under the first prong of the intervention test, the Fitzgerald group would have sufficient legal interest entitling them to intervene and participate as a party in the formation of a new settlement agreement. (p. 1121)

Should the district court find that the Downingtown Senior High School commencement is a nonpublic forum, then school officials are free to enforce restrictions "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." See Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 105 S. Ct. 3436, 3451. Moreover, school officials must be permitted to "retain the authority to refuse to associate the school with any position other than neutrality on matters of political controversy." Id. 108 S. Ct. at 570. (p. 1122)

As the Supreme Court stated in Cornelius, "[a]lthough the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas." (105 S. Ct. at 3453) Moreover, even though commencement exercises are arguably not part of the educational curriculum, Hazelwood stands for the proposition that school officials are to be accorded broad discretion in regulating speech in all school forums that are nonpublic. (p. 1122)

Consequently, the speech restrictions at issue in the present case could easily meet this reasonableness standard. For example, school officials may wish to prohibit all religious speech at a graduation ceremony in order to avoid offending anyone in the audience, who may not share the speaker's religious beliefs. Officials might also aim to prevent controversy and to

maintain neutrality as between religion and nonreligion. (p. 1122)

If the district court determines on remand that no public forum exists, it should consider whether the restrictions are, in fact, reasonable in light of the purpose served by the forum and whether they are viewpoint neutral. If the district court so finds, it need not proceed any further in the intervention as of right inquiry. (p. 1122)

Disposition: The appeals court remanded the case to the District Court for the Eastern District of Pennsylvania for further development of the factual record and for a determination of the public forum issue. (p. 1111)

Citation: Harris v. Joint School District No. 241, 41 F.3d 447 (9th Cir. 1994)

Facts: In this case, students and a parent of students challenge the constitutionality of the inclusion of prayer in the Grangeville High School graduation ceremony held yearly in Grangeville, Idaho. The plaintiffs claim that the prayers violate the Idaho Constitution (the "Idaho Religion Clauses"), and the Establishment Clause of the United States Constitution. The plaintiffs originally sued in state court. The defendants removed the case to federal district court. The district court allowed several students and parents to intervene on the side of the school district. The intervenors claim that they have a right under the Free Speech and Free Exercise Clauses of the United States Constitution to have a prayer at the graduation ceremony. Both the plaintiffs and the intervenors moved for summary judgment. The district court declined to rule on the state law issues, held that the prayers did not violate the Establishment Clause, and entered judgment for the defendants. The plaintiffs appealed. (p. 449)

Issues: The primary First Amendment issues center on the tension between the free speech/free exercise rights of students and the Establishment Clause. The particular questions are: (1) Does school prayer in this case violate the Establishment Clause? (2) Does prohibiting prayer under the circumstances of this case violate the free speech or free exercise rights of students desiring to pray? (p. 447)

Holding: The Court of Appeals for the Ninth Circuit held that: (1) school prayer violated the Establishment Clause, and (2) prohibiting prayer did not violate the free speech or free exercise rights of students desiring to pray. (p. 447) The appeals court also concluded

that high school graduation was not a public forum, and the majority of students, who desired to pray, could exercise their religion outside the ceremony. (p. 448)

Reasoning: The district here and the intervenors argue that to deny students permission to pray at graduation would violate the students' rights to free speech and free exercise of religion. See Collins, 644 F.2d at 762-763. Essentially, the district and intervenors argue that, by giving the senior class authority to control events at graduation, the government has created an "open forum" at which, under the First Amendment, the government may not limit the speech that occurs. In support, they cite Mergens, 110 S. Ct. at 2370-2371 (opinion of O'Connor, J., for herself and three other Justices) (quoting Widmar v. Vincent, 102 S. Ct. at 275, 276); Hedges v. Wauconda Community Unit School District No. 118, 9 F.3d 1295 (7th Cir. 1993) (holding that a school could not prohibit or restrict students' dissemination of religious literature more than other literature). In Mergens, various kinds of nonschool-related speech were allowed on a nondiscriminatory basis. See 110 S. Ct. at 2368-2370. The same was true in Widmar, 102 S. Ct. at 273, 276. Our conclusion that the Grangeville High Graduation is not an open or public forum with regard to the prayers disposes of this free speech argument. (p. 458)

Disposition: The appeals court reversed the segment of the ruling by the District Court of Idaho which held that prayer during a high school graduation ceremony did not violate the Establishment Clause. (p. 459)

Citation: Ingebretsen v. Jackson Public School District, 88 F.3d 274 (5th Cir. 1996)

Facts: On a wave of public sentiment and indignation over the treatment of a principal, Dr. Bishop Knox, who allowed students to begin each school day with a prayer over the intercom, the Mississippi legislature passed the School Prayer Statute at issue here. Section 1(2) of the statute reads:

> [o]n public school property, other public property or other property, invocations, benedictions or nonsectarian, nonproselytizing student-initiated voluntary prayer shall be permitted during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related student events. (p. 277)

The statute includes a lengthy preamble stating that it shall not be construed to violate the Constitution

and that its purpose is to accommodate religion and the right to free speech. The School Prayer Statute also contains a severability clause which permits any provision of the statute found to be invalid or unconstitutional to be severed without affecting the remainder of the statute. (p. 277)

A group of parents, students, and taxpayers in the Jackson Public School District, including Ingebretsen, filed suit along with the American Civil Liberties Union of Mississippi in July of 1994 to enjoin enforcement of the School Prayer Statute on the ground that it violates the Establishment Clause. A motion for a preliminary injunction to preserve the status quo was filed simultaneously with the complaint. (p. 277)

On August 11, 1994, one day before the start of the 1994-1995 academic year for the Mississippi public schools, the district court issued a preliminary injunction prohibiting enforcement of the School Prayer Statute. The injunction was designed to maintain the status quo until the court had full opportunity to assess each portion of the statute separately. On August 16, 1994, the court held a supplemental hearing to determine what portion of the statute, if any, could escape the injunction by its severability clause. The court heard the testimony of Dr. Dan Merritt, Interim Superintendent of the District, and Dr. Emanuel Reeves, principal of Provine High School in Jackson, Mississippi, and concluded that the provision for prayers at high school commencement exercises was the only constitutionally acceptable portion of the statute. (p. 278)

The district court enjoined enforcement of the statute in its entirety with the exception of the portion which permits prayers to take place at graduation ceremonies in accordance with Jones v. Clear Creek Independent School District, 977 F.2d 963, 972 (5th Cir. 1992) (Jones II). (p. 278)

Issues: The major legal issue in this case concerns an Establishment Clause challenge to Mississippi's School Prayer Statute permitting public school students to imitate nonsectarian, nonproselytizing prayer at various compulsory and noncompulsory school events. However, the court also answers the question of whether an injunction prohibiting school prayer as stipulated in the statute impinges on students' First Amendment guarantees of the free exercise of religion and free speech. (p. 276)

Holding: With regard to the issues of the free exercise of religion and free speech, the Court of Appeals for the

Fifth Circuit ruled that the district court's preliminary injunction enjoining the enforcement of Mississippi's School Prayer Statute did not have a chilling effect on students' First Amendment rights to the free exercise of religion and free speech (p. 276). The court also held that, with the exception of a provision allowing prayer at high school commencement ceremonies, the statute violated the Establishment Clause of the First Amendment. (p. 276)

Reasoning: The only harm asserted by the state's Attorney General is that the injunction would have a chilling effect on students who would like to pray at school. However, the district court correctly held that the injunction affected only the School Prayer Statute and would not affect students' existing rights to the free exercise of religion and free speech. Therefore, students continue to have exactly the same constitutional right to pray as they had before the statute was enjoined. They can pray silently or in a nondisruptive manner whenever and wherever they want, Wallace v. Jaffree, 105 S. Ct. 2479, in groups before or after school or in any limited open forum created by the school. See Board of Education of Westside Community Schools v. Mergens, 110 S. Ct. 2356, 2366. (p. 280)

The School Prayer Statute is an unconstitutional endorsement of religion so the public interest was not disserved by an injunction preventing its implementation. (p. 280)

All four requirements of a preliminary injunction were properly met. The district court did not abuse its discretion in determining that a preliminary injunction was warranted. (p. 280)

This court declines Ingebretsen's invitation to reconsider our holding in Jones II which allows students to choose to solemnize their graduation ceremonies with a student-initiated, nonproselytizing and nonsectarian prayer given by a student. (977 F.2d at 965 n. 1) To the extent the School Prayer Statute allows students to choose to pray at high school graduation to solemnize that once-in-a-lifetime event, this court finds it constitutionally sound under Jones II. (p. 280)

Disposition: The appellate court affirmed the order of the District Court for the Southern District of Mississippi, which enjoined the enforcement of the School Prayer Statute except as to nonsectarian, nonproselytizing, student-initiated, voluntary prayer at high school commencement exercises as condoned by Jones II. (p. 281)

Citation: Chandler v. James, 958 F. Supp. 1550 (M.D.Ala. 1997)

Facts: In 1993 the Alabama legislature enacted a "school prayer" statute. The operative portion of Section 16-1-20.3 reads:

> (b) On public school, other public, or other property, nonsectarian, nonproselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or noncompulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events. Ala. Code Section 16-1-20.3(b) (1995). (p. 1553)

In 1996, the plaintiffs filed this suit asserting, among other things, that Section 16-1-20.3 is facially unconstitutional. Thus, this court must decide whether this school prayer statute has been cured of the infirmities that rendered its predecessors unconstitutional. (p. 1553)

Issues: In this case, the primary issue involving student speech is whether an Alabama statute permitting student-initiated, nonsectarian, nonproselytizing voluntary prayer at school-related student events in public schools impinges upon students' First Amendment rights to free speech and the free exercise of religion. (p. 1551)

Reasoning: The Free Exercise Clause protects absolutely the right to believe whatever we choose. This right, coupled with our right to freedom of speech found in the First Amendment, allows people to espouse their beliefs, including their religious beliefs, in any "public forum" limited only by reasonable time, place and manner restrictions. See United States Postal Service v. Council of Greenburg Civic Associations, 101 S. Ct. 2676, 2686-2687. Children attending public school are "Constitutional people," possessed of Constitutional rights and entitled to Constitutional protections. See Tinker v. Des Moines Independent School District, 89 S. Ct. 733, 739. ("Students in school as well as out of school are 'persons' under our Constitution.") Therefore, subject to the limitations discussed below, children attending public school have the right to espouse their religious beliefs. (p. 1559)

The court's acknowledgment of this right, while intended to be informative, is also dispositive of the issue at hand, the constitutionality of Ala. Code Section 16-1-20.3. Section 16-1-20.3(b) provides that

public school students may engage in student-initiated, nonsectarian, nonproselytizing prayer during compulsory and noncompulsory school-related events. According to the statement of purpose found in subsection (a), the statute is intended "to provide guidance to public school officials on the rights and requirements of the law." Ala. Code Section 16-1-20.3(a). In an effort to assure the public and the courts that the statute does not diminish generally the constitutional rights of public school students, and thus "save" the statute, the Alabama legislature added subsection (c) which states that the statute "shall not diminish the right of any student or person to exercise his or her rights of free speech and religion at times or events other than those stated in subsection (b)." Ala. Code Section 16-1-20.3(c). The "times and events referred to in subsection (c) are "compulsory or noncompulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events." Ala. Code Section 16-1-20.3(b). That is, subsection (c) assures the public that the statute has no effect on the constitutional rights of public school students, including the rights of free speech and prayer, except during the times and events enumerated in subsection (b). Regrettably, instead of "saving" the statute, subsection (c) highlights the impermissible effect of the statute—the statute diminishes public school students' free speech and prayer rights during the times and events listed in subsection (b). (pp. 1559-1560)

The Alabama legislature has defined its public school students' free speech and prayer rights too narrowly. To the extent that students' free speech rights attach, they are free to engage in sectarian, proselytizing religious speech. The legislature's effort to limit the application of the statute's constrictive definition of public school students' free speech and prayer rights to "school-related student events" fails to affect this court's analysis. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." See Tinker, 89 S. Ct. at 736. Accordingly, this court finds that Section 16-1-20.3 is unconstitutional because it infringes public school students' free speech and prayer rights. (p. 1560)

The Establishment Clause does not forbid private sectarian, proselytizing speech. In fact, the Establishment Clause has no bearing at all on private speech. The Establishment Clause operates only on government or state-sponsored speech, and then prohibits all re-

ligious speech, not only sectarian, proselytizing religious speech. (p. 1560)

Thus, Section 16-1-20.3 is fatally flawed in that it defines students' free speech and religion rights too narrowly. When these rights attach to students in school, they may engage in sectarian, proselytizing religious speech. And, of course, it is the duty of this court and all other courts to protect these constitutional rights when and if they are impinged. (p. 1561)

While a determination of the scope of students' free speech rights requires the court to make a factual inquiry, the court notes that there are many forms of student religious expression which should, generally, be permissible. As long as students abide by a school's generally applicable rules and regulations, students should ordinarily be permitted to engage in the following forms of religious expression:

(1) individual or group prayer or religious discussion outside of organized classes or school-sponsored events;

(2) reports, homework, and artwork which reflect students' religious beliefs;

(3) distribution of religious literature (provided that the school generally permits students to distribute other literature not related to the school curriculum and that the religious literature is distributed in accordance with all applicable time, place and manner restrictions);

(4) display of religious symbols, articles and medals (e.g., Crosses, Stars of David, St. Christopher and other religious medals, even replicas of the Ten Commandments) and/or clothing bearing religious messages (provided that the school allows students to display nonreligious expressive symbols and apparel and such display is in accordance with all applicable time, place and manner restrictions); and

(5) religious activity permitted by the Equal Access Act. Additionally, students may pray silently at any time so long as it does not interfere with their school work. (pp. 1561-1562)

In providing this list, this court has attempted to illustrate generally permissible, private student religious expression. The Establishment Clause does not prohibit such expression. The Establishment Clause does, however, unequivocally prohibit state-sponsored religious expression in public schools. (p. 1562)

By enacting Section 16-1-20.3, the Alabama legislature sought to return prayer to the state's public schools. However, one need not "return" something which was never absent. The Constitution guarantees that public school students have the right to "freedom of religion," and "freedom of speech." Under most circumstances, public school students have the right to engage in private religious speech of any type. Therein lies the great irony of Section 16-1-20.3. The statute is unconstitutional because it unreasonably restricts the free speech and religion rights of Alabama's public school students. (p. 1568)

Disposition: The District Court for the Middle District of Alabama, Northern Division, granted the plaintiff's motion for summary judgement on the constitutionality of the Alabama statute (Alabama Code Section 16-1-20.3). The court noted that Section 16-1-20.3 was unconstitutional in that it violated the mandates of the First Amendment to the United States Constitution as interpreted by the United States Supreme Court and the Court of Appeals for the Eleventh Circuit. (p. 1568)

Religious Expression

Citation: DeNooyer by DeNooyer v. Livonia Public Schools, 799 F. Supp. 744 (E.D.Mich. 1992)

Facts: During the 1990-1991 school year, Kelly DeNooyer was a second-grade student at McKinley Elementary School in the Livonia Public School District. Her teacher, Mrs. Sandra Solomon, instituted a V.I.P. program, a type of show and tell in which a different student would be a "V.I.P." each week and would be permitted to bring special belongings to school to present to the class. The V.I.P. program was part of the curriculum for second-grade students in Mrs. Solomon's class, designed to promote poise and self-esteem through developing oral communications skills in the classroom. Elementary students receive a grade in oral communications. The principal, Jane Van Poperin, approved the program, which took place during the regular instructional time of the class. (p. 746)

When Kelly DeNooyer was selected to be V.I.P., she brought in a videotape of herself singing before the congregation of Temple Baptist Church where she and her mother are members. Kelly asked to show the tape to the class, and Mrs. Solomon reviewed it pursuant to a school policy which required her to do so. Kelly appeared on the videotape singing "I Came to Love You Early," a proselytizing song. (p. 746)

> Mrs. Solomon conferred with principal Van Poperin, and they agreed that Kelly should not be permitted to show the video. Mrs. Solomon told Kelly that she would not be allowed to show the tape, and informed Ilene DeNooyer of the school's decision. Ilene DeNooyer contacted Principal Van Poperin, Kent Gage (the Director of Elementary Education), and Carole Samples (Assistant Superintendent), requesting that Kelly be permitted to show her video. Principal Van Poperin, Dr. Gage, and Superintendent Samples all confirmed the school district's decision not to permit the showing of the video. (p. 746)
>
> The school district gave various reasons for prohibiting the playing of the videotape. Mrs. Solomon indicated that showing a videotape was inconsistent with the purpose of the V.I.P. program, which was designed to develop self-esteem through oral presentations in the classroom. Because playing a videotape does not involve speaking before the class, it would not advance the program's objectives. Further, Mrs. Solomon was concerned that permitting Kelly to show the videotape would encourage other students to bring in videos too. She wanted to avoid the time consuming process of previewing videotapes and using class time to show them; she felt that the time was needed for instruction. The school administrators were also concerned about the message of the song on the videotape, which is about a young child accepting Jesus Christ as her savior. Mrs. Solomon felt that second-graders might not have the maturity to understand the context in which the song was presented, that the students might assume that the school district endorsed the message of the song, and that the song might embarrass or offend other students and their parents. (pp. 746-747)
>
> As a result of the school's refusal to permit Kelly to show her videotape to her second-grade class, Kelly and her mother brought suit against the Livonia Public Schools and certain school officials. The complaint alleges violations of their constitutional rights to freedom of speech, free exercise of religion, equal protection, freedom of association, and the liberty interest of a parent to educate her child. (p. 747)

Issues: Is a school district's restriction prohibiting a student from showing a videotape of herself singing a proselytizing song reasonable, or is the restriction violative of the student's First Amendment right of free speech? (p. 745)

Holding: The District Court for the Eastern District of Michigan, Southern Division, held that the school district's restriction on a second-grade student's speech

was reasonable and did not violate the First Amendment. (p. 744)

Reasoning: Although the religion clauses of the First Amendment are implicated due to the religious character of the speech at issue in this case, in essence this is a free speech case. The First Amendment, applicable to the states via the Fourteenth Amendment, guarantees the right to free speech. See, e.g., Tinker v. Des Moines Independent Community School District, 507, 89 S. Ct. 733. Students do not "shed their constitutional rights to freedom or expression at the schoolhouse gate." (89 S Ct at 736) However, where student-initiated speech occurs as part of the curriculum in the closed forum of a classroom, school authorities may limit the speech as long as their actions are "reasonably related to legitimate pedagogical concerns." See Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562. (p. 748)

In Hazelwood, the Supreme Court held that a school could control the style and content of student-authored articles published in the student newspaper. The court first engaged in a forum analysis in order to determine the level of scrutiny required to evaluate the school's actions. There are three types of forums: traditional public forums, limited public forums, and closed forums. Traditional public forums include areas such as streets and parks that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." (108 S Ct. at 567) Limited public forums are those created by the state when it opens its property for expressive activity. See Perry Educational Association v. Perry Local Educators' Association, 103 S. Ct. 948, 954. The government may only restrict speech in public forums or limited public forums if the restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. (103 S. Ct. at 954) If state facilities have not been dedicated to public use but have instead been reserved for other purposes, they are closed forums. The state may impose reasonable restrictions on speech in closed forums 103 S. Ct. at 955. (p. 748)

Schools are not traditional public forums. See Hazelwood, 108 S. Ct. at 567. However, school officials may create a limited public forum if, by policy or practice, they open the school for indiscriminate use by the public. Id., citing Perry, 103 S. Ct. at 956. (pp. 748-749)

Other courts have followed Hazelwood and found that classrooms are not public forums if there is no evi-

dence that school authorities have opened them for indiscriminate public expression. The undisputed facts establish that the Livonia Public Schools did not open the classrooms at McKinley Elementary School for unregulated public speech. The fact that Kelly DeNooyer was invited to speak in front of her class as part of a V.I.P. program, part of the regular curriculum, does not show that the school opened its doors for indiscriminate public expression. The fact that Mrs. Solomon previewed Kelly's tape indicates the closed nature of the classroom. Kelly DeNooyer's second-grade classroom was a closed forum during class hours, at the time she wished to show her videotape. Because Kelly asserts a right to speech in a closed forum, the school authorities may regulate the content of her speech in any reasonable manner. See Hazelwood, 108 S Ct. at 569. (p. 749)

In addition to holding that speech in the closed forum of the classroom could be regulated in any reasonable manner, in Hazelwood the Supreme Court found that school-sponsored speech that is part of the curriculum also may be reasonably regulated. The court distinguished Tinker as follows:

> 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. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences. (pp. 749-750)

See Hazelwood, 108 S. Ct. at 569-570. The court held that school authorities may restrict school-sponsored expression so long as such restrictions are reasonably related to "legitimate pedagogical concerns." Id. 108 S. Ct. at 570. (p. 750)

In this case, Kelly DeNooyer sought to show a videotape of herself singing a proselytizing religious song

as part of a "V.I.P." program in her second-grade classroom. The V.I.P. program was a show and tell activity conducted as part of the regular curriculum during class hours. Kelly's teacher, Mrs. Solomon, determined the selection of students for the program and screened the presentations made by the students. Kelly's presentation to her class was a class assignment; it was more than school-sponsored speech, it was "school itself." (p. 751)

Further, the Livonia school authorities had legitimate pedagogical interests in deciding that Kelly DeNooyer should not show her video. The purpose of the V.I.P. program was to teach children oral communication skills. Showing a videotape would circumvent this purpose. The school authorities wanted to avoid encouraging other children to bring in videotapes, because showing them preempts instructional time. The school had a policy of having all videotapes reviewed before classroom use. Moreover, because the show and tell was conducted during classroom instructional time, all students were required to attend. The school wanted to avoid a situation where other students and their parents would be offended by the religious content of the speech they were required to listen to or would infer the school's endorsement of the speech presented during class. The maturity level of the second-grade students was a significant concern. (p. 751)

Disposition: The district court denied the plaintiffs' motion for summary judgment and granted the defendants' motion for summary judgment. (p. 755) (The decision of the district court was appealed to the Court of Appeals for the Sixth Circuit. The court of appeals, without published opinions, affirmed the decision of the district court. See 12 F.3d 211 (6th Cir. 1993).)

Citation: Settle v. Dickson County School Board, 53 F.3d 152 (6th Cir. 1995)

Facts: During the week of March 15, 1991, Ms. Ramsey assigned a research paper to her ninth-grade class at Dickson County Junior High School. In assigning the paper, the teacher stressed to the students that she wanted them to learn how to research a topic, synthesize the information they gathered, and write a paper using that information. Thus, as she explained, students could not merely expound on their own ideas. She required that each student use four sources in performing the research. (p. 153)

Each student could select his or her own topic, subject to the teacher's approval. She required only that each topic be "interesting, researchable and decent."

She posted a sign-up sheet for each student to list the topic he or she had chosen. Between March 15 and March 22 students could sign up and change their topics at will. On March 22, Ms. Ramsey removed the sign-up sheet to approve the topics, and afterwards students had to receive her approval if they wished to change their topic. On March 26, each student was required to hand in an outline of the paper he or she planned to write. The plaintiff originally signed up to write a paper on "Drama." Subsequently, she changed her mind after deciding that the topic might be too broad. Without Ms. Ramsey's prior approval, the plaintiff attempted to submit an outline for a paper entitled "The Life of Jesus Christ." The teacher refused to accept the outline and told the plaintiff she would have to select another topic. At this point, the plaintiff's father intervened to complain and met with the principal of the school, Ms. Ramsey, and other school officials. Ms. Ramsey told the plaintiff's father that she would accept a paper on religion as long as it did not deal solely with Christianity or the life of Christ. On April 3, the plaintiff attempted to submit another outline, with the title "A Scientific and Historical Approach to Jesus Christ." Ms. Ramsey rejected this outline as well. Ultimately, the principal, the superintendent of schools, and the Dickson County School Board all expressed their support for Ms. Ramsey's decision and noted that the teacher had not exceeded her discretion as far as they were concerned. The plaintiff and her family decided to make an issue of the matter before the school board and then in court. (pp. 153-154)

Issues: The suit brought on behalf of a junior high school student claims that her teacher's assigning a grade of zero for a proposed paper on the life of Jesus Christ violates her First Amendment freedom of speech rights. (p. 152)

Holding: The Court of Appeals for the Sixth Circuit held that if a teacher violates no positive law or school policy, the teacher has broad authority to base grades for students on the teacher's view of merits of the students' work. The assignment of a grade by the teacher is part of the teacher's authority to regulate speech within the classroom. Therefore, the teacher could give the student a grade of zero on her proposed research paper covering the life of Jesus Christ without violating the student's freedom of speech rights. (p. 152)

Reasoning: After reviewing the precedents concerning students' rights of free speech within a public school, the court finds few cases that address the conflict between the student's right to free speech in the

classroom and the teacher's responsibility to encourage decorum and scholarship, including her authority to determine course content, the selection of books, the topic of papers, the grades of students, and similar questions. Students do not lose entirely their right to express themselves as individuals in the classroom, but federal courts should exercise particular restraint in classroom conflicts between student and teacher over matters falling within the authority of the teacher over curriculum and course content. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." See Epperson v. Arkansas, 84 S. Ct. 266. (p. 155)

The free speech rights of students in the classroom must be limited because effective education depends not only on controlling boisterous conduct, but also on maintaining the focus of the class on the assignment in question. So long as the teacher violates no positive law or school policy, the teacher has broad authority to base her grades for students on her review of the merits of the students' work. See Parate v. Isibor, 868 F.2d 821, 828 ("[T]he individual professor's assignment of a letter grade is protected speech.") Grades are given as incentives for study, and they are the currency by which school work is measured. The plaintiff argues that Ms. Ramsey's rejection of her paper topic infringed upon her fundamental right to freedom of speech. The censorship in the Hazelwood case involved a school newspaper, a kind of open forum for students, and even there the Supreme Court said that "educators do not offend the First Amendment by exercising editorial control over the style and context of student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns." 92 S. Ct. at 511. Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forums. So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion, or political persuasion, the federal courts should not interfere. (p. 155)

It is the essence of the teacher's responsibility in the classroom to draw lines and make distinctions—in a word, to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject. Teachers, therefore, must be given broad discretion to give grades and conduct class discussion based on the content of speech. Learning is more vital

in the classroom than free speech. It is not for this court to overrule the teacher's view that the student should learn to write research papers by beginning with a topic other than her own theology. Papers on the transfiguration of Jesus and similar topics may display more faith than rational analysis in the hands of a young student with a strong religious heritage—at least the teacher is entitled to make such a judgement in the classroom. The case relied upon most heavily by the plaintiff's lawyers, Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, supports the conclusion that teachers have broad discretion in limiting speech when they are engaged in administering the curriculum. In Tinker, the Court specifically stated that a school could limit otherwise protected speech if it did so as part of a "prescribed classroom exercise." 89 S. Ct. at 738. (p. 156)

Citation: Herdahl v. Pontotoc County School District, 887 F. Supp. 902 (N.D. Miss. 1995)

Facts: This cause is before the court on the plaintiff's motion for preliminary injunctive relief against the defendants, Pontotoc County School District ("District"), seeking to enjoin the District's practice of allowing a student organization known as the "Aletheia Club" to broadcast morning devotionals and sectarian prayers over its school intercom system. The plaintiff also seeks an injunction preventing student-initiated prayers in individual classrooms during classroom hours. (p. 904)

Plaintiff Lisa Herdahl is the mother of five children currently attending the North Pontotoc Attendance Center ("Center"), a public school located in Ecru, Mississippi. The Center provides public education from kindergarten through twelfth grade. The public address system serves the entire school and announcements are broadcast to every classroom and can also be heard in the hallways. Each morning after the principal or another designated school official makes the morning announcements, a student member of the Aletheia Club (formerly the "Christ in Us Club") leads a devotional, usually an inspirational reading from the Bible, followed by a prayer selected by the student organization which is broadcast over the intercom system. Most prayers are concluded with the phrase "in Jesus Christ, Amen" or words to that effect. The plaintiff's children are currently exempt from attending class during the broadcast. Additionally, in some elementary classes which the Herdahl children attend, vocal group prayer sometimes takes place, initiated and led by students shortly before lunch. A teacher escorts the Herdahl children out of the classroom before the practice begins. After her protests met with indifference,

the plaintiff challenged the practices of the District as violative of the Establishment Clause of the United States Constitution. (pp. 904-905)

Issues: Although the primary issue in this case centers on the Establishment Clause of the First Amendment, an ancillary issue deals with the First Amendment right of students to religious expression in a public school setting. Specifically, the issue is whether the issuance of an injunction prohibiting a student group from broadcasting morning prayers over the intercom would have a chilling effect on the students' First Amendment right to religious expression. (p. 904)

Holding: The District Court for the Northern District of Mississippi, Western Division, rejected the school district's contention that the injunction would have a chilling effect on the students' ability to freely exercise their existing right of religious expression under the First Amendment. The students remained free to exercise the First Amendment right of expression before or after official school hours. Accordingly, the threatened injury to the plaintiffs outweighed any harm the injunction would cause the defendants. Also, the court held that reciting morning prayers over the school's intercom system violated the Establishment Clause, even if students were allowed to excuse themselves from class during the prayers. (pp. 902,904,911)

Reasoning: The court finds that the plaintiff has established a substantial likelihood that she will ultimately prevail in this action. Over thirty years ago, the United States Supreme Court held that practices substantially similar to the practices challenged in this lawsuit were prohibited by the Establishment Clause of the First Amendment. See School District of Abington Township v. Schempp, 83 S. Ct. 1560. As in the instant cause, provisions permitting a student to be voluntarily excused from attendance or participation in the daily prayers did not shield those practices from invalidation. (83 S. Ct. at 1572-1573) Although the practices were voluntary by the students, the court found that these opening exercises were government-sponsored religious ceremonies which violated the Establishment Clause. (p. 905)

The defendants contend that the practices of the district are legal and, in fact, mandated by the Constitution. What is at issue in this case, the defendants allege, are the practices of students protected by the First Amendment, rather than actions of the district abridging those protections. It is their position that (1) the district has created and maintains a limited public forum that is the school's intercom system; and

(2) the Equal Access Act prohibits the district from preventing the Aletheia Club or any other student group from using the forum for the broadcasts at issue. See Board of Education of Westside Community School District v. Mergens, 110 S. Ct. 2356, Mergens. Mergens and its progeny involve religious groups denied access to public school facilities for fear that such access would violate the Establishment Clause. The Supreme Court has consistently held that when the state denies religious groups the same access it provides to other groups, the state has engaged in un constitutional discrimination. See e.g., Lamb's Chapel v. Center Moriches School District, 113 S. Ct. 2141. The court finds no evidence of the existence and maintenance by the district of a public forum at the beginning of the school day at the Center, either in the form of a written policy or by actual past practice. See Student Coalition for Peace v. Lower Merion School District Board of School Directors, 776 F.2d 431, 436 (3d Cir. 1985). The district may have a valid argument that it created a public forum at the "activity period" offered between certain classes each day. At this time, all student organizations are permitted to meet. However, it is not suggested that any student organization other than the Aletheia Club could conduct similar activities after the morning announcements and before class instruction begins. Accordingly, the court rejects for lack of evidence the proposition that the district's involvement is limited to the maintenance of a public forum, the existence of which cannot be found or inferred on this record. (p. 907)

The district does not argue that it would be harmed by an injunction prohibiting broadcast of prayers and devotionals to all students at the Center. It would be disingenuous for the district to take such a position in light of its disavowance of involvement in the challenged practice. The court rejects the district's contention that the issuance of an injunction would have a "chilling effect" on the exercise of First Amendment rights of the students who want the broadcast and prayers. The issuance of an injunction would have no bearing on the students' ability to freely exercise their existing rights to religious expression under the First Amendment through other constitutional methods. The students remain free to exercise their rights before and/or after official school hours. Accordingly, the court finds that the threatened injury to the plaintiff outweighs any harm the injunction would cause the defendants. (p. 911)

Disposition: The district court granted the plaintiffs' request for a preliminary injunction enjoining the practice of allowing a student group to broadcast morning prayers over the intercom and allowing student-led

prayers in individual classrooms during school hours. (p. 902)

School Emblems

Citation: Augustus v. Board of Escambia County, Florida, 507 F.2d 152 (5th Cir. 1975)

Facts: During the 1972-1973 school year, the fourth year of significant integration, Escambia High was afflicted with racial disturbances within the student body, slightly less than eight percent of which was black. Four massive confrontations involved major interracial fighting. After the first, in November, law enforcement officers were called in to restore order, and they remained for the rest of the academic year. The school had to be closed twice. In addition to the four major disturbances, there were numerous lesser ones, including small-scale fights and walkouts. (p. 155)

One source of racial tension was black students' demands to abolish the school's Confederate symbols. The name "Rebels" had been chosen by vote of the all-white student body when the school first opened in 1958. The Confederate Battle Flag became the accepted symbol of the athletic teams that same fall. The desire to continue the use of "Rebels" and the Confederate Battle Flag was confirmed by a landslide student vote in January 1973, after two of the major confrontations had occurred. A week after the district court issued a preliminary injunction enjoining the school board from permitting (1) the use of the name "Rebels," (2) the display of the Confederate Battle Flag on school premises, with certain exceptions, and (3) the wearing or displaying of the flag on the clothes of any student while the student attended a school-sponsored activity. A week after the court's preliminary order, the third major black and white confrontation occurred—weeks later, the fourth. (p. 155)

After the preliminary injunction, a number of white students were permitted to intervene on the side of the school board. After a trial, the district court made final its preliminary injunction. The court found that the use of the symbols was racially irritating to many black students, was a significant contributing cause of racial tension at the school, had become a focal point for racial tension, and would continue as a source of tension and a cause of violence and disruption. Although recognizing that most white students identified the symbols only with Escambia High, and not with anti-black sentiments, and that removal of the symbols might not eliminate racial tension, the

court concluded that the continued presence of the symbols would adversely affect the operation of a unitary system at Escambia High by providing a continuing, visual focal point for racial tensions. (p. 155)

Issues: The major First Amendment issue at hand is whether the district court's injunction prohibiting the official use of the name "Rebels" and the Confederate Battle Flag as well as use by individual students of such symbols at school functions violates the students' First Amendment rights to freedom of speech. (p. 153)

Holding: The Court of Appeals for the Fifth Circuit ruled that the injunction prohibiting the official use of Confederate symbols and the use of such symbols by individual students at school functions did not violate the students' First Amendment rights to freedom of speech (p. 153). However, the appeals court also held that the fact that a school board regulation banning all use of racially irritating symbols in a high school under a desegregation order may have been permissible did not impose upon the district court the right to force such a measure by use of a permanent injunction when there was a possibility that lesser restrictions might have sufficed. (p. 154)

Reasoning: It is axiomatic that federal courts should not lightly interfere with the day-to-day operation of schools. See, e.g., Wright v. Houston Independent School District, 486 F.2d 137 (5th Cir. 1973), cert. denied, 94 S. Ct. 3173; Shanley v. Northeast Independent School District, 462 F.2d 960 (5th Cir. 1972). There is a serious question as to whether this case involving what name high school athletic teams will play under, and what flag the school will use for a symbol, could independently gain the attention of a federal court. (p. 155)

There is little question that, as a general rule the community would be better served by letting the students of public high school determine, by the democratic processes of their student governments, the names and symbols to designate their athletic teams and school programs. The key factor that derailed that concept in this case was the violence and disruption that occurred in the educational process; violence and disruption which was focused on the use and misuse of these symbols. With violence and disruption as the key, the case presents for rationalization two concepts: one which is totally unacceptable, i.e., by creating a violent disturbance over the failure to obtain a change in the name and flag of a school's athletic teams peacefully, an unsuccessful minority may furnish a base upon which to posit a court order requiring a change in the name and flag selected by a

majority of the students; and one which is worthy of consideration, i.e., where a pre-existing condition of a school which is placed under a court order to obtain a unitary school system inherently prevents students of both races from enjoying an equal education at that school, a federal court has the power and the obligation to require a change in that pre-existing condition. (pp. 155-156)

The plaintiffs argue that the injunction against the students collides with their First Amendment rights to freedom of speech, as explicated under Healy v. James, 92 S. Ct. 2338; Wisconsin v. Yoder, 92 S. Ct. 1526; Tinker v. Des Moines Community School District, 89 S. Ct. 733; and University of Southern Mississippi Chapter of M.C.L.U. v. University of Southern Mississippi, 452 F.2d 564 (5th Cir. 1971). An established exception to the First Amendment rights of students occurs, however, in cases where the exercise of that right causes violence and disruption in the educational process. See Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966). Here the district court made adequate findings to place the injunctive relief well within this exception.

A point made by intervenors presents us the issue which requires that the case be remanded for further consideration by the district court. The intervenors assert that the court's injunction against the individual students is erroneous because the school board had promulgated a written policy prohibiting the use of the involved symbols to harass or intimidate teachers or other students, directing their use and display only in good taste, and directing the policy's enforcement and providing sufficient lawmen to protect all students before intervenor Jackson filed her complaint. On this point, the intervening white students' argument lines up with the argument of the school officials. Inherent in the argument is the assertion that had the school board been permitted time to enforce its own regulations, the violent results from the use of the symbols could have been eliminated without federal court intervention. They note that neither intervenor Jackson, nor her witnesses, nor the trial judge ever contended that the involved symbols per se prevented a "unitary school system." They assert that Jackson and her witnesses were complaining about the misuse of said symbols by a relatively small minority of the white students and some unidentified people off-campus. They point to the express exemptions in the district court's order that permit the symbols and names to be used and displayed. The officials and intervenors state that the effect of this is to demonstrate that the symbols are not per se suppressible, but that their misuse may be prohibited.

Finally, they contend that the school board had taken appropriate action to prohibit their misuse, and that is all the relief to which Jackson should be entitled. Thus, they argue, the court's injunction, which goes must further, is in error and should be vacated. (pp. 156-157)

In the instant case, the school board seeks the opportunity to reach a solution to the problems created by abusive use of the school symbols, which solution it feels can be less drastic than the total ban required by the district court's injunction. We agree that the school board should have the opportunity it seeks. (p. 157)

Disposition: The ruling of the District Court for the Northern District of Florida was modified and remanded with directions. In particular, the case was remanded for reconsideration of whether any injunction is still necessary, when the school should be released from the effect of any injunction that may still be needed, whether an injunction against the misuse of flags and symbols would be preferable to a complete prohibition, and whether the school board can develop a plan that will achieve the purpose of a unitary school system without interference from the federal court. (pp. 158-159)

Citation: Crosby by Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988)

Facts: This is the second appearance of "Johnny Reb" in this court. Johnny Reb, the former cartoon symbol of the Fairfax High School Rebels, was eliminated by defendant-appellee Harry Holsinger, the school's principal after he received complaints from black students and parents. Students protested his decision in a number of ways before filing this action. The district court initially dismissed it as frivolous, but we reversed. At the trial, the court granted a directed verdict for Holsinger as to the broad "censorship" claim, and the jury returned a verdict for him on plaintiff-appellant Cheryl Crosby's narrower "protest restriction" claim. Appeal was taken. (p. 802)

Holsinger acted to remove the symbol based on complaints that it offended black students and a suggestion by the school's Minority Achievement Task Force. He then allowed the students to choose a new symbol which was to be unrelated to the Confederacy. (p. 802)

After the elimination of Johnny Reb, the students protested by holding rallies at school, mounting a petition drive, attending a school board meeting, and displaying blue ribbons. Except for a single incident

involving Crosby, Holsinger did nothing to interfere with these protests. In the one instance, he initially stopped Crosby from posting notices on school bulletin boards of the school board meeting before allowing it the next day. This incident is the basis of Crosby's individual claim. (p. 802)

Issues: The court of appeals addressed two First Amendment issues. First, does the principal's action of eliminating the high school's mascot or symbol, after receiving complaints from black students and parents, unconstitutionally limit student expression and speech? Second, does the principal's one-day delay in permitting a student to post notices for a school board meeting violate the student's free speech rights? (p. 801)

Holding: The Court of Appeals for the Fourth Circuit ruled that: 1) the principal was justified in eliminating the school's "Johnny Reb" symbol after receiving complaints from black students and parents, and 2) the jury could reasonably have found that a one-day delay in permitting a student to post notices for a school board meeting was only a de minimis violation of the student's free speech rights, and the principal was acting in good faith. (p. 801)

Reasoning: While students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," (Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733-736), school officials need not sponsor or promote all student speech. See Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, 569; Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159, 3164. This is particularly true for anything that the public "might reasonably perceive to bear the imprimatur of the school." See Hazelwood, 108 S. Ct. at 569. There is a difference between tolerating student speech and affirmatively promoting it. A school mascot or symbol bears the stamp of approval of the school itself. Therefore, school authorities are free to disassociate the school from such a symbol because of educational concerns. In this case, Principal Holsinger received complaints that Johnny Reb offended blacks and limited their participation in school activities. Consequently, he eliminated the symbol based on legitimate concerns. Except to make the rough threshold judgement that this decision has an educational component, this panel will not interfere, and it is clear that educational concerns promoted Holsinger's decision. (p. 802)

Regarding Crosby's individual claim based on the one-day delay in posting notices for the school board meeting, this court must uphold the jury's verdict if

"there was evidence upon which the jury could reasonably return a verdict for him." See Mays v. Pioneer Lumber Co., 502 F.2d 106, 107. In this circumstance, the jury could have found that there was only a de minimis violation in the one-day delay. The jury could also have decided that the principal acted in good faith. See Wood v. Strickland, 95 S. Ct. 992, 1000-1001. Because there were at least two reasonable views of the evidence to support the verdict, this panel will not disturb it. (p. 803)

Under the Supreme Court decisions noted above, school officials have the authority to disassociate the school from controversial speech even if it may limit student expression. Principal Holsinger was within his power to remove a school symbol that blacks found offensive. (p. 803)

Disposition: The district court's ruling was affirmed. (p. 802)

School Publications

Citation: Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969)

Facts: This action concerns the right of high school students to publish a paid advertisement opposing the war in Vietnam in their school newspaper. The action seeks declaratory judgement and injunctive relief prohibiting violation of the plaintiffs' freedom of speech by the principal of New Rochelle High School, the president of the New Rochelle Board of Education, and the New Rochelle Superintendent of Schools. (p. 102)

A group of New Rochelle High School students, led by plaintiff Richard Orentzel, formed an Ad Hoc Student Committee Against the War in Vietnam. The group sought to publish an advertisement in opposition to the war in the student newspaper, the Huguenot Herald, in November 1967, offering to pay the standard student rate. The editorial board of the newspaper, which was then headed by the plaintiff Laura Zucker, approved publication of the advertisement, but the principal of the school, Dr. Adolph Panitz, directed that the advertisement not be published. Orentzel alleges that the committee still desires to publish the advertisement and has been informed that the newspaper would accept it but for the directive of the principal. (pp. 102-103)

Issues: Does the high school's principal deny students their First Amendment rights of expression and speech

by refusing to allow a paid advertisement opposing the Vietnam War to be published in the newspaper? (p. 102)

Holding: The District Court for the Southern District of New York ruled that the plaintiff high school students were entitled to relief, on freedom of speech grounds, although advertising on political matters was not permitted, where it appeared that there had been articles on the war and the draft and that the school's newspaper was a forum for the dissemination of ideas and was open to the free expression of ideas in news and editorial columns and letters to the editor. (p. 102)

Reasoning: The dispute concerns the function and content of the school newspaper. The plaintiffs allege that the purpose of the Huguenot Herald is "to provide a forum for the dissemination of ideas and information by and to the students of New Rochelle High School." Therefore, prohibition of the advertisement constitutes a constitutionally proscribed abridgement of their freedom of speech. (p. 103)

The defendants advance the theory that the publication "is not a newspaper in the usual sense" but is a "beneficial educational device" developed as part of the curriculum and intended to inure primarily to the benefit of those who compile, edit and publish it. They assert a long-standing policy of the school administration which limits news items and editorials to matters pertaining to the high school and its activities. Similarly, "no advertising will be permitted which expresses a point of view on any subject not related to New Rochelle High School." Even paid advertising in support of student government nominees is prohibited and only purely commercial advertising is accepted. This policy is alleged to be reasonable and necessary to preserve the journal as an educational device and prevent it from becoming mainly an organ for the dissemination of news and views unrelated to the high school. (p. 103)

In sum, the defendants' main factual argument is that the war is not a school-related activity, and therefore not qualified for news, editorial and advertising treatment. However, it is clear that the newspaper is more than a mere activity time and place sheet. The factual core of defendants' argument falls with a perusal of the newspapers submitted to the court. They illustrate that the newspaper is being used as a communications media regarding controversial topics and that the teaching of journalism includes dissemination of such ideas. Such a school paper is truly an educational device. (p. 103)

The presence of articles concerning the draft and student opinion of United States participation in the war shows that the war is considered to be a school-related subject. This being the case, there is no logical reason to permit news stories on the subject and preclude student advertising. (p. 104)

The defendants would have the court find that the school's action is protected because plaintiffs have no right of access to the school newspaper. They argue that the Supreme Court case of Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, held only that students have the same rights inside the schoolyard that they have as citizens. Therefore, since citizens as yet have no right of access to the private press, the plaintiffs are entitled to no greater privilege. (p. 104)

In Tinker, the plaintiffs were suspended from school for wearing black armbands to protest the war in Vietnam. The court held that the wearing of armbands was closely akin to pure speech and that First Amendment rights, "applied in light of the special characteristics of the school environment, are available to teachers and students." (89 S. Ct. at 736) The principle of free speech is not confined to classroom discussion. (pp. 104-105)

The defendants have told the court that the Huguenot Herald is not a newspaper in the usual sense, but is part of the curriculum and an educational device. However, it is inconsistent for them to also espouse the position that the school's action is protected because there is no general right of access to the private press. (p. 105)

This court has found, from review of its contents, that within the context of the school and educational environment, it is a forum for the dissemination of ideas. The problem then, as in Tinker, "lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities." (89 S. Ct. at 737) Here, the school paper appears to have been open to free expression of ideas in the news and editorial columns as well as in letters to the editor. It is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas. (p. 105)

It would be both incongruous and dangerous for this court to hold that students who wish to express their views on matters intimately related to them, through traditionally accepted nondisruptive modes of communi-

cation, may be precluded from doing so by the adult community. (p. 105)

Disposition: The plaintiffs motion for summary judgment was granted. (p. 105)

Citation: Koppell v. Levine, 347 F. Supp. 456 (E.D.N.Y. 1972)

Facts: Pursuant to Section 1983 of Title 42 of the United States Code, the plaintiffs seek three forms of relief: (1) an injunction against educational authorities preventing distribution of a student literary magazine on the premises of a public high school; (2) a declaration that the system of prior review of student literature employed by defendants violates the United States Constitution; and (3) damages and attorneys' fees. (p. 458)

During the relevant period, plaintiffs Bonnie Koppell and Donald Margulies were students at John Dewey High School and served as editors of STREAMS OF CONSCIENCE, an annual collection of student essays and poetry. Mr. Margulies has since graduated and Ms. Koppell is now editor-in-chief. (p. 458)

In the academic year 1970-71 the material included in STREAMS OF CONSCIENCE was selected from fellow students' work by the editors; their faculty advisor and the chairman of the English department approved these decisions. Duplication of approximately 1,000 copies of the magazine was completed by June, 1971, but distribution was postponed until the fall term because there was insufficient time to collate most of the copies. (p. 458)

At the beginning of the fall term, Sol Levine, the high school principal, impounded the undistributed copies of the magazine. On October 21, 1971, meeting with the editorial staff, he announced that he found the document obscene. A story written by Mr. Margulies employed four letter words as part of the vocabulary of an adolescent youth and contained a description of a movie scene where a couple "fell into bed." (p. 458)

On November 12, 1971, the plaintiffs appealed the principal's decision by letter to Jacob B. Zack, Assistant Superintendent of High Schools for New York City. A hearing was held on November 30, 1971. Written arguments were submitted and letters exchanged with respect to the delay in Mr. Zack's decision. An appeal dated January 19, 1972 to the Chancellor of the New York City schools was denied on January 26, 1972, on the grounds that Mr. Zack had not yet rendered his decision. In a decision dated January 27, 1972, Mr.

Zack upheld the action of the principal. The plaintiffs promptly renewed their appeal to the Chancellor on February 7, 1972, and received an adverse decision on March 6, 1972. On March 7, 1972, the plaintiffs appealed to Isaiah Robinson, President of the Board of Education of the City of New York. The board upheld the earlier decision in an opinion dated April 5, 1972. (p. 458)

Issues: Is the confiscation of a school publication by the principal an unconstitutional infringement on the students' First Amendment guarantee of free expression, where the principal judges the publication to be obscene? (pp. 456-457)

Holding: The District Court for the Eastern District of New York held that its examination of the high school student literary magazine, the testimony of expert witnesses, the plaintiffs' testimony, and judicial notice showed that the magazine, which contained no extended narrative tending to excite sexual desires or predominantly appeal to prurient interest of any kind, was not obscene. Because the magazine was determined not to be obscene for high school students, it could not be impounded by the principal without violating the students' freedom of expression, unless the principal based the action on some overriding justification related to his disciplinary and educational responsibilities. No such justification existed in this case. However, consideration of all circumstances, including the lack of any actual or threatened disciplinary action, compelled this court to conclude that it should not decide the merits of prior review procedures. (pp. 456-457)

Reasoning: The definition of obscenity falling outside First Amendment protection may vary according to the group to whom material is directed or from whom it is withheld. Even regarding minors, however, constitutionally permissible censorship based on obscenity must be premised on a rational finding of harmfulness to the group in question. (pp. 458-459)

Based on its examination of STREAMS OF CONSCIENCE, the testimony of expert witnesses, plaintiffs' testimony, and judicial notice, the court concluded that it was not obscene. The magazine contained no extended narrative tending to excite sexual desires or constituting a predominant appeal to prurient interest. The dialogue was the kind heard repeatedly by those who walk the street of our cities, use public conveyances and deal with youth in an open manner. It was not patently offensive to adult community standards for minors as evidenced by comparable material appearing in respected national periodicals and literature contained

in the high school library. It was intended by the students involved to be a serious literary effort, and, especially with respect to Mr. Margulies, that intent was effected in a manner demonstrative of unusual talent. The entire literary project was of significant constructive social and educational importance for high school students. (p. 459)

Since not obscene for high school students, STREAMS OF CONSCIENCE could not be impounded without some overriding justification based on the principal's disciplinary and educational responsibilities. The Supreme Court has unequivocally stated, in connection with the exercise of constitutionally protected forms of speech by students in the public schools, that administrative interference with First Amendment rights will not be lightly countenanced:

> "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 737. (p. 459)

The applicable test is whether school authorities might reasonably forecast "substantial disruption of or material interference with school activities." See Tinker, 89 S. Ct. at 740. There are no countervailing circumstances in this case sufficient to overcome the public interest that students in public educational institutions be afforded "the widest latitude for free expression and debate consonant with the maintenance of order." See Healy v. James, 92 S. Ct. 2338, 2341. (pp. 459-460)

The issue of whether a principal might properly exercise any greater degree of supervisory discretion in connection with publications bearing the school's name, or on which school funds were about to be expended or materials or facilities employed is not presented. The name of the school did not appear on the publication, and expenditures involved in its duplication had already occurred. For the purposes of this litigation, this literary magazine had the character of a private creation by the student editors. (p. 460)

Citation of authority is hardly needed to support the proposition that the administrative delay of a full academic year in deciding whether this publication could be distributed is completely unacceptable. Any administrative determination and review procedure limiting free expression must be made almost immediately, not over a course of months or years, where prior censorship prevents publication. This proposition is particularly important in the case of student publica-

tions because the tenure of a student editor is so short. If there is to be any control over high school publications, the board of education must utilize more adequate procedures for prompt resolution of disputes. (p. 460)

Consistent with these findings, the court on April 28, 1972, directed the defendants to return to the plaintiffs the impounded copies of STREAMS OF CONSCIENCE and to permit the distribution of the magazine on school property in a way that did not substantially interfere with or disrupt school activities, providing the defendants could, if they wished, stamp each copy with a legend to the effect that the school assumed no responsibility for the contents. (p. 460)

Disposition: The plaintiffs' motion for summary judgment with respect to declaratory judgment was denied. There was no indication in the record of bad faith by the defendants sufficient to justify a judgment for nominal punitive damages and attorneys' fees. The plaintiffs, because they were forced to sue to obtain constitutional rights, were entitled to costs. (p. 465)

Citation: Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974)

Facts: The October 25, 1974, issues of the Farmingdale High School student newspaper contains a sex information supplement. One plaintiff is an editor of the newspaper. A second plaintiff is a student who states that she wishes to receive the supplement. The four-page supplement is primarily composed of articles dealing with contraception and abortion. The articles are serious in tone and obviously intended to convey information rather than appeal to prurient interests. It is conceded the articles are not obscene. On October 25, 1974, the defendant principal ordered the seizure of 700 undistributed copies of the newspaper. He also ordered that there be no further distribution of the newspaper and supplement. The defendants have expressed, however, a willingness to release the newspapers without the supplements. This proposal is not satisfactory to the plaintiffs. (p. 1165)

Issues: The relevant First Amendment issue is whether the seizure of a sex education supplement to a high school newspaper and refusal to allow its distribution unconstitutionally abridge students' freedom of expression and speech. (p. 1164)

Holding: The District Court for the Eastern District of New York determined that the seizure of a sex education supplement to a high school newspaper and refusal to allow its distribution were unconstitutional viola-

tions of student expression and speech where such actions were not reasonably necessary to avoid material and substantial interference with school work or discipline. (p. 1164)

Reasoning: In Tinker v. Des Moines School District, 89 S. Ct. 733, the Court held that a school regulation prohibiting expression of a particular opinion is impermissible under the First and Fourteenth Amendments without evidence that the regulation is "necessary to avoid material and substantial interference with schoolwork or discipline," 89 S. Ct. at 739. Although Tinker is factually distinguishable because it involved expression of an opinion rather than publication of factual information (which is primarily involved here), the test seems equally valid in this case. The newspaper staff's attempt to educate their fellow students by means of a number of thoughtfully written articles seems at least equally deserving of protection under the First and Fourteenth Amendments as the symbolic wearing of an armband, the protected activity in Tinker. (p. 1165)

In this court's opinion, it is extremely unlikely that distribution of the supplement will cause material and substantial interference with schoolwork and discipline. Accordingly, the court finds that seizure of the supplement and refusal to allow distribution were not reasonably necessary to award material and substantial interference with schoolwork or discipline. (p. 1165)

Relying on Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971), the defendants claim that there is no violation of the First Amendment where the action taken has a reasonable basis. Assuming that this is the proper standard, none of the reasons given by defendants provide a reasonable basis for their actions. There is no merit, for example, to defendants' argument that the actions were reasonable because distribution presents a "clear and present danger" that will bring about substantial evils that the state has a right to prevent. In this court's view, no clear and present danger is presented by distribution. It is ironic that the defendants view the dissemination of knowledge here as presenting a "danger" which will bring about "evils." (pp. 1165-1166)

The defendants also assert that seizure was reasonable because publication of the supplement constituted an unauthorized intrusion into an area of secondary school curriculum. In this court's view, publication of the newspaper and supplement is an extracurricular activity rather than part of the curriculum. This view is buttressed by the fact that no academic credit is

given for serving as a member of the newspaper staff. (p. 1166)

Even assuming that the newspaper is part of the "curriculum," the defendants' "intrusion" theory does not furnish a reasonable basis for interference with student speech. The invalidity of defendants' theory is demonstrated by examining the impact it would have in the factual context of Tinker. Social studies surely is part of the school curriculum. Under the defendants' theory, the petitioners in Tinker might well not be permitted to wear armbands to protest the Vietnam war since their symbolic protest dealt with an area of the curriculum. Moreover, if the defendants' theory is adopted, the presence of articles in the school newspaper dealing with political topics will make the newspaper subject to seizure in the future. Such a result is inconsistent with the right of high school students to free expression, subject to well-defined and relatively narrow limitations. (p. 1166)

For the foregoing reasons, this court declares that seizure and prohibition of distribution of the newspaper and supplement infringed the plaintiffs' First and Fourteenth Amendment rights. (p. 1166)

Disposition: The defendants were enjoined from preventing the distribution of seized copies of the school newspaper and the supplement. Because the court found no basis for awarding damages, the plaintiffs' demand for damages was denied. In addition, the plaintiffs' demand for the costs of this action was denied. (p. 1166)

Citation: Pliscou v. Holtville Unified School District, 411 F. Supp. 842 (S.D.Cal. 1976)

Facts: The plaintiff, Lisa Martine Pliscou, is a fourteen-year-old sophomore student enrolled at Holtville High School, Holtville, California. The plaintiff is before this court seeking a preliminary injunction enjoining the defendants from interfering with the publication of an unofficial student newspaper, the First Amendment. The plaintiff, acting through her guardian, alleges that the conduct of the defendants constitutes an unconstitutional interference with her rights guaranteed by the First and Fourteenth Amendments. The Saga is the official student newspaper published by the journalism class of Holtville High School. During the preceding academic year, 1974-1975, Linda Rombaut served as editor-in-chief of the Saga. The staff of the Saga consisted of an editor-in-chief, an assistant editor and four individual page editors. The publication of the four-page student newspaper was under the

supervision of Mrs. Edna Harrison, journalism instructor and advisor to the Quill and Scroll Society at Holtville High School. (pp. 844-845)

At the end of the preceding school year, Robert Wynkoop, an instructor at Holtville High, was approached by the school principal, Gerald Beaman, and asked if he would teach journalism and assume responsibility for the publication of the Saga during the next school year, 1975-1976. Mr. Wynkoop accepted the offer. By the end of the summer, Mr. Wynkoop concluded that he would restructure the staff of the Saga, eliminating the editor-in-chief and assistant editor. (p. 845)

During the first week of the current school year, Mr. Wynkoop announced to the journalism class that it was his intention to restructure the Saga's staff, limiting it to four page-editors. Wynkoop also determined that the newspaper would not publish any advertisements. (p. 845)

In the interim, Linda Rombaut had designated Lisa Pliscou as her assistant editor, and both students had spent a considerable amount of time during the summer months preparing for the publication of the Saga. Although Mr. Wynkoop eliminated the positions of editor-in-chief and assistant editor, he offered Linda Rombaut and Lisa Pliscou "page" editorships, which they eventually declined. Wynkoop banned advertisements so as to concentrate on the students' writing skills. (p. 845)

The plaintiff is a member of the Quill and Scroll Society, an officially recognized student organization at Holtville High School. The Quill and Scroll is the local chapter of an international journalistic society. During the first meeting of the semester, the plaintiff was elected president of the Quill and Scroll and the membership decided to publish a newspaper. During the second meeting of the semester, the membership named the newspaper the First Amendment and began to design the paper's format. (p. 845)

Shortly thereafter, Mrs. Harrison, the sponsor of the Quill and Scroll, advised the plaintiff that the school principal would not authorize the publication of a second newspaper. In response to Mr. Beaman's directive, Mrs. Harrison stated that she felt that she could no longer act as the organization's sponsor. (p. 845)

Mr. Beaman then approached Mr. O. Ray Warren, a member of the Holtville High School faculty, and asked him to act as sponsor of the Quill and Scroll with the understanding that there would be no second newspaper on

campus. Mr. Warren assumed this position in addition to his extracurricular responsibilities as coach of the freshman football team and sponsor of the Literary Club. (pp. 845-846)

The plaintiff and other members of the Quill and Scroll sought to publish the First Amendment at no cost to the high school by soliciting advertisements and donations for each issue. In order to solicit advertising, the organization was required to submit an activity request to the school administrators and student council for approval. Mr. Warren, the Quill and Scroll sponsor, refused to authorize the solicitation of advertisements and would not sign the activity request card. The student council, at a meeting on October 22, 1975, determined that it could not approve the activity request without the signature of the sponsor or the school principal. (p. 846)

On October 24, 1975, the Quill and Scroll Society was to meet for the purpose of planning the first edition of the First Amendment newspaper. The plaintiff suggests that an unusually large number of freshman football players, attended the meeting, expressing a student interest in journalism. The meeting was disorderly and chaotic. Mr. Warren went so far as to characterize the meeting as a "general disturbance." (p. 846)

The plaintiff seeks the issuance of a preliminary injunction enjoining the defendants from interfering with her right to publish the First Amendment as an on-campus newspaper at Holtville High School. (p. 846)

Issues: Several First Amendment questions are implicated in this case: 1) Is the evidence sufficient to establish that school officials restructured the journalism class and refused to authorize publication of a proposed student newspaper in order to suppress editorial comment or regulate content in violation of the First Amendment? 2) Does a school district regulation which requires that a copy of any printed matter proposed for distribution be presented to the principal prior to distribution constitute an invalid prior restraint on student speech? 3) Is a school regulation prohibiting the distribution of material which incites students to disrupt the orderly operation of the school so overly broad and vague as to have an unconstitutional chilling effect on students' First Amendment right of free speech? 4) Do the plaintiff's First Amendment interests require that her request to seek advertising support for the proposed student newspaper be approved? (pp. 842-844)

Holding: The District Court for the Southern District of California determined the following: 1) Evidence was insufficient to establish that the school officials had acted in order to suppress editorial comment or regulate the content of student publications; (2) A school district regulation which required that a copy of any printed matter proposed for distribution be presented to the principal prior to distribution was an invalid restraint insofar as it failed to specify a period of time within which the principal was required to act and failed to provide for the contingency of the principal's failure to act; (3) A school district regulation which prohibited the collection of funds or donations for printed matter was an illegitimate exercise of the school board's authority to regulate the time, place, and manner of distribution; (4) A school district regulation which prohibited distribution of material which incited students to disrupt was overbroad and vague, and that, in light of First Amendment interests, the plaintiff's request for approval to seek advertising support was required to be approved. (p. 842)

Reasoning: The plaintiff contends that the concerted actions of the defendants deprived her of her First Amendment rights. At the outset, it should be emphasized that the First Amendment rights of high school students are not coextensive with those of adults. (p. 847)

Nevertheless, the authority of school officials to regulate the students' exercise of constitutional rights cannot be used to deprive those students of their rights altogether. As the Supreme Court stated in Tinker v. Des Moines School District, 89 S. Ct. 733, 736:

> It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. (p. 847)

The scope of a student's rights is determined in light of the special characteristics of the school environment. The latitude afforded students can be circumscribed by reasonable rules and regulations necessary to the orderly administration of the school system. Students may exercise their First Amendment rights provided they do so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without interfering with the rights of others." See Tinker, 89 S. Ct. at 740. In Scoville v. Board of Education of Joliet TP. H. S. District, 240, 425 F.2d 10 (7th Cir. 1970), the court recognized that school of-

ficials have a "comprehensive authority" to prescribe and control conduct in the school through reasonable rules and regulations consistent with the Constitution. However, if any of those rules infringe on constitutional rights, the school authorities bear the burden of justification. (p. 847)

Lisa Pliscou urges that the actions of the defendants compromise her First Amendment rights, not limited to her freedom to publish. The First Amendment encompasses a number of peripheral rights. In Griswold v. Connecticut, 85 S. Ct. 1678, the Supreme Court explained:

> The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read. 85 S. Ct. at 1680 (p. 847)

It should be noted that a school district is not required to establish a newspaper. Once a newspaper is established, its publication cannot be suppressed because of its editorial content. (p. 847)

This court is not of the opinion that the defendants acted in order to suppress editorial comment or regulate the content of the Saga. The testimony is equivocal, but this court cannot conclude that the restructuring of the journalism class and the refusal to authorize the publication of the First Amendment were designed to deprive the plaintiff of a forum or regulate the content of the Saga. This controversy, unlike Tinker and its progeny, does not involve a direct regulation of expression. The case at bar involves the regulation of conduct which incidentally limits speech. (p. 847)

The Holtville school officials recognize the Quill and Scroll Society as a legitimate on-campus organization. Indeed, where an organization complies with the reasonable directives of the administration, official recognition cannot be arbitrarily denied. (pp. 847-848)

An officially recognized on-campus organization cannot be dealt with in an arbitrary manner so as to frustrate its legitimate objectives. The regulations of the Holtville School District do not expressly prohibit the publication of the First Amendment newspaper, but as a practical matter, the plaintiff and members of the Quill and Scroll cannot publish the First Amendment newspaper under the existing regulations. It is imperative to note that the plaintiff is not seeking access to school materials or machinery, nor would the publication interfere with the plaintiff's class

time. The plaintiff is not seeking financial assistance from the school. The plaintiff does, however, seek authorization to solicit advertising to finance the publication of the newspaper. The plaintiff contends that the First Amendment newspaper cannot remain financially viable without the solicitation of advertisements from the local community. In order to do so, the membership of the Quill and Scroll must secure the approval of the organization's sponsor or the school principal, and this request must be ratified by the student council. (p. 848)

School authorities have a legitimate interest in regulating the conduct of students. The regulation of conduct which incidentally limits speech is permissible where there is an important governmental interest in regulating the non-speech aspect of the conduct. (p. 848)

This activity request procedure represents an attempt to regulate student conduct incidental to student expression. Mr. Beaman's refusal to authorize the solicitation of advertisements for the First Amendment was premised upon his concern over depleting the financial resources of the community. The school district regulations attempt to limit the time, place and manner of distribution of printed matter. These limitations apply across the board to all recognized on-campus organizations and are not calculated to suppress the publication of the First Amendment newspaper. The procedure for the approval of activity requests reflects the school authorities' legitimate concern over monitoring the activities of all on-campus organizations. The legitimate interest will sustain an even-handed application of the procedures employed, notwithstanding incidental restriction of First Amendment freedoms. Recognition of a student organization impliedly includes those rights necessary to the functioning and growth of the organization. School officials cannot impinge upon the First Amendment rights of the members of the Quill and Scroll by arbitrarily denying their activity request to solicit advertising. (pp. 848-849)

Singling out the Quill and Scroll Society and denying its activity request, in deference to the fund-raising activities of other organizations, would constitute a denial of equal protection. Viewed in its entirety, the denial of the proffered activity request stands suspect and will not be condoned, especially where First Amendment considerations loom in the background. (p. 849)

The failure of the school officials to approve the plaintiff's activity request to seek out advertising does not rest upon any rational justification—nor does

there appear to be one. An even-handed application of school procedures dictates approval of the activity request. The plaintiff and the organization which she is a member of cannot be singled out and denied access to the community. First Amendment rights enjoy a "preferred" status, and no justification has been offered that would warrant denying the instant request. In conformity with the opinion of this court, the plaintiff should submit the activity request to the appropriate officials for approval, and in light of existing policy, the request must be approved. This order is not to preclude the school board from promulgating reasonable regulations that apply to all students and campus groups even-handedly, but a ruse to stifle First Amendment rights cannot stand. (p. 851)

Disposition: A preliminary injunction was unwarranted. The defendants were given thirty days from the date of this opinion to remedy the deficiencies in the school district's regulations. (pp. 842, 852)

Citation: Trachtman v. Anker, 426 F. Supp. 198 (S.D.N.Y. 1976)

Facts: The plaintiffs are a student at Stuyvesant High School in New York City and his father. Student plaintiff Jeff Trachtman, in his capacity as editor-in-chief of the school newspaper, the Voice, sought permission from the defendant principal at Stuyvesant and the New York City Board of Education to distribute a questionnaire designed to measure the sexual attitudes of his fellow Stuyvesant students. Permission was denied. (p. 199)

The questionnaire is composed of twenty-five questions requiring rather personal and frank information about the student's sexual attitudes, preferences, knowledge, and experience. The plaintiff seeks to distribute the questionnaire on a random basis. He would then tabulate and interpret the responses for publication in the school newspaper. The identities of those who answer the questionnaire are to be kept strictly confidential. The questionnaire includes a proposed cover letter which describes the nature of the inquiry. It also suggests to the student that if he or she finds the questionnaire disturbing, it should not be answered. In denying the plaintiff permission to distribute the questionnaire, the board acknowledged the constitutional rights of the students, but stated that student research, especially that which deals with a subject as sensitive as a student's sexual attitudes, must comply with the strict standards contained in a handbook entitled, "Cooperative Procedures Governing Research Proposals--Handbook for Research Applicants." In short, the contention of the board is that since

the questionnaire did not meet these standards and since only professional researchers could handle such a subject with the proper sensitivity, the student request to conduct this study must be denied. It also claimed that some students would suffer irreparable psychological damage upon being confronted with the questionnaire and the necessity to answer certain of the questions. (p. 200)

The plaintiff denies that the study, as planned, could result in harm to some students. He claims that the handbook applies to outside researchers, not expressive activities conducted by the students themselves. (p. 200)

Issues: The primary question in this case is whether the defendants deprived the student plaintiff of his First Amendment right to freedom of expression by refusing him permission to distribute his questionnaire designed to measure the sexual attitudes of his fellow high school students and by prohibiting publication of an interpretation of the responses in the school's newspaper. (pp. 198,200)

Holding: The District Court for the Southern District of New York held that where the questionnaire, which was composed of 25 questions concerning personal and frank information about the student's sexual attitudes, preferences, knowledge, and experience, included a cover letter which described the nature of the inquiry and suggested that if the subject found the questionnaire disturbing, it should not be answered, and the identities of those who answered were to be kept strictly confidential, denying permission to distribute the questionnaire to junior and senior students denied First Amendment rights to expression, but permission to distribute could be denied as to freshman and sophomore students; school authorities could not impose a requirement of parental consent before a student was allowed to answer the questionnaire. (p. 198)

Reasoning: The basic principles governing First Amendment rights of high school students were enunciated by the Supreme Court in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. There the court said: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 89 S. Ct. at 736 (p. 200)

Although students do not shed their constitutional rights upon entering school, Tinker and subsequent

cases make it clear that these rights must be balanced against the duty of the school authorities to maintain discipline and to provide an atmosphere which is conducive to learning. First Amendment rights must be applied in the context within which they are asserted, and these rights are not necessarily coextensive with those of adults. (p. 201)

The principles enunciated above have been formulated mainly in the context of student publications and political activities and their potential disruptive effects. The question in this case, however, is markedly different: To what extent will the distribution of a questionnaire dealing with sexual attitudes infringe on the rights of the students and their parents, and what is the potential for psychological harm as a result of the distribution? If defendants can prove there is a strong possibility the distribution of the questionnaire would result in significant psychological harm to members of Stuyvesant High School, then the distribution could be denied. (p. 201)

The thrust of the defendants' evidence is that serious harm could result if certain students are confronted with particular questions in the survey. It is argued that many high school students are only beginning to develop sexual preferences and that their "identities" are in a state of rapid development. To be asked such pointed questions at this stage in their lives would force those students who are emotionally immature to confront difficult issues prematurely. The court finds that this reasoning applies only to students as young as 13 and 14 years of age. The defendants, therefore, did not violate the Constitution in prohibiting distribution at this level. (p. 201)

When students' First Amendment rights are asserted, the reasonable restrictions which are imposed must be the minimum necessary to protect the need for discipline and to protect the interests of the students. See Grayned v. City of Rockford, 92 S. Ct. 2292. The relief must be carefully tailored in light of the circumstances of each individual case. (pp. 201-202)

The court finds the defendants' analysis of possible harm to be unconvincing with respect to the junior and senior students. In fact, it appears that such a questionnaire would have substantial beneficial effects. It seems to the court that the distribution of this questionnaire, which is soberly and responsibly written, is an acceptable way in which to have students present sexual issues to other students—free from the debasement of commercialism and sensationalism—and guided by interested parents. (p. 202)

> The defendants are concerned that harm will result if the students are directly confronted with their own attitudes towards sexual issues (and they certainly will be so confronted if they answer this questionnaire). But it seems that the result of answering this survey is more likely to produce exactly the opposite effect. The distribution of the questionnaire and the publication of the results in the Voice will make it clear that the questions asked are the concerns of many, and that the problems which a student may face are not unique to himself. (p. 202)
>
> In addition to this court's finding that, with respect to the older students, the psychological benefits of the survey far outweigh any harm, there are also significant educational benefits to be gained from this student project. Many of the defendants' affiants objected to the unscientific nature of the survey, claiming that the questions are a hodge-podge and that the results would prove nothing. This argument is beside the point. The value to the scientific community is not relevant. What is important here is that a number of students took the initiative to research and design a survey with the help of adults. This type of independent investigation should be encouraged and applauded, for an integral goal of our educational system is to stimulate inquiry as well as to impart knowledge. (p. 202)
>
> The defendants suggest that the students are free to distribute the questionnaire off of the school grounds. This alternative is not acceptable to the students because it would defeat their attempt to collect a random sample of responses. The court's objection to this alternative is that the various safeguards—which the defendants understandably insist are necessary—would be impossible to apply in such a situation. (p. 203)

Disposition: The court stated that the details of the distribution of the questionnaire should be worked out through negotiations of the interested parties. The negotiators should be chosen by the respective parties and include a student representative, a parent representative chosen by the students, the principal (or his representative) of Stuyvesant, and a representative of the board of education (who may designate his authority to the principal). A written description of this plan shall be submitted to the court on or before December 30, 1976. A hearing on the proposed plan will be held on January 5, 1977. It is to be attended by those who negotiated the agreement as well as the parties' counsel. If no agreement can be reached, the court will draw its own plan. If an acceptable plan

has been previously submitted, the hearing may be canceled. (p. 204)

Citation: Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979)

Facts: The plaintiffs Renee Frasca and Joan Falcetta are, respectively, the former editor-in-chief and present assistant editor of the Chieftain, the official student newspaper of Sewanhaka High School, which is located in Floral Park, Nassau County, New York. The defendants in this action are: Robert Andrews, the building principal of Sewanhaka High School; W. Wallace Purdy, the district principal; and the Board of Education of Sewanhaka Central High School District. (p. 1045)

Copies of the June 1978 issue of the Chieftain were returned to the school from the printer on the evening of June 14, 1978, and placed in the homeroom mail boxes in the school office for distribution on the following day, June 15, 1978, the last day of the school year. The next morning, the newspaper staff discovered that all copies of the June 1978 issue had been seized by the building principal, defendant Andrews, who prohibited their distribution. The bases for the seizure and the focal points of this suit were two letters printed in the paper and designated in the court documents as Exhibits "A" and "B." (p. 1046)

Exhibit "A" read as follows:

> Sports editor,
>
> We, the Lacrosse players of Sewanhaka would like to know why you do not have any sports articles in the Chieftain. We would like a formal apology in public or else we will kick your greasy ass.
>
> [signed] Pissed Off
> S.H.S. Lacrosse Team.

The editor's response, printed immediately below, read:

> We would like to reply by saying that the articles were stolen. We would also like to say that you hotheaded, egotistical, "Pissed Off" jocks of the Lacrosse team do not deserve an apology for anything. You should be giving one.
>
> The Editors. (p. 1046)

Exhibit "B" criticized the conduct of a particular student who was then vice-president of the student government. The student will be referred to as "John" in this decision to protect him from further unnecessary

embarrassment. The letter stated that John "has been a total disgrace to the school," that he had been suspended from school, that he did not maintain a high academic average, that he attended only a few of the many student council meetings, and that he had changed his report card grades "by typing over the letters on the computer terminal." (p. 1046)

The Chieftain is an extra-curricular activity funded entirely by the local school district, which provides space, utilities, supplies, desks, typewriters, and printing. The paper is staffed solely by students, who primarily determine the content, management, and control of the newspaper. The district has no written policies, guidelines, or rules pertaining to the Chieftain's content, or to possible prior review, restraint, or censorship by the faculty or administration. Nevertheless, the defendants regard the newspaper as being under the jurisdiction and direction of the English Department's chairperson, and ultimately under the supervision and control of the board of education, administered through the district principal and the building principal. They consider the student editors and staff to be subject to supervision "in a manner consistent with sound educational practice." (p. 1046)

Defendant Andrews first read the June 1978 issue on the morning of June 15, after copies had been placed in the homeroom mailboxes for distribution to the students. Andrews' personal acquaintance with members of the lacrosse team caused him to doubt "very much whether the team as a whole, or for that matter, even a majority of the team members would concur in and write such a letter." As to Exhibit "B," Andrews knew of his own knowledge that John was an excellent student, a senior, and that this was the last issue of the paper for the year. He recognized that John had no opportunity to defend himself and that, true or false, the letter would have a "devastating impact" upon him. Because he doubted the truth, both of the signature on Exhibit "A" and of the content of Exhibit "B," Andrews had all the papers removed from the mailboxes, thereby preventing their distribution, and immediately commenced an investigation. (p. 1047)

Andrews spoke to the plaintiffs individually. Frasca indicated to him that she knew who had actually written the lacrosse team letter, but she "evaded" the question as to whether the letter had been authored by the team as a whole. With respect to Exhibit "B," Frasca told Andrews that she had reliable information that the letter's contents were true. (p. 1047)

> In their brief, the plaintiffs argue that Exhibit "B" is true and offer to prove its truth at a hearing. No factual support has been presented, however, to rebut the specific falsities pinpointed by the defendants' affidavits. (p. 1047)
>
> As a result of his investigation, Andrews concluded that Exhibit "A" was false in that it was not authorized by the "SHS Lacrosse team," that certain words in the letter were obscene and vulgar and that, if published, the letter might provoke a physical as well as verbal confrontation between the lacrosse teams and the staff of the Chieftain. With respect to Exhibit "B," Andrews concluded that several of its statements were false and, in his opinion, libelous, that its publication would have a devastating impact on John, and that there would be no reasonable opportunity to reply. He ordered that the copies of the paper which had previously been removed from the homeroom mailboxes be destroyed, thereby preventing their distribution to the students. This suit followed. (p. 1048)

Issues: The First Amendment issues of freedom of expression and freedom of speech are central to this case. The primary question is whether a high school principal's action of seizing the school newspaper to prevent its distribution is violative of students' First Amendment rights or is such action constitutionally justified because the principal has a rational basis for assuming that publication of the newspaper would create a substantial risk of disruption within the school, even if the school board has no written policies requiring review in advance of distribution. (pp. 1043-1045)

Holding: The District Court for the Eastern District of New York ruled that: (1) the power of school officials to prevent distribution within school of material that was libelous, obscene, disruptive of school activities, or likely to create substantial disorder, or which invades the privacy of others, did not disappear merely because the school board failed to adopt written policies requiring review in advance of distribution; (2) the principal had a rational basis, grounded in fact, for his conclusion that publication of a letter purportedly from the school's lacrosse team would create substantial disruption of school activities; (3) the principal had a rational and substantial basis for preventing publication containing a letter which, among other things, stated that a particular student, who was vice-president of the student government, had been a total failure in performing his duties and had been suspended from school; and (4) "public figure" exception to libel liability ought not to be extended to the level of a high school editor's comments about

a fellow student who is a student government member. (pp. 1043-1044)

Reasoning: An appropriate starting point for analysis is the Supreme Court's decision in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. The Court there held that a prohibition of expression in the schools is impermissible under the First and Fourteenth Amendments unless there is evidence that it is "necessary to avoid material and substantial interference with schoolwork or discipline." 89 S. Ct. at 739 (pp. 1048-1049)

Before evaluating the circumstances of this case, this court must consider the plaintiff's categorical argument that absent written policies, guidelines, or regulations, the defendants had no power whatsoever to exercise any prior restraint over publication of the Chieftain. All of the cases cited by the plaintiff in support of this argument dealt with "underground" newspapers which, unlike the Chieftain, were not sponsored by the school district, not represented as a school newspaper, not financed in any way by public funds, and not in any way supervised by faculty members. (pp. 1049-1050)

More significantly, each of those cases involved an attack upon a written school policy which required advance permission to distribute the underground newspaper. Even assuming that the same protection must be accorded to a school newspaper as to an "underground" publication, the power of school officials in a proper case to prevent distribution within the school of material which is libelous, obscene, disruptive of school activities, or likely to create substantial disorder, or which invades the rights of others, does not disappear merely because the school board has failed to adopt written policies requiring review in advance of distribution. Written policies and guidelines undoubtedly have a pedagogical value; they probably help to avoid problems such as have arisen in this case by offering to students a clearer indication of what is permitted and what is proscribed. In addition, when a prior restraint is actually imposed, it enhances a sense of fairness and provides an opportunity for discussion, negotiation, and compromise in order to accommodate competing interests. All of that may be desirable, but is not required by the Constitution. (p. 1050)

In determining whether a school official's suppression of a particular newspaper is reasonable, all the circumstances must be evaluated, including whether or not written guidelines have been established for such action. Absent such guidelines, suppression of publica-

tion by school officials must, of course, be scrutinized more carefully than if the issue were presented to the court after guideline procedures had been pursued. To be consistent with the First Amendment, drastic post-publication suppression, particularly, as here, on the last day of school, should be permitted only when clearly justified. (p. 1050)

One justification offered by the defendants has great merit. Although it might be argued that any disruption of school activities caused by publication of a newspaper on the last day before a two-month summer holiday could not be "substantial" by reason of the short period of time in which its effect would be felt, the court does not interpret Tinker to require that "substantial disorder" be expected to continue for any particular length of time. Three school officials expressed concern over the possibility that one or more of the school's lacrosse players might have taken literally the threat of violence expressed in Exhibit "A." (pp. 1050-1051)

In opposition, the plaintiffs argue that the staff of the Chieftain had already seen the letter purporting to be from the "SHS Lacrosse Team" and that no arguments or violence had ensued. The argument ignores, however, the obvious facts that the lacrosse team (a) had not yet seen the letter, (b) had not seen the published reply of "the editors," and (c) might well be viewed as more likely to express their feelings physically than would less athletic staff members of the Chieftain. (p. 1051)

The remaining problem, Exhibit "B," focuses upon defendant Andrews' reasoned and supported conviction that its content was substantially false, would have a devastating impact on John, and would leave John without any reasonable opportunity to respond, correct, or explain. Based upon his prompt investigation, personal knowledge of the student, and the virtually certain irreparable harm which would result from the letter, defendant Andrews had a rational and substantial basis for preventing its publication. (p. 1052)

Because the disputes which arise in the day-to-day operations of our public schools cannot, as a general rule, be resolved by federal district judges, who necessarily must view them after the fact, from a remote point of view, and without direct responsibility for the immediate and practical consequences of the determinations, the rule has been wisely established that decisions of school officials will be sustained, even in a First Amendment context, when, on the facts before them at the time of the conduct which is challenged, there was a substantial and reasonable basis

for the action taken. See Trachtman v. Anker, 563 F.2d 512 (CA2 1977). Because there was such a basis to support Andrews' determination here, there is no basis for court intervention. (p. 1052)

Disposition: The plaintiffs' motion for a preliminary injunction was denied, and the complaint was dismissed. (p. 1052)

Citation: Gambino v. Fairfax County School Board, 564, F.2d 157 (4th Cir. 1977)

Facts: The Fairfax County School Board appeals the district court's order enjoining it from banning the publication of portions of an article about birth control in a school newspaper, The Farm News. The board's major contentions are that (1) the First Amendment does not apply to The Farm News because it is an in-house organ of the school system, funded and sponsored by the board, and therefore cannot be viewed as a public forum; (2) the school's students are a captive audience because the newspaper is solicited for and distributed during school hours, and students cannot avoid exposure to the controverted article—therefore the public forum doctrine does not apply; and (3) even if the newspaper itself is subject to the First Amendment protection, the article is not protected because its publication would undermine a valid school policy which prohibits the teaching of birth control as part of the curriculum. (pp. 157-158)

Issues: Two primary First Amendment questions are addressed in this appeal. First, is a secondary school newspaper, conceived, established, and operated as a conduit for student expression in a wide variety of topics, entitled to First Amendment protection? Second, where a student newspaper in a secondary school is established as a public forum and not an official publication, does the general power of a school board to regulate course content apply to allow the board to ban publication of portions of the newspaper which are objectionable? (p. 157)

Holding: The Court of Appeals for the Fourth Circuit held that: (1) the newspaper was entitled to First Amendment protection, and (2) the school board did not have the general power to regulate the newspaper, which was established as a public forum and not an official publication. (p. 157)

Reasoning: Upon considering the board's general policy toward student publications, as well as past articles in The Farm News, the district court found that the newspaper was established as a public forum for student expression, and therefore is subject to First Amend-

ment protection. It also concluded that the students are not a captive audience merely because of their compulsory attendance at the school. Finally, the court concluded that because the newspaper was established as a public forum and not as an official publication, it cannot be viewed as part of the curriculum; accordingly, the general power of the board to regulate course content does not apply. (p. 158)

Disposition: The district court's decision was affirmed. (p. 158)

Citation: Reinke v. Cobb County School District, 484 F. Supp. 1252 (N.D.Ga. 1980)

Facts: This is an action for injunctive relief and a declaratory judgment brought on behalf of the plaintiff, Charles E. Reinke, by his father as next friend, seeking to enjoin the defendants from engaging in certain alleged acts of censorship and control over the McEachern Arrowhead (hereinafter, "the Arrowhead" or "the newspaper." The Arrowhead was a monthly newspaper written edited, and published by certain students at McEachern High School. Its publication has currently been suspended. The plaintiff was the coeditor-in-chief. The newspaper was printed at a private printing company and was sold on the campus of McEachern High. Some financial support was provided by the high school, but most funding was derived from advertising and sales of individual copies. The student editors and staff of the Arrowhead were enrolled in a journalism class at McEachern for which they received academic credit. The teacher of the journalism class served as the faculty advisor to the newspaper. (p. 1255)

Basically, four acts of censorship have been alleged. After the September 27, 1979, edition of the Arrowhead was returned from the printer, it was distributed to the journalism class that was responsible for publishing the newspaper. At this time, the plaintiff noticed that several changes had been made to the issue. In an article entitled "New Teachers at McEachern," a paragraph dealing with the new teachers' general attitudes toward homosexual teachers had been deleted. In addition, the word "darn" had been substituted for the word "damn" in a quote attributed to a local radio personality. These changes were admittedly made by the faculty advisor while the September 27 edition was still at the printer, and constitute the first act of censorship alleged by the plaintiff. (p. 1255)

On the following morning, the students began selling the newspaper. Shortly thereafter, the principal ordered the distribution stopped, and requested the return of all copies that had already been sold. The

principal had several objections to the content of the September edition of the Arrowhead. He thought that photographs had been used from other publications without permission, authority, or waiver of copyright; that an article entitled "Vietnam Syndrome" was in poor taste and possibly libelous; that an article regarding ticket prices to high school football games contained erroneous statistics; that an article concerning the student body president was a personal attack upon that student; that an article entitled "Advertising Metamorphosis," which quoted the 1960 segregationist stance of a current member of the Cobb County Board of Education, would adversely affect racial relationships at the high school; and that a purported letter to the editor signed "D. Newburn" would be falsely attributed to the student chaplain, Danny Newburn, and would cause a disruption of school activities. The principal also noted that there were a number of technical defects in the newspaper in grammar and spelling. The confiscation of the September 27 edition in its entirety is the second act of censorship alleged by the plaintiff. (pp. 1255-1256)

Several weeks thereafter, the second issue of the Arrowhead for the 1979-80 school year was published and distributed as scheduled. However, two articles in this October edition were deleted by the faculty advisor while the newspaper was at the printer. One was a story about the high school football team, written by the team's manager, who also served as the student sports editor. The faculty advisor objected to this article on the ground that it constituted inappropriate editorializing on the sports page. The other story that was deleted concerned the confiscation of the September issue. These actions by the faculty advisor constitute the third alleged act of censorship. (p. 1256)

By letter dated October 30, 1979, an attorney retained by the plaintiff contacted the school principal and advised him that the aforementioned actions constituted censorship of the school newspaper in violation of his client's First Amendment rights. Subsequently, the principal suspended further publication of the Arrowhead, pending termination of the threatened litigation. A literary magazine was substituted as an alternative means of student expression. This suspension of publication constitutes the fourth act of alleged censorship. (p. 1256)

Issues: The relevant First Amendment issue is whether the school officials can demonstrate reasonable cause to believe that the prohibited expression would have engendered material and substantial interference with

school activities or with the rights of others. (p. 1257)

Holding: The District Court for the Northern District of Georgia, Atlanta Division, determined that, among other things, school authorities could not prohibit the inclusion in publication of an occasional use of the word "damn," a paragraph describing attitudes of new teachers at the high school toward homosexual teachers, or an article explaining why a prior edition of the school newspaper was not distributed as scheduled. (p. 1252)

Reasoning: A logical starting point when discussing student First Amendment rights is the landmark case of Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, which concerned a public school policy forbidding the wearing of black armbands by students in protest of the Vietnam war. While affirming the comprehensive authority of school officials to prescribe and control conduct in the nation's schools, the Supreme Court emphasized that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (89 S. Ct. at 736) The court held that a prohibition of expression in a school setting such as that involved in Tinker was impermissible under the First and Fourteenth Amendments, unless there was evidence that it was "necessary to avoid material and substantial interference with schoolwork or discipline." 89 S. Ct. at 739 (pp. 1256-1257)

The Tinker standard of material and substantial disruption has been applied by numerous courts, including those in this circuit, in cases involving student publications. See cases cited in Frasca v. Andrews, 463 F. Supp. 1043, 1049 (E.D.N.Y. 1979). In Shanley v. Northeast Independent School District, Bexar County, Texas, 462 F.2d 960 (5th Cir. 1972), the Fifth Circuit Court of Appeals summarized the decisional implications of Tinker and its progeny as follows:

> . . . (1) expression by high school students can be prohibited altogether if it materially and substantially interferes with school activities or with the rights of other students or teachers, or if the school administration can demonstrate reasonable cause to believe that the expression would engender such material and substantial interference; (2) expression by high school students cannot be prohibited solely because other students, teachers, administrators, or parents may disagree with its content; (3) efforts at expression by high school students may be subjected to prior screening under clear and reason-

> able regulations; and (4) expression by high school students may be limited in manner, place, or time by means of reasonable and equally-applied regulations. 462 F.2d at 970. (p. 1257)

There is a "heavy burden" on the defendants to justify their actions where they constitute a prior restraint. See Healy v. James, 92 S. Ct. 2338, 2347; Shanley, 462 F.2d at 969. It is clear that school administrators need not await the occurrence of actual disruption before exercising reasonable restraint over a student publication. See Butts v. Dallas Independent School District, 436 F.2d 728, 731 (5th Cir. 1971). However, mere "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." See Tinker, 89 S. Ct. at 737. (p. 1257)

The defendants have attempted to justify the first act of alleged censorship on several grounds. The faculty advisor claims that the printer had recommended the elimination of one or more paragraphs of the story, "New Teachers at McEachern," in order to improve the appearance of the page. The faculty advisor deleted the paragraph concerning new teachers' attitudes about homosexual teachers because he felt that it "did not fit in with the rest of the story and because the writer, Jennifer Dehart, had also felt that it did not fit." (p. 1258)

The faculty advisor was also responsible for substituting the word "darn" for the word "damn" in another article about a local radio personality. The faculty advisor maintains that he took this action in view of Cobb County School Board regulations that prohibit the use on campus of obscenities or vulgar language. He also felt that it would have caused a disruption among conservative and religious students and their parents. (p. 1258)

The court finds that these justifications, even though made in good faith, fail to satisfy the legal standards expressed in Tinker and Shanley. To allow the faculty advisor to excise possibly controversial material in the name of improving an article's appearance would too easily allow a circumvention of the Shanley rule that student expression may not be prohibited solely because of disagreement with its content. It is also inconceivable that the use of the word "damn" one time in the newspaper would have caused material and substantial interference with school activities. The actions of the faculty advisor cannot be sustained. (p. 1258)

The most serious allegation of censorship concerns the confiscation of the entire September edition of the Arrowhead. The defendants have sought to justify their actions in this regard on numerous grounds. The school principal expressed concern that the use of photographs from other publications without permission might have exposed the school to a suit for copyright infringement. Although this may have been a sufficient reason to delay distribution of the Arrowhead for a few days until competent legal advice was obtained on the matter, the court cannot conclude that it justified a total suppression of the newspaper. (p. 1258)

The principal also felt that an article entitled "Vietnam Syndrome" might be libelous. Although the article may be in poor taste, it clearly does not rise to the level of actionable libel under the standard set forth in New York Times Co. v. Sullivan, 84 S. Ct. 710. Again, had the principal merely delayed distribution of the Arrowhead while legal counsel was consulted, there would be no objection to his conduct. However, total suppression of the newspaper was not justified. (p. 1258)

The defendants have most closely approached the legal standard which justifies the prohibition of student expression in their assertion that the publication of certain articles in the September edition would have resulted in a substantial disturbance and disruption of student activities at McEachern High. One such article was entitled "Council Activities," and the defendants have alleged that it would have caused a substantial disturbance because it was critical of the student body president. They have also alleged that the article was a personal attack on that student, and thus constituted an "invasion of the rights of others," which has no constitutional protection under Tinker, 89 S. Ct. at 740. (pp. 1258-1259)

The court is unable to discern why the publication of this article would have led to a substantial interference with educational activities. It is the court's conclusion that the article's appearance would have, at most, provoked discussion and comment among the students at McEachern. (p. 1259)

Nor is the court able to comprehend the manner in which the article in question constitutes a personal attack upon the student body president. Although the story reports a dispute which occurred at a Student Council meeting with regard to the powers of the officers to assess dues, it does not vilify or ridicule the president, nor does it in any way attack his reputation or character. (p. 1259)

The defendants also objected to a fictitious "Letters" column, and were particularly concerned with a letter attributed to "D. Newburn" from "McEachern, GA." (p. 1259)

The student chaplain at McEachern High School is named Danny Newburn. Because the McEachern student body is generally religious and conservative, the principal felt that this letter would cause a disturbance and disruption if published. The court concludes, however, that the principal's good faith belief amounted to no more than an "undifferentiated fear or apprehension of disturbance," which Tinker instructs us "is not enough to overcome the right to freedom of expression." (89 S. Ct. at 737) In the absence of additional, compelling evidence, it was unreasonable to equate the possibility of controversy or adverse reaction with a substantial likelihood of disruption. (p. 1260)

The final allegation by the defendants concerning the September issue is that the article entitled "Advertising Metamorphosis" would have adversely affected racial relations at McEachern High School and caused a substantial disruption of student activities due to increased racial tensions. The court concludes that there was no reasonable basis to forecast that the publication of this material would cause a significant and material disruption at McEachern High. By all accounts, racial relations at the high school are good. The principal termed them "very good," while another of defendants' affiants, a black teacher, thinks they are "excellent." Of the seventeen hundred students at McEachern, only approximately 100 are black. Yet the student body president, who is black, was overwhelmingly elected by a 95% vote of the entire student body. There is no reason to believe that the article in question will destroy this harmonious atmosphere. (p. 1260)

Based on the foregoing analysis and a consideration of all the evidence before it, the court finds that the plaintiff has shown a strong likelihood of prevailing on the merits in this action. Moreover, the plaintiff, who was appointed as co-editor-in-chief of the Arrowhead for the 1979-80 school year, is suffering irreparable harm in being deprived of his editorial position. The newspaper was intended to be a learning experience for those students interested in journalism. This educational opportunity has been suspended. In addition, the students are being denied the right to disseminate and receive the information that would have been published in the newspaper. Under these circumstances, the court concludes that irreparable injury has been adequately demonstrated. (p. 1262)

The court also finds that the benefits to the plaintiff arising from the issuance of a preliminary injunction are not outweighed by the harm to the other parties, since it is apparent that the defendants will not suffer any harm if the material in question is published and distributed. Finally, the public interest will not be harmed by granting the injunction. On the contrary, the vindication of First Amendment rights is in the public interest. This is especially true in the present situation, since "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." See Shelton v. Tucker, 81 S. Ct. 247, 251. (p. 1262)

Disposition: The district court concluded that a preliminary injunction should be issued to enjoin the school district, the high school principal, and the faculty advisor from engaging in certain alleged acts of censorship and control over the school newspaper. (pp. 1252, 1262)

Citation: San Diego Committee Against Registration and the Draft (CARD) v. Governing Board of the Grossmont Union High School District, 790 F.2d 1471 (9th Cir. 1986)

Facts: CARD is a non-profit organization located in San Diego County, California, that is actively involved in counseling young men on alternatives to compulsory military service. CARD's membership consists of both students and non-students. The board is the governing body of the Grossmont Union School District and retains ultimate responsibility for the adoption and enforcement of policies, rules and regulations relating to administration of the district's schools, including policies affecting the student newspapers. (p. 1472)

In October 1982, CARD sought to purchase advertising space from five student newspapers published by high schools within the district. According to CARD, its advertisement was directed toward providing information and counseling to male students regarding alternatives to military service. CARD's requests were referred to faculty advisors for review and subsequently submitted to the principals of the five high schools. The principals, in turn, requested Robert Pyle, superintendent of the school district, to issue a policy guideline. (p. 1472)

On November 8, 1982, Bob King, acting assistant superintendent, issued a directive instructing all principals to reject CARD's requests on the ground that publication of the advertisements would contribute to the solicitation of illegal acts by the district's students. On January 17, 1983, CARD filed an administra-

tive claim with the board in which it sought reversal of the superintendent's decision. This claim was rejected on February 3, 1983. (pp. 1472-1473)

On March 16, 1983, CARD brought suit against the board pursuant to Title 42 U.S.C. Section 1983, alleging that the board's actions and policies had deprived CARD of its rights under the First and Fourteenth Amendments. CARD sought to enjoin the board from enforcing those policies, rules and regulations that had resulted in the rejection of CARD's advertisements. The district court upheld the governing board's actions. CARD appealed the decision to the Court of Appeals for the Ninth Circuit. (p. 1473)

Issues: The First Amendment issues in this case concern the following questions: 1) Does the school board violate CARD's First Amendment free speech rights when it excludes its advertisement after creating a limited public forum, and 2) have CARD's free speech rights been violated even if the school newspapers are a nonpublic forum? (p. 1471)

Holding: The Court of Appeals for the Ninth Circuit held that: 1) the school board had violated the First Amendment when it excluded, without advancing a compelling governmental interest, CARD's advertisement after creating a limited public forum by accepting military recruitment advertisements, and 2) the board violated the First Amendment's guarantee of free speech even if the school newspapers were a nonpublic forum. (p. 1471)

Reasoning: CARD contends that because others' advertisements relating to military service were published in several Grossmont High School newspapers, the board could not exclude CARD's advertisement, particularly since Card's advertisement presented an opposing viewpoint to the position taken in the previous ads. The values embodied in the First Amendment require the state, under certain circumstances, to provide members of the public with access to its facilities for purposes of speech. Certain state facilities, which may appropriately be used for communication, enjoy special constitutional status as "public forums." See Cornelius v. NAACP Legal Defense & Educational Fund, 105 S. Ct. 3439, and Perry Education Association v. Perry Local Educator's Association, 103 S. Ct. 948. (p. 1474)

In Perry and Cornelius, the Supreme Court identified three types of forums to which the public's right to access varies, as does the type of limitations the state may impose upon the right. The Court first focused on "places which by long tradition or by government fiat have been devoted to assembly and debate,"

such as streets and parks, where "the rights of the state to limit expressive activity are sharply circumscribed." See Perry, 103 S. Ct. at 954, and Cornelius, 105 S. Ct. at 3449. For a state to enforce content-based exclusion in these open public forums, it must show that the regulation is necessary to serve a compelling state interest. (p. 1475)

The second type of public forum on which the Court focused consists of "public property which the State has opened for use by the public as a place for expressive activity." See Perry, 103 S. Ct. at 955, and Cornelius, 105 S. Ct. at 3449. The courts have come to call this type of public forum a "limited public forum or a "public forum by designation." A limited public forum may, depending on its nature and the nature of the state's actions, be open to the general public for discussion of all topics, or there maybe limitations on the groups allowed to use the forums or the topics that can be discussed. Thus, a limited public forum may be open to certain groups for the discussion of any topic, or to the entire public for the discussion of certain topics. Once the state has created a limited public forum, its ability to impose further constraints on the type of speech permitted in that forum is quite restricted. (p. 1475)

The third type of forum is "[p]ublic property which is not by tradition or designation a forum for public communication," (Perry, 103 S. Ct. at 955), such as a military base or jail. The Court recognized that this type of forum is governed by standards different from those applicable to the first two. The Court stated, "[I]n addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable." See Perry, 103 S. Ct. at 955, and Cornelius, 105 S. Ct. 15 3448. "The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination." See Cornelius, 105 S. Ct. at 3454. (p. 1476)

The board contends that the school newspapers fall into the third category of forums, nonpublic forums. This court disagrees and holds that the newspapers fall into the second category, limited public forums. In deciding whether a particular forum is a limited public forum or a nonpublic forum, the courts must determine what type of forum the government intended to create. In this case, the evidence clearly indicates an intent to create a limited public forum. Newspapers, including the board's are devoted entirely to expressive activity. Everything that appears in a

newspaper is speech, whether commercial, political, artistic, or some other type. In addition, the admitted policy and practice of the board is to allow a particular group—the students—to discuss any topic in the newspapers, subject to certain conditions not relevant to the issues before this court. Thus, under the test enumerated in Cornelius, the board's newspapers, as most other school papers, constitute at minimum, a limited public forum. (p. 1476)

The board also allows non-students to use the forum it has created in the newspapers. The board's admitted policy and practice is to allow members of the general public to avail themselves of the forum as long as their speech consists of advertisements offering goods, services, or vocational opportunities to students. Because the newspapers are open to the entire public for discussion of these limited topics, the board has again created a type of limited public forum. See City of Madison Joint School District v. Wisconsin Employment Relations Commission, 97 S. Ct. 421. (p. 1476)

As a result, the dispute between the Board and CARD reduces itself to a debate over the precise limitations on the topics that may be discussed by non-students in the limited public forum the board has created. The board argues that it permits non-students to engage only in non-political commercial speech in the newspapers. It claims that the military service advertisements were non-political, but that CARD's ad is not. The district court agreed with the board and found that the military service advertisements published in the newspapers (1) offered vocational or career opportunities to students and (2) were non-political. (pp. 1476-1477)

This court agrees with the first part of the district court's finding but disagrees with the second. The advertisements regarding military service career opportunities are different from most career ads in several important respects. First, most career ads are commercial in nature. They involve the advertiser's "economic interests." In this case, the government's interest in promoting military service is not an economic one; it is essentially political or governmental. Nor is any commercial transaction being proposed. (p. 1477)

Second, it has long been recognized that the subject of military service is controversial and political in nature. There has been opposition to military service, both compulsory and voluntary, throughout our nation's history. The ads sponsored by the military advanced the position taken by the proponents of one side to

that political dispute. Accordingly, the district court erred when it found that the military recruitment advertisements were non-political. Thus, the board has allowed certain members of the public—various military recruiters—to use its newspapers to engage in speech that is not essentially commercial in nature but that combines elements of political and commercial speech. As a result, the board's actual policy and practice leads, under Cornelius, to the conclusion that the board has established the school newspapers as a limited public forum in which students can discuss any topic, and in which non-students can engage in commercial speech generally and in speech which is both political and commercial with respect to at least one important and highly controversial topic-military service. (pp. 1477-1478)

Because the board, on a number of occasions, permitted the publication of advertisements advocating military service, there can be no question but that the board intended to open the newspapers for advertisements on this topic—at least by one side to the debate. CARD's advertisement comes within the boundaries of the limited public forum the board has created. Having established a limited public forum, the board cannot, absent a compelling governmental interest, exclude speech otherwise within the boundaries of the forum. In particular, the board cannot allow the presentation of one side of an issue, but prohibit the presentation of the other side. See City of Madison, 97 S. Ct. at 426-427. (p. 1478)

In this case, the board permitted mixed political and commercial speech advocating military service, but attempted to bar the same type of speech opposing such service. The board has failed to advance a compelling governmental interest justifying its conduct. Accordingly, the board violated CARD's free speech rights under the First Amendment when it excluded its advertisements from the newspapers. In the alternative, this court holds that even if the board is correct in its assertion that the school newspapers are a nonpublic forum, its conduct still abridged constitutionally protected speech because its refusal to accept CARD's ads was unreasonable and constitutes viewpoint-based discrimination. (p. 1478)

Disposition: The decision of the District Court for the Southern District of California was reversed and remanded with instructions that the district court enter a preliminary injunction in favor of CARD. (p. 1481)

Citation: Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562 (1988)

Facts: The petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials; Robert Eugene Reynolds, the principal of Hazelwood East High School; and Howard Emerson, a teacher in the school district. The respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. (p. 565)

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982-1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community. (p. 565)

The board of education allocated funds from its annual budget for the printing of Spectrum. These funds were supplemented by proceeds from sales of the newspaper. (p. 565)

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each Spectrum issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school. (pp. 565-566)

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. (p. 566)

Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson, the journalism teacher, had deleted the student's name from the final version of the article. (p. 566)

Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled

press run and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce. He informed his superiors of the decision, and they concurred. (p. 566)

The respondents subsequently commenced legal action in the United States District Court for the Eastern District of Missouri seeking a declaration that their First Amendment rights had been violated, injunctive relief, and monetary damages. After a bench trial, the district court denied an injunction, holding that no First Amendment violation had occurred. The Court of Appeals for the Eighth Circuit reversed. The Supreme Court granted certiorari. (p. 566)

Issues: This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum. (p. 565)

Holding: The Supreme Court ruled that the respondent's First Amendment right to free speech was not violated. School authorities do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, as long as their actions are reasonably related to legitimate pedagogical concerns. (p. 563)

Reasoning: Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. at 736. They cannot be punished for merely expressing their personal views on school premises unless school authorities have reason to believe that such expression will substantially interfere with the work of the school or impinge upon the rights of other students." See Tinker, 89 S. Ct. 15 738. This Court has, nonetheless, recognized that the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings," Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159, and must be "applied in light of the special characteristics of the school environment." See Tinker, 89 S. Ct. at 736. A school need not tolerate student speech that is inconsistent with its "basic educational mission," Fraser, 106 S. Ct. 15 3165,

even though the government could not censor similar speech outside the school. This Court recognizes that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," 106 S. Ct. at 3164, rather than with the federal courts. (p. 567)

This Court deals first with whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all the attributes of streets, parks, and other traditional public forums. Hence, school facilities may be deemed to be public forums only if school administrators have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," Perry Education Association v. Perry Local Educators' Association, 103 S. Ct. at 956, or by some segment of the public, such as student organizations. See 103 S. Ct. at 955. If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. See 103 S. Ct. at 955. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." See Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 105 S. Ct. 3439, 3449. The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide. Board Policy 348.51 provided that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." School officials did not deviate in practice from their policy that the production of Spectrum was to be part of the educational curriculum and a "regular classroom activit[y]." School officials did not evince either "by policy or by practice," Perry Education Association, 103 S. Ct. at 956, any intent to open the pages of Spectrum to "indiscriminate use," 1035 S. Ct. at 956, by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]," 103 S. Ct. at 955, as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. See 103 S. Ct. at 955. It is this standard, rather than this Court's decision in Tinker, that governs this case. (p. 568)

The question whether the First Amendment requires a school to tolerate particular student speech—the question the Court addressed in Tinker—is different from

the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart knowledge or skills to student participants and audiences. Educators are entitled to exercise greater control over this second form of student expression to assure that participants can learn whatever lessons the activity is designed to teach, that readers and listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may, in its capacity as publisher of a school newspaper or producer of a school play, "disassociate itself," Fraser, 106 S. Ct. at 3165, not only from speech that would "substantially interfere with [its] work or impinge upon the rights of other students," Tinker, 89 S. Ct. at 738, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world—and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate intended speech on potentially sensitive topics. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," Fraser, 106 S. Ct. at 3164, or to associate the school with any position other than neutrality on matters of political controversy. Accordingly, this Court concludes that the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, this Court holds that 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. (pp. 569-571)

Disposition: The judgement of the Court of Appeals for the Eighth Circuit was reversed. (p. 573)

Citation: Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988)

Facts: In 1983, five students at Lindbergh High School in Renton, Washington, wrote a four-page newspaper entitled Bad Astra. They did so at their own expense, off school property, and without the knowledge of school authorities. The content of Bad Astra included articles written by the five students and which were generally critical of school administration policies concerning student activities, student service card requirements, and enforcement of student attendance. The newspaper also included a mock teacher evaluation poll, and poetry written by Stephen Crane, Edgar Lee Masters and Langston Hughes. The paper did not include any profanity, religious epithets, or any material which could be considered obscene, defamatory, or commercial. Students distributed approximately 350 copies of Bad Astra at a senior class barbecue; the president of the Lindbergh High School Parent Teacher Association, mother of one of the students, placed copies in school faculty and staff mailboxes. (p. 1150)

The school principal censured the students for not submitting Bad Astra for predistribution review pursuant to existing school board policy. The principal placed letters of reprimand in the students' files, where they remain. (pp. 1150-1151)

The five students, joined by their parents as guardians, commenced this action under U.S.C. Section 1983. They sought injunctive and declaratory relief holding the predistribution review policy unconstitutional under the First and Fourteenth Amendments, and asked that the students' reprimands be expunged from their records. The defendants included Brian Barker, principal of Lindbergh High School, Gary Kohlwes, the school superintendent, and members of the School Board of Renton School District No. 403. (p. 1151)

The policy in effect when the students were reprimanded ("old policy") was adopted by the Renton School District in 1977 and required prior approval by school officials of any material written by students enrolled in the school and which students wished to distribute on school premises. (p. 1151)

After the students' unauthorized distribution of Bad Astra, but prior to this lawsuit, the school board decided to revise its predistribution review policy. The "new policy," which included an administrative review procedure, stated that prior approval was necessary for distribution of ten or more copies of written material. (p. 1151)

For purposes of this appeal, the parties agree the plaintiffs would have been reprimanded under either policy, and that the "new policy" has effectively superseded the old. Under both versions, all student-written communications had to be submitted for prior approval before being distributed on school property; under both versions, students would be formally censured for failure to make such submission, and under neither version was this material objectionable. Also, under neither version did the school attempt to narrow or define the subject matter it wished to scrutinize in order to avoid subjecting all communication to possible censorship. (p. 1151)

Issues: The salient issue before the Ninth Circuit Court of Appeals in this case is whether the District Court for the Western District of Washington correctly held that the First Amendment permits school officials to require prior review, for possible censorship of objectionable content, of all student-written, nonschool-sponsored materials distributed on school grounds. (p. 115)

Holding: The school district policy requiring high school students to submit for approval any student-written material prior to distribution, regardless of whether forum for such material is school-sponsored, is an overly broad content-based prior restraint in violation of the First Amendment. (p. 1149)

Reasoning: The Supreme Court, in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, held that school officials may punish students for the content of their expression only in limited circumstances. In order to justify prohibiting any particular expression of opinion, they must show more than resultant discomfort or unpleasantness, but that the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." See Tinker, 89 S. Ct. at 738. The Court also held that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." See 89 S. Ct. at 737. (p. 1153)

The record in this case shows that this policy, with its censure of students for failing to present unob-

jectionable material for review, is the product of just such an "undifferentiated fear" of disruption. The school's action in this case is contrary to the principles laid down in Tinker. A decision upholding the school's action in this case would also be contrary to circuit decisions after Tinker involving situations in which student expression came into conflict with school discipline. The courts of appeal after Tinker were sensitive to examine whether interference with student expression was justified in a given case, and sensitive to the competing interests of the school in maintaining discipline and of the students in expressing their views. (p. 1154)

The majority of the courts of appeal considering policies similar to the one at issue here found them violative of the First Amendment because they were overly broad and inadequately focused on avoidance of disruption and interference with school discipline. While most of these opinions refrained from holding that any policy of prior review was per se a violation of the First Amendment, they found constitutionally objectionable policies of blanket review designed to censure out objectionable materials that could be described in only general terms. Decisions in the post-Vietnam era involving prior restraints dealt with nonschool-sponsored, or what were commonly referred to as "underground" publications, such as the Bad Astra. These decisions, however, did not focus upon any distinction between school-sponsored and nonschool-sponsored expression. (p. 1155)

The Supreme Court began to focus on that distinction beginning with its decision in Board of Education, Island Trees Union Free School District v. Pico, 102 S. Ct. 2799, and continuing in its subsequent decisions in Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159, and Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562. Implicit in Pico is the premise that control over the educational curriculum requires control by administrators over the content of what is taught; this is a premise made more explicit in Kuhlmeier. The corollary of this premise is that no similar content control is justified for communication among students which is no part of the educational program. In Fraser, the power of schools to impose standards not merely on the formal curriculum, but also on student conduct in school-sponsored forums, was the theme of the Court's decision (p. 1157). In this case, the communications, such as Bad Astra, which the school policy targets for review for censorship purposes are in no sense "school-sponsored." They are, therefore, not within the purview of the school's exercise of reasonable editorial control. The student distribution of nonschool-sponsored material under the

Supreme Court's decision in Tinker and Kuhlmeier cannot be subjected to regulation on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials, and no more than undifferentiated fear appears as a basis for regulation in this case. There is no justification for this policy, which conditions all distribution of student writings on school premises upon prior school approval. Interstudent communication does not interfere with what the school teaches; it enriches the school environment for the students. (p. 1159)

The policy of the Renton School District conditions distribution of all written materials on school premises upon prior school review for censorship purposes, and is directed at communications lacking any element of school support or endorsement. It is a blanket policy of unlimited scope and duration. For that reason, there is no need to decide under what more limited circumstances, if any, a school may impose a policy of predistribution review. This court holds that Renton's policy is overbroad and violates the appellants' First Amendment rights. This holding is limited to school distribution policies which are content-based and does not pertain to regulations of time, place, and manner of distribution. (p. 1159)

Disposition: The judgement of the district court was reversed and the case remanded with instructions to enter an order enjoining further enforcement of the review policy and directing the school to purge the plaintiff-students' records of reprimands for violating the policy. (p. 1159)

Citation: Planned Parenthood v. Clark County School District. 941 F.2d 817 (9th Cir. 1991)

Facts: Planned Parenthood of Southern Nevada (Planned Parenthood) brought suit under Title 42 U.S.C. Section 1983 against the Clark County School District (school district) seeking declaratory and injunctive relief for an alleged deprivation of its First Amendment rights. (p. 820)

The school district authorizes its high schools to publish newspapers, yearbooks, and athletic programs. Newspapers and yearbooks are published as part of the school district curriculum. Athletic programs are not produced as part of any particular course, but are distributed by the schools at school-sponsored events to inform spectators about the competition. (p. 820)

Principals are allowed to decide whether to accept advertising for these publications, to establish guidelines regulating acceptable advertisements and to de-

termine whether a proposed advertisement satisfies the guidelines, if any. All of the schools but one accept advertising. (p. 820)

The school district's advertising guidelines typically provide that the school reserves the right to deny advertising space to any entity that does not serve the best interests of the school, the school district, and the community. A faculty member, usually the principal, must approve all advertisements prior to publication. In addition to declaring that the school will not run any ads it deems lewd, obscene, or vulgar, the guidelines note that advertisements for certain products will not be accepted: X- or R-rated movies, gambling aids, tobacco products, liquor products, birth control products or information, drug paraphernalia, and pornography. (p. 821)

The school district also has enacted regulations dealing with "controversial issues," which provide in part, "No group or individual may claim the right to present arguments for or against any issue under study directly to students or to the class without authorization." (p. 821)

On numerous occasions between March 1984 and August 1985, Planned Parenthood submitted advertisements for publication in school district newspapers and athletic programs. Each ad offered routine gynecological exams, birth control methods, pregnancy testing and verification, and pregnancy counseling and referral. Most schools rejected the ad; one school continues to publish it. (p. 821)

Following trial on the stipulated facts, the district court concluded that under San Diego Committee Against Registration and the Draft (CARD) v. Governing Board of Grossmont Union High School District, 790 F.2d 1471, the publications were limited public forums for advertisements lawfully available to high school audiences, and that without showing a compelling government interest, the school district would have to publish Planned Parenthood's advertisements to the extent they fell within the forum created. When the Supreme Court thereafter decided Hazelwood, the district court withdrew its order and on reconsideration found that the publications were nonpublic forums and the exclusions reasonable. Planned Parenthood appealed the district court's judgement in favor of the school district. The panel affirmed, Planned Parenthood v. Clark County School District, 887 F.2d 935 and the Court of Appeals for the Ninth Circuit took the matter en banc. (p. 821)

Issues: Three central issues are encompassed within Planned Parenthood's claim that it was deprived of its first Amendment right of free speech. First, the issue of whether the high schools' publications constitute a public forum must be addressed. Second, the court must determine if these school-sponsored publications bear the imprimatur of the schools, such that they are within the intended purpose for which the forum is reserved. Third, the court is asked to decide if the schools' justification for not publishing Planned Parenthood's advertisements is reasonable. (pp. 817,820)

Holding: The Court of Appeals for the Ninth Circuit ruled that: 1) the publications at issue were not a public forum; 2) the school district, by accepting advertisements in high school newspapers, yearbooks, and athletic programs did not create a limited public forum for advertisers of lawful goods and services, but retained the right to disapprove of advertisements that might carry a school-sponsored message to the readers of its publications and put the school's imprimatur on one side of a controversial issue; and 3) the schools' justification for refusing to publish family planning advertisements was reasonable. (pp. 817-818)

Reasoning: Both parties agree that Planned Parenthood's advertisements are protected speech under the First Amendment. Therefore, this court must first resolve whether the schools' newspapers, yearbooks, and athletic programs are forums for public expression. Planned Parenthood seeks access to advertising space in school-sponsored publications. Hazelwood, 108 S. Ct. at 567, teaches that "school facilities may be deemed to be public forums only if school authorities have by policy or by 'practice' opened those facilities 'for indiscriminate use by the general public,' Perry Education Association v. Perry Local Educators' Association, 103 S. Ct. 948, 956, or by some segment of the public, such as student organizations." If, on the other hand, school facilities have been reserved for other intended purposes, "communicative or otherwise," no public forum will have been created and reasonable restrictions on speech may be imposed. See Hazelwood, 108 S. Ct. at 567; Perry, 103 S. Ct. 948, 1955. In this case, the school district and its principals treated all publications similarly. Their intent is most clearly evidenced by written policies that explicitly reserve the right to control content. Their practices were not inconsistent with these policies. This court, therefore, cannot conclude that the school district clearly intended to open its publications, including advertising space, for "indiscriminate use." Rather, like the school board in Hazelwood, the school district here showed an affirmative intent to retain editorial control and responsibility over

all publications and advertising disseminated under the auspices of the school. In light of the schools' policy in accepting advertising in school-sponsored publications, and their practice of retaining control and requiring approval, this court concludes that the record fails to reveal the requisite "clear intent to create a public forum." See Hazelwood, 108 S. Ct. at 569. Therefore, these school-sponsored newspapers, yearbooks, and athletic programs, including advertisements, are not public forums. The Supreme Court has often held that selective access to government property does not alone render it a public forum. (pp. 821-826)

When "school-sponsored" speech can fairly be characterized as part of the schools' mission, which the Court broadly defined, the First Amendment affords educators "greater control" in deciding when the school will affirmatively "promote" or "lend its name and resources" to particular speech. See Hazelwood, 108 S. Ct. at 570-571. School-sponsored publications bear the name of the school. The newspapers and yearbooks are produced as part of the course curriculum, and the school directly distributes athletic programs at school events. School officials have editorial control over the contents of these publications and must specifically approve advertisements for publication. Accordingly, it is not at all unlikely that members of the public, parents of school children in particular, might reasonably perceive school-sponsored publications to "bear the imprimatur of the school" and associate the school in some way with the content of a particular advertisement. A school's decision not to promote or sponsor speech that is unsuitable for immature audiences, or which might place it on one side of a controversial issue, is a judgement call which Hazelwood reposes in the discretion of school officials and which is afforded substantial deference. This court, therefore, concludes that controlling the content of school-sponsored publications so as to maintain the appearance of neutrality on a controversial issue is within the reserved mission of the Clark County School District. (pp. 828-829)

Having concluded the advertising pages in the school district's school-sponsored publications are nonpublic forums, this court now considers whether the schools' justification for refusing to publish Planned Parenthood's advertisement is reasonable. When school facilities are not opened up as forums for public expression, Hazelwood recognizes the school board's authority over school-sponsored speech. In light of the nature of the school environment, educators must have the ability to consider the "emotional maturity of the intended audience" as well as the authority to refuse

to "associate the school with any position other than neutrality on matters of political controversy." See Hazelwood, 108 S. Ct. at 570. "Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate on the free exchange of ideas." See Cornelius v. NAACP Legal Defense and Education Fund, 105 S. Ct. at 3453. This court, therefore, agrees with the district court that the school district's policy of not publishing advertisements that are "controversial, offensive to some groups of persons, that cause tension and anxiety between teachers and parents, and between competing groups such as [Planned Parenthood] and pro-life forces" is a reasonable one. Exclusion of Planned Parenthood's advertisements serves the goal of preserving the schools' editorial control over school-sponsored publications and preventing advertising sections of those publications from becoming a forum for debate on family planning. The school district and individual school principals could reasonably choose to have the family planning debate take place in the classroom rather than in the advertising papers of its school-sponsored publications. (pp. 829-830)

In summary, this court concludes that the Clark County school-sponsored publications, including advertising spaces, are nonpublic forums. The decision to feature advertising in newspapers, yearbooks, and athletic programs does not indicate the clear intent to abdicate editorial control over their contents and create a forum for advertisers of lawful goods and services. These schools retained the right to disapprove of advertisements that might carry a school-sponsored message to readers of its publications and put their imprimatur on one side of a controversial issue. Because their decision to limit access, whether wise or unwise, is reasonable and not an effort at viewpoint discrimination, the school district did not violate the First Amendment's Free Speech Clause in declining to publish Planned Parenthood's advertisements. (p. 830)

Disposition: The decision of the district court was affirmed. (p. 830)

Citation: Yeo v. Lexington, 1997 WL 292173 (1st Cir. (Mass.))

Facts: The seed from which this case germinated was the Lexington School Committee's 1992 decision to distribute condoms and information packets about their proper use as part of "safe sex" education to high school students without parental consent. The school committee's decision was both preceded and followed by extensive

controversy and much public debate within the school and the wider community. (p. 8)

Proponents of a condom distribution policy circulated support petitions at Lexington High School ("LHS") and succeeded in securing the signatures of some 500 students, faculty members, and administrators, a figure representing about one-third of the LHS community. The LHS Student/Faculty Senate voted in favor of the condom policy. When the school's principal, David A. Wilson, vetoed the measure, the Senate responded in kind by voting to override his veto. (p. 8)

The high school newspaper, the Musket, took an immediate and keen interest in following the story as it developed. In its January 31, 1992, edition, it took a strong editorial position in favor of making condoms freely available at LHS. Among the teachers who were most prominent in supporting the proposed condom policy and advocating its adoption before the Lexington School Committee was Samuel Kafrissen, a faculty member of the LHS Senate and the Musket's faculty advisor. (p. 8)

Yeo, a bass trombonist with the Boston Symphony Orchestra who had been featured in the Musket and had played with LHS music groups, was among the Lexington parents who opposed the School Committee's decision to make condoms and "safe sex" materials available free of charge and without parental consent. Yeo helped to organize a group called the Lexington Parents Information Network ("LEXNET"), whose stated purpose was to help inform Lexington parents about public school issues. In November 1993, Yeo, acting on behalf of LEXNET, sent an advertisement to the LHS Yearbook, along with a check for $200. The ad's text stated:

We know you can do it!
ABSTINENCE:
The Healthy Choice
For accurate information on abstinence,
safer sex and condoms,
contact:
Lexington Parents Information Network(LEXNET)
Post Office Box 513, Lexington
Massachusetts 02173 (pp. 8-9

Several days after Yeo submitted this ad, the Yearbook's co-editors asked their faculty advisor, Mechem, to call Yeo and inform him that the Yearbook was not going to print his ad as submitted, but would be willing to offer him the chance to rewrite it as a message of congratulations to the graduating senior class, without any mention of sexual abstinence. In the subsequent phone conversation between Mechem and Yeo, Yeo

rejected the suggestion that he rewrite the ad. Mechem then conferred with Kafrissen, the Musket faculty advisor, and on February 4, 1994, she wrote a letter to Yeo in which she stated that "[b]ecause of the non-controversial nature of the advertising section of the Yearbook, we have decided not to print [the] advertising you have submitted." On February 13, Yeo wrote back asking the Yearbook to reconsider its rejection. (p. 9)

On February 24, Yeo did in fact receive a response, but from Dong Shen, business manager of the Musket, who wrote to inform him that the newspaper, too, would not print his ad. Yeo then protested the refusals to Principal Wilson and other school officials. The town's legal counsel advised Wilson that the newspaper and yearbook should print the ads so as to avoid possible litigation. Wilson contacted Kafrissen to notify him of the town counsel's legal opinion. (p. 9)

The Musket, in turn, sought its own legal advice, and relying on the opinion received, decided to stand by its refusal to print the LEXNET ad. On March 1, 1994, Kafrissen wrote a letter to Yeo on behalf of the Musket in which he set forth a compromise solution; specifically, the newspaper would print a letter to the editor from Yeo in which he could state his opinion on the condom policy. That same day, Yeo met with Principal Wilson, who told Yeo that Superintendent Young was anxious to see the school newspaper and yearbook print the LEXNET ads because that was what the town's legal counsel had recommended. Yeo insists that Wilson assured him that the ads would be published, something Wilson denies, but Wilson, in any event, accepted the still-uncashed check that Yeo had originally submitted with the Yearbook ad, which the Yearbook had returned. (p. 9)

On March 7, Yeo responded to Kafrissen's letter. In his reply, he refused the Musket's proposed compromise and explained his view that the newspaper's refusal to print the ad amounted to a violation of his free speech rights. Four days later, Superintendent Young convened a meeting of the respective chief editors and faculty advisors of both the Musket and the Yearbook, with Principal Wilson also attending, to discuss the dispute. On March 18, Young chaired a second, similar meeting that included two Lexington school committee members. Superintendent Young urged the student editors to take the time to reflect and to consider carefully the implications of their continued refusal to print the ads, particularly in light of Yeo's credible threat of pursuing the matter in court. The assembled school officials, nonetheless, made it clear to the students that they "support[ed] the students' right to

decide." The students, for their part, were not to be moved. By April 8, 1994, the Musket and LHS Yearbook had both reaffirmed their refusal to print the LEXNET abstinence ads. Before the month was out, Yeo filed this suit in federal district court. (pp. 9-10)

Yeo's federal action claimed that the refusals of the school newspaper and yearbook to print the ads he submitted on behalf of LEXNET violated his rights to free speech and equal protection as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution, Article 16 of the Massachusetts Declaration of Rights, and Title 42 U.S.C. Section 1983. Yeo sought a temporary restraining order prohibiting publication of either the newspaper or the yearbook in the event they did not include the LEXNET ad. The district court denied the motion and refused Yeo's subsequent attempt to preliminarily enjoin publication of the school newspaper. This court affirmed the district court's refusal to grant the preliminary injunction, dismissed Yeo's appeal for want of appellate jurisdiction on the ground of mootness, and remanded the case to the district court. The district court granted the defendants' motion for summary judgment on the ground that Yeo could not establish state action. This appeal ensued. (p. 10)

Issues: The following First Amendment issues related to student expression and speech are addressed in this case: 1) Are the advertising papers of a public high school's newspaper and yearbook considered to be "limited public fora" for First Amendment purposes? 2) Does an editorial policy against accepting political or advocacy advertising by a public high school's newspaper and yearbook constitute an impermissible content-based restriction? 3) Is the rejection by a public high school newspaper and yearbook of advertisements submitted by a parent organization on grounds that they were "controversial" or "objectionable" impermissible viewpoint discrimination under the First Amendment? (pp. 5-6)

Holding: The Court of Appeals for the First Circuit determined that: 1) the advertising pages of a public high school's newspaper and yearbook were, for First Amendment purposes, "limited public fora" which could not constitutionally be subjected to content-based restriction; 2) under First Amendment analysis, an editorial policy against acceptance of political or advocacy advertising by a public high school's newspaper and yearbook was impermissibly content-based and did not render their advertising pages nonpublic, where such advertising pages otherwise fell within the definition of a limited public forum; and 3) rejection by a public high school's newspaper and yearbook of ad-

vertisements submitted by a parent organization on grounds that they were "controversial" or "objectionable" gave rise to the appearance of presumptively impermissible viewpoint discrimination, in light of the school newspaper's strong editorial stance in favor of condom distribution in the high school and the fact that all-text advertisements at issue were no different in appearance than many others published and incorporated no images or language inappropriate for high school minors. (pp. 5-6)

Reasoning: Using the Supreme's Court's discussion in Hazelwood as a reference point, this court considers the relationship between Lexington High School and the two school publications in question: the Musket and the Yearbook. Nothing in the record evidence suggests that either publication escapes the reasonable perception that it bore the imprimatur of the school. To be sure, unlike the school paper in Hazelwood, neither the Musket nor the Yearbook seems to have been produced by students for academic credit, and neither publication was required to submit proofs to the school principal for his approval prior to publication. See id. 108 S. Ct. at 568-569. Nevertheless, school-paid faculty members supervised both the Musket and the Yearbook, and both publications were at least partly designed to impart knowledge about journalism and publishing to the student participants. The newspaper's faculty advisor, Sam Kafrissen, is a resource to the student newspaper staff whose mission is to facilitate both their learning experience and the successful publication of the Musket. Karen Mechem, the Yearbook's advisor, trains the student editors in the technical issues involved in publishing the Yearbook and makes herself available to provide guidance to the students upon request. (p. 12)

On these facts, Hazelwood instructs that both the Musket and the Yearbook "may fairly be characterized as part of the school curriculum" because both publications "are supervised by faculty members and [are] designed to impart particular knowledge or skills to student participants." (108 S. Ct. at 570) Indeed, "it is not at all unlikely that members of the public, parents of school children in particular, might reasonably perceive school-sponsored publications to bear the imprimatur of the school." See Planned Parenthood of Southern Nevada, Inc. v. Clark County School District, 941 F.2d 817, 828 (9th Cir. 1991). Because Lexington High School is a public secondary school, the refusals by the Musket and Yearbook to print the LEXNET abstinence ads constituted actions attributable to the state. (p. 12)

Having addressed the threshold state action requirement, the court now turns to Yeo's arguments regarding his alleged federal and state constitutional rights of access to the advertising pages of the Musket and LHS Yearbook. Yeo's argument, in essence, "is based on the notion that when the state provides a communication forum generally open to the public, the state may not discriminatorily forbid the use of the forum by certain individuals because of the content of their proposed messages." See Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1080 (5th Cir. 1976). Evaluating the legal merits of Yeo's argument requires this court to do two things. First, the court must determine whether the Musket and the Yearbook engaged in state action, which the court has answered in the affirmative based on its Hazelwood analysis. Second, it requires the court to ascertain whether the advertising sections of the school publications were public fora at the time the LEXNET ads were rejected. (p. 14)

The litigants do not dispute that LEXNET's abstinence advertisements are protected speech under the First Amendment and Article 16 of the Massachusetts Declaration of Rights. Instead, the dispute revolves around Yeo's alleged right to have the ads he submitted on behalf of LEXNET printed in the Musket and Yearbook. This question requires that the court resolve whether the school newspaper [and] yearbook are forums for public expression." See Planned Parenthood, 941 F.2d at 821; see also Hazelwood, 108 S. Ct. at 568. (p. 14)

In analyzing this question, this court first notes that Yeo sought access to the school publications' advertising sections. This fact requires the court to focus attention on whether the publications' ad spaces, not the entire publications, were public fora at the time the ads were rejected, because "the access sought by the speaker" identifies the relevant forum. See Cornelius v. NAACP Legal Defense & Education Fund, 105 S. Ct. 3439, 3448. (p. 14)

The parties do not dispute that the facts of this case either permit or compel the disaggregation of the publications into component parts for purposes of discerning the existence of public/nonpublic fora. The parties disagree, however, on how to characterize the ad spaces in question. The defendants suggest that the Musket acted properly in giving Yeo the option of writing a letter to the editor. The Musket's rationale for allowing Yeo to write a letter when it would not publish his LEXNET ad was, in the words of Kafrissen's letter to Yeo on the subject, that the paper "long considered the Letters to the Editor section of the Musket," but not its ad space, "to be a public forum." In advancing the argument about the letter-to-the-edi-

tor compromise, the defendants thus grasp at what the court in Cornelius laid out, namely that the relevant forum for First Amendment purposes in this case is not the publications per se, but rather their ad space, because their ad space is "the particular channel of communication" to which the speaker seeks to have access. See Cornelius, 105 S. Ct. at 3448; see also Planned Parenthood, 941 F.2d at 840. (pp. 14-15)

Under well-established First Amendment jurisprudence, traditional public fora are "streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" See Perry Educational Association v. Perry Local Educators' Association, 103 S. Ct. 948, 954-955. Designated public fora come into being when the government decides to open other property or avenues of communication "'for indiscriminate use by the general public,' or by some segment of the public." See Hazelwood, 108 S. Ct. at 568 (quoting Perry, 103 S. Ct. at 956). The government need not, however, open its property or channels of communication indiscriminately. It may restrict public use of a forum, for instance, by limiting its use to certain classes of speakers (e.g., student groups) or certain subjects (e.g., school board business), and thus create a limited public forum. See Rosenberger v. Rector & Visitors of University of Virginia., 115 S. Ct. 2510, 2516-2517; Cornelius, 105 S. Ct. at 3448-3449; Perry, 103 S. Ct. at 954-956 and n. 7; Widmar v. Vincent, 102 S. Ct. 269, 273-274; City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission, 97 S. Ct. 421. While the government need not open its otherwise closed property or channels of communication in this way, "[o]nce it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set," and may not thereafter exclude speech from the property or means of communication in question except for reasons anchored in "'the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint." See Rosenberger, 115 S. Ct. at 2517 (quoting Cornelius, 105 S. Ct. at 3451). (p. 15)

Thus, this court must determine whether the advertising pages of the Musket and LHS Yearbook (not being traditional public fora), cf. Hazelwood, 108 S. Ct. at 567-568, had been opened to the public during the academic year in question, 1993-1994, either fully or in a more limited fashion. To resolve this question, Supreme Court precedent requires this court to look to the government's intent or to governmental policy or practice. See id. ("[S]chool facilities may be deemed to be public forums only if school authorities have by

policy or by practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations.") Also, despite what the defendants would have this court believe, the record facts indicate that both publications evidenced and acted upon a "clear intent" to open their advertisement sections to at least a segment of the public, specifically commercial businesses, nonprofit organizations, and members of the school community. See Hazelwood, 108 S. Ct. at 569-570; Cornelius, 105 S. Ct. at 3448-3449. (pp. 15-16)

The defendants argue that the two publications did not reveal any intent to create a public forum. Their position is that both school publications: (1) maintained policies dictating that all ads were subject to final approval and acceptance by the student editorial boards (a situation, at least with regard to the Musket, of which Yeo was made aware upon his request for advertising rates), (2) had policies against acceptance of any political or advocacy ads, and (3) had maintained practices consistent with these policies in that they had never published any political or advocacy ads. The defendants contend, therefore, that the advertising spaces in the Musket and the Yearbook were nonpublic, and, thus, that the publications' decisions to reject the LEXNET abstinence ads are not subject to strict scrutiny. This court disagrees. (p. 17)

The defendants' assertion of plenary editorial control over the advertising space is fundamentally mistaken because it assumes that government officials may create a nonpublic forum and escape strict scrutiny merely by declaring their intent to control content as they see fit. On the theory argued by the school officials, so long as government reserves for itself broad, better yet, unbridled, discretion to censor expression, then it will be deemed to have intended to create a nonpublic forum, and its content-based exclusions will escape strict scrutiny. See Planned Parenthood, 941 F.2d at 831. In Planned Parenthood, a case involving a family planning group's claimed right to advertise in a high school newspaper and other publications, the Ninth Circuit majority denied access and adopted the position that school-sponsored publications do not display the requisite intent to create a public forum (as mandated by Hazelwood and Cornelius) where they open their ad pages to the public but retain discretion to deny any ad submitted by a business or individual that is not in the school's "best interest." Id. at 824. (p. 17)

While selective access to government facilities does not a public forum make, see Perry, 103 S. Ct. at 956,

this court cannot accept the proposition that government can selectively, and with sole and absolute discretion, open its facilities or avenues of communication along purely content-based lines, and thus determine to admit the messages it likes and choose to exclude the messages it dislikes on no basis beyond the messages' content. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." See Rosenberger, 115 S. Ct. at 2516. The Ninth Circuit's position reduces the Supreme Court's designated public forum doctrine to a circular nullity because it would allow government to use impermissible content-based exclusions not anchored to any intended reserved purpose for the forum as conclusive proof that the forum is not open to the public, thereby allowing the content-based exclusions to survive less strident reasonableness review. (p. 17-18)

This court thus rejects the Ninth Circuit majority's position because it misconstrues Perry, a seminal case in the Supreme Court's public forum jurisprudence. Perry allows a state actor either to "reserve [its] forum for intended purposes" (thereby retaining the nonpublic nature of the forum or making it a "limited purpose" forum), or to impose "[r]easonable time, place and manner regulations." (103 S. Ct. at 955-956 2nd n. 7) Perry makes it clear that "content-based prohibition[s]" that are not linked to any "intended purposes" for the forum "must be narrowly drawn to effectuate a compelling state interest." Id. 103 S. Ct. at 955 (citing Widmar, 102 S. Ct. at 274). Perry goes on to make clear that even state actors who reserve a forum for intended purposes can regulate speech only "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." Id. (p. 18)

At the core of the advertisement restriction policies at issue in this case is the claimed unbridled discretion of the two school publications to reject any ad. Such unfettered discretion is impermissible under Supreme Court precedent. It is one thing for an entity engaging in state action to reserve a forum for a specific, lawful purpose and then to exclude from the forum only expression that is incompatible with that purpose (as the Court found was the case in Cornelius, Perry, and Hazelwood); it is another thing for a state entity to "open up its facilities indiscriminately with no specific purpose that narrow[s] its discretion to engage in [impermissible] content control." See Planned Parenthood, 941 F.2d at 832 (dissenting opinion). Put simply, state actors cannot open their facilities and other avenues of communication to the public and yet seek to retain unbridled discretion to

refuse a proposed use of the forum for any reason they subsequently deem sufficient. See Rosenberger, 115 S. Ct. at 2517. (p. 19)

This court does not ascribe any significance to the defendants' argument that the ad spaces in question were not public fora because of the possible existence of certain unwritten policies or practices. The undisputed material facts in the record indicate that policies or practices allegedly in existence against political or advocacy ads did not form the basis for rejecting these ads. The record demonstrates that the ads were instead rejected because the Musket and Yearbook deemed them controversial. (p. 21)

In reviewing the record, this court finds no intended purpose for the fora at issue here other than (1) the collection of revenue, or (2) the creation of effective communication among businesses, non-commercial entities, and members of the LHS community. Both publications charged businesses for commercial speech aimed at informing students and other readers of the goods or services that the advertisers were capable of providing. The Musket also had a policy and practice of publishing ads for nonprofit organizations at no charge. The record reflects no evidence, however, that the publications published ads for any instructional purposes relating to the education of its student editors. (p. 21)

In Hazelwood, the Supreme Court concluded that the school intended to reserve the copy space of its curricular newspaper for use consistent with an intended purpose that the paper be a "supervised learning experience for journalism students." (108 S. Ct. at 569) The situation in Hazelwood, however, is not analogous to this case. Hazelwood involved students' asserted right to select certain articles for publication in a public school newspaper free of school officials' objections. Moreover, the forum in question was opened to students for a specific educational purpose. The Court determined that the newspaper constituted a non-public forum and ruled that school-imposed restrictions on proposed news articles were permissible to the extent that they were rationally related to the forum's reserved educational purpose. See Hazelwood, 108 S. Ct. at 570-571. Here, the court has an apparent assertion of an unbridled right of student-edited public school publications to refuse to publish ads in advertising sections that had been previously opened to large segments of the public (specifically, commercial businesses, non-profit organizations, and members of the school community) with no apparent restrictions or purpose in mind other than to raise money or to provide an effective forum for those interested in

communicating messages to students and other members of the school community. (pp. 21-22)

Thus, this court finds that these advertisement sections were limited public fora at the time of the relevant events described earlier. The court therefore concludes that the school publications' refusals to print the LEXNET ads in these spaces during the relevant 1993-1994 academic year were permissible only to the extent that the rejections pass muster under a strict scrutiny analysis. See Perry, 103 S. Ct. at 955. ("Reasonable time, place, and manner regulations are permissible [in a designated public forum, but] ... a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.") (pp. 21-22)

It should be understood that this court's holding does not stop public school publications "from banning ads for liquor, drugs, X-rated movies or other products inappropriate for minors. Banning ads for such products would easily pass First Amendment muster, either under strict scrutiny or reasonableness review." See Planned Parenthood, 941 F.2d at 844 (dissenting opinion). It should further be understood that school publications that wish to solicit advertisements can do so without fear that they will lose control over their ad spaces or render them into bulletin boards for warring political and social viewpoints. This court's holding primarily addresses the problem of decision to reject ads made pursuant to policies purporting to give state entities unbridled discretion over access to public fora. The court's holding does not address the situation in which ads are permissibly refused according to a "rational and [content-]neutral policy, implemented in a non-discriminatory fashion." See AIDS Action Committee of Massachusetts, Inc. v. MBTA, 42 F.3d at 12. The court's ruling permits school publications to winnow out the chaff, but it requires them to do so with a legitimate reserved purpose in mind and in accordance with clearly articulated procedural safeguards that protect against the risk of constitutionally disfavored content-based or viewpoint censorship. When government entities open their facilities or avenues of communication to the public, they "cannot shut them discriminatorily to a few without satisfying the most stringent constitutional safeguards." See Planned Parenthood, 941 F.2d at 844 (dissenting opinion). (pp. 22-23)

The appeal Yeo has brought "is not the ordinarily encountered First Amendment case in which a student newspaper seeks to set aside an order directing it not to publish something which it wishes to publish. To the contrary, it is a case in which a group seeks ju-

dicial compulsion against a student newspaper requiring publication of an advertisement which that paper does not want to publish." See Mississippi Gay Alliance, 536 F.2d at 1074. Because it appears that the school publications opened their advertising spaces to the public with no apparent, reserved, intended purposes beyond raising money or providing an effective means of communicating commercial, nonprofit, and personal messages to the LHS school community, this court determines that the ad spaces in question, as a matter of law, constituted limited public fora under the public forum doctrine. On the evidence presented, this court thus concludes that the district court erred in granting summary judgment for the defendants-appellees. (p. 24)

Disposition: The appellate court reversed the ruling of the District Court of Massachusetts and remanded the case for further proceedings consistent with this opinion. (p. 24)

Sending Information Home Via Students

Citation: Buckel v. Prentice, 572 F.2d 141 (6th Cir. 1978)

Facts: This litigation grew out of an unsuccessful effort by the appellants to distribute a circular to parents of children enrolled at Kingswood Elementary School in Columbus, Ohio. The appellants wanted to distribute the circular by having school children take it home to their parents. The materials were written by a parent, appellant, William L. Buckel. On April 3, 1974, Buckel presented copies of the circular to the principal of the school for the purpose of distribution to homes via students. The principal refused to allow the children to take the materials home to their parents. The superintendent of the Columbus City Schools and the board of education upheld the decision of the principal. (p. 142)

The appellants filed this action under Title 42 U.S.C. Section 1983, charging violation of their rights under the First and Fourteenth Amendments. It is contended that the school officials have created a public forum by permitting a wide variety of printed information to be sent home to parents via the school-age children, and that access to this public forum cannot be denied to the appellants. (p. 142)

Issues: The First Amendment issue presented in this appeal centers on the question of the creation of a public forum. Namely, do school officials create a public forum for First Amendment purposes by permitting a

wide variety of printed information to be sent home to parents via school-age children? (p. 142)

Holding: The Court of Appeals for the Sixth Circuit determined that because the materials prepared by the plaintiffs were not offered in response to anything previously distributed from the school by way of student messengers, the plaintiffs were, in fact, seeking to create a forum rather than to use one created by the defendants. Hence, the defendants had not created a public forum for the expression of ideas or the dissemination of information. (pp. 142-143)

Reasoning: The district court found as follows:

> [T]he distribution via students of information concerning coming theatrical events, home safety measures, and the like, is not indicative of the establishment of a forum for First Amendment purposes. Dissemination of such material is a logical and a proper extension of the educational function of schools in our society, and such dissemination does not of itself give rise to any right of access to student distribution by parents or other concerned citizens. 410 F. Supp. at 1247 (p. 142)

The district court also stated, "If plaintiffs were seeking to take issue with the content of the materials heretofore permitted to be distributed, a different case might be presented." This court agrees with the distinction. Because the materials prepared by the plaintiffs were not offered in response to anything previously distributed from the school by way of student messengers, the plaintiffs were seeking to create a forum rather than to use one created by the defendants. (p. 143)

The court further held that the distribution of the materials described in its opinion, including an earlier circular prepared by appellant Buckel, "is insufficient to support a finding that defendants have created a public forum for the expression of ideas or the dissemination of information." 410 F. Supp. at 1247 (p. 143)

Disposition: The decision of the District Court for the Southern District of Ohio was affirmed. (p. 143)

Student Dress and Appearance

Citation: Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966)

Facts: Several days prior to September 21, 1964, Mr. Montgomery Moore, Principal of the Booker T. Washington High School of Philadelphia, Mississippi, learned that a number of his students were wearing "freedom buttons" obtained from the headquarters of the Council of Federated Organizations, which had been established in Philadelphia, Mississippi. The buttons were circular, approximately 1-1/2 inches in diameter, containing the wording "One Man One Vote" around the perimeter with the "SNCC" inscribed in the center. Thereupon, he announced to the entire student body that they were not permitted to wear such buttons in the school house or in their various classes. Mr. Moore testified that this disciplinary regulation was promulgated because the buttons "didn't have any bearing on their education," "would cause commotion," and would be disturbing [to] the school program by taking up time trying to get order, passing them around and discussing them in the classroom and explaining to the next child why they are wearing them." Despite Mr. Moore's announcement, on September 21, 1964, three or four children appeared at school wearing the buttons. All were given an opportunity to remove the buttons and remain in school, but three of the children elected to keep them and return home. The following day all the children returned to school without their buttons. On the morning of September 24, 1964, Mr. Moore was summoned to the school by one of the teachers who reported that 30 or 40 children were displaying the buttons and that it was causing a commotion. Mr. Moore then assembled the children in his office, reminded them of his previous announcement, and gave them the choice of removing their buttons or being sent home. The great majority elected to return home, and Mr. Moore thereupon suspended them for a period of one week. Mr. Moore then delivered a letter to each parent concerning the suspension, and all parents agreed to cooperate in the matter except Mrs. Burnside, Mrs. English, and Mrs. Morris, whereupon injunctive proceedings were instituted against the school officials to enjoin them from enforcing the regulation. (pp. 746-747)

Issues: The appellants contend that the school regulation forbidding "freedom buttons" on school property is an unreasonable rule which abridges their children's First Amendment freedom of speech. (p. 747)

Holding: The Court of Appeals for the Fifth Circuit ruled that the high school's regulation prohibiting students from wearing "freedom buttons," which do not appear to hamper the school in carrying out its regular schedule of activities, was arbitrary, unreasonable, and an unnecessary infringement on the students' protected right of free expression and speech. (p. 745)

Reasoning: The interest of the state in maintaining an educational system is a compelling one, giving rise to a balancing of First Amendment rights with the duty of the state to further and protect the public school system. The establishment of an educational program requires the formulation of rules and regulations necessary for the maintenance of an orderly program of classroom learning. In formulating regulations, including those pertaining to the discipline of school children, school officials have a wide latitude of discretion. But the school is always bound by the requirement that the rules and regulations must be reasonable. It is not for this court to consider whether such rules are wise or expedient, but merely whether they are a reasonable exercise of the power and discretion of the school authorities. Regulations which are essential in maintaining order and discipline on school property are reasonable. Thus, school rules which assign students to a particular class, forbid unnecessary discussion in the classroom, and prohibit the exchange of conversation between students are reasonable even though these regulations infringe on such basic rights as freedom of speech, because they are necessary for the orderly presentation of classroom activities. Therefore, a reasonable regulation is one which measurably contributes to the maintenance of order and decorum within the educational system. The regulation which is before this court prohibits the wearing of "freedom buttons" on school property. The record indicates only a showing of mild curiosity on the part of other school children over the presence of some 30 or 40 children wearing such insignia. Thus it appears that the presence of "freedom buttons" did not hamper the school in carrying on its regular schedule of activities; nor would it seem likely that the simple wearing of buttons unaccompanied by improper conduct would ever do so. If the decorum had been disturbed by the presence of "freedom buttons," the principal would have been acting within his authority, and the regulation prohibiting the presence of buttons on school grounds would have been reasonable. But the affidavits and testimony before the district court reveal no interference with educational activity and do not support a conclusion that there was commotion or that the buttons tended to distract the minds of the students away from their teachers. This court must also emphasize that school officials cannot ignore expressions of feelings with which they do not wish to contend. They cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate

discipline in the operation of the school. (pp. 748-749)

Disposition: The order entered by the district court denying the preliminary injunction sought was vacated, the judgement was reversed, and the cause was remanded with directions to the district court to grant a preliminary injunction enjoining the officials of Booker T. Washington High School from the enforcement of the disciplinary regulation forbidding their students from wearing "freedom buttons" on the school premises. (p. 749)

Citation: Davis. v. Firment, 269 F. Supp. 524 (E.D.La. 1967)

Facts: Plaintiff Howard Davis filed this suit on behalf of his fifteen-year-old son, Dave Davis, against the Orleans Parish School Board, its superintendent, Dr. Carl J. Doice, and against A. L. Firment, who is the principal of its John F. Kennedy Senior High School where Dave Davis began his sophomore year on August 31, 1966. (p. 525)

The suit against the school board seeks damages due to public embarrassment of the father and the son each in the sum of $12,000.00 for the reason that student Davis was suspended from attendance at school, some sixteen days after the academic school year began, because the student's hair was too long, styled somewhat after the Beatle-type haircut. In addition to the damages for embarrassment sought by the father and son, the plaintiff asks for issuance of a preliminary injunction on which a hearing was held by this court. (p. 525)

The principal of Davis' high school distributed during the first three days of school a student handbook explaining a demerit plan which is geared to promote discipline and which provides for the imposition of demerits which can result in suspension, expulsion, or even loss of schoolwide honors. The student handbook referred to the fact that regulations regarding dress for students would be posted in all classrooms during these first three days. A mimeographed sheet entitled "Dress and Grooming Regulations" was issued by the principal and posted in all classrooms which included a hair-style regulation. (pp. 525-526)

The record in this case shows that student Davis was told by at least two of his teachers on September 9 and 12, 1966, that his hair should be cut because it was excessively long and violated the principal's regulations on the subject.

> Finally, on September 16, the principal suspended student Davis for three days because of his failure to have his hair cut in conformity with the principal's instructions. Student Davis therefore was suspended for willful disobedience to the principal's instruction to get a hair cut, which instruction was legally given under state law and board regulations. (p. 526)
>
> Six days after the suspension, student Dave Davis, accompanied by his father, tried to get readmitted at a conference with the assistant principal of the school, but readmission was refused. On September 26, 1966, ten days after the suspension, the plaintiff and student Davis, represented by an attorney, held a conference in the office of the superintendent of the Orleans Parish Schools with two assistant superintendents and the principal of the high school. At this conference, readmission was urged despite student Davis' failure to have his hair cut, but those representing the school refused readmission and the superintendent sustained this position. On the night of September 26, 1996, a petition for review of the superintendent's decision was presented to the Orleans Parish School Board. After hearing the argument made by Davis' attorney and permitting the production of any information and evidence, the Orleans Parish School Board went on record with the superintendent and the principal as refusing readmission to student Davis unless he obtained a haircut. (p. 526)
>
> On September 28, 1966, Dave Davis was readmitted to the high school when he reported with an appropriate haircut. (p. 526)

Issues: The issues addressed in this case concerned the Eighth, Ninth, and Fourteenth Amendments, in addition to the First Amendment. In regard to the First Amendment, the relevant question is whether the enforcement of a hair-style regulation in a public high school violates a student's right to symbolic expression or speech. (p. 527)

Holding: The District Court for the Eastern District of Louisiana decided that a high school student had no constitutional right, buttressed by the Civil Rights Act, to keep his hair long in direct disobedience to the rules and regulations of the parish school board, acting directly and through its superintendent and its principal. (p. 524)

Reasoning: Symbolic expression has been held to be entitled to First Amendment protection. See West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178. But a symbol must symbolize a specific idea or viewpoint. A symbol is merely a vehicle by which a concept is

transmitted from one person to another; unless it represents a particular idea, a "symbol" becomes meaningless. It is, in effect, not really a symbol at all. (p. 527)

Just what does the wearing of long hair symbolize? What is student Davis trying to express? Nothing really. Even if the wearing of long hair is assumed to be symbolic expression, it falls within that type of expression which is manifested through conduct and is therefore subject to reasonable state regulation in furtherance of a legitimate state interest. (p. 527)

The predominant interest of a school is to educate its students. If a particular type of conduct has the effect of disrupting the learning atmosphere, it should be subject to regulation. (p. 528)

In the case before the court there is uncontradicted evidence that hair grooming regulations by the Orleans Parish School Board is based on disciplinary considerations. (p. 528)

Disposition: The plaintiff's application for a preliminary injunction was denied, and the defendants' motion to dismiss, treated as a motion for a summary judgment, was granted. (p. 529)

Citation: Crews v. Cloncs, 303 F. Supp. 1370 (S.D.Ind. 1969)

Facts: The plaintiff, Tyler Crews, age 16 years, brings this action by his father and next friend, Borden Crews. The defendants are Eugene Cloncs, principal of North Central High School; the superintendent of the Metropolitan School District of Washington Township; the vice-principal of North Central High School; the assistant superintendent of the school district, and the members of the board of education. The plaintiff requests injunctive relief requiring the defendant school authorities to admit him to North Central High School without his first complying with the school's requirement of a satisfactory hair length and style under announced rules and regulations. (p. 1371)

The plaintiff contends that the defendants have violated his constitutional rights by suspending him from attendance at North Central High School until he cuts his hair to a length specified by the defendants. (p. 1372)

At the time of suspension, it is admitted that the plaintiff's hair was over his ears and below his collar, contrary to the school's requirement of hair

length "above the collar, above the ears and out of the eyes." (p. 1372)

The defendants contend that the basis for the rule on hair length is contained in the inherent authority of school officials, under the laws of the State of Indiana, to promulgate reasonable rules and regulations. (p. 1373)

The defendants' sole reason for the suspension of the plaintiff was his failure to get his hair cut according to the announced standards. No other complaint was made that the plaintiff was a disciplinary problem. (p. 1373)

Considerable testimony was given on behalf of the defendants by school officials and teachers that long hair on boys created class disruption and discipline problems. (p. 1373)

The defendants state unequivocally that unusual hair styles, such as long hair, disrupt the classroom atmosphere, impede classroom decorum, cause disturbances among other students in attendance, and result in the distraction of other students so as to interfere with the educational process in the high school. (p. 1373)

Issues: A primary issue in this case is whether the student's choice of hairstyles could be received as an expression of opinion equivalent to symbolic speech deserving First Amendment protection. (p. 1370)

Holding: The District Court for the Southern District of Indiana held that where the interest of the state was in maintaining an orderly and efficient school system, and the student's appearance of long hair directly caused disturbance and disruption of the educational process, the school board's suspending the student, even assuming that the student's choice of hairstyles was an expression of opinion constituting symbolic speech protected by the First Amendment, did not unconstitutionally infringe upon the student's substantive due process rights. (p. 1370)

Reasoning: The authority of school boards and school administrators to use their discretion in enforcing rules and regulations, including the right to exclude or suspend students violating rules and regulations is summarized in the Indiana Legal Encyclopedia, Education, Section 192. (p. 1374)

This court has no desire to interfere with the duly constituted authority of school boards and school administrators to adopt and to enforce reasonable rules and regulations. Neither does the court propose to

substitute its judgment for that of the school boards and school administrators absent a clearly defined violation of constitutional rights. (p. 1374)

The long hair case of today may be a shaven head case tomorrow, or a brilliantly dyed hair case of some other time. The possible extremes of dress and attire are nearly unlimited. (p. 1374)

The plaintiff alleges that the action of the school authorities constitutes an unjustifiable infringement of his rights under the First and Fourteenth Amendments, asserting that the wearing of long hair constitutes symbolic speech. In Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, the Supreme Court held that the wearing of black armbands by secondary school pupils protesting the Vietnam war constituted symbolic speech protected by the First Amendment; however, it is not so clear a question whether wearing long hair in this case is also First Amendment protected speech. (p. 1375)

It is clear that the right to free expression is not absolute, and that it may be infringed by state authority upon a showing of a compelling reason; particularly is this the case when "pure speech" is not involved but rather conduct which reflects or is imbued with speech or opinion. See Cox v. State of Louisiana, 85 S. Ct. 453. (p. 1375)

Here the interest of the state is in maintaining an orderly and efficient school system, an academic atmosphere in which knowledge can be peacefully transmitted to the pupils. The importance of this state interest cannot be overstated. (p. 1375)

To require the school authorities to attempt to carry out the educational function in an atmosphere of turmoil and disruption would be ludicrous; hence, conduct which has the effect of bringing about disruption, whether intending that effect or not, may constitutionally be proscribed within reason. (p. 1375)

In this case, the court finds that the plaintiff's appearance directly caused disturbances and disruption of the educational process, both in the academic classroom and during physical education classes. (pp. 1375-1376)

It is important to note that the disruption found here resulted not from the very fact that a student had violated a rule; rather, it resulted directly from plaintiff's wearing long hair. Had disruption resulted indirectly merely because a pupil chose to flaunt the school's authority by violating a rule, it would lend

absolutely no constitutional support to the rule itself. (p. 1376)

Tinker dealt with conduct closely akin to "pure speech." Yet the Supreme Court held that:

> [C]onduct 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 guaranty of freedom of speech. (p. 1376)

Therefore, where the conduct involved is wearing long hair, which is rather far removed from "pure speech," the Constitution permits reasonable regulation on a showing of classwork disruption. (p. 1376)

Disposition: The plaintiff student was not entitled to an injunction requiring the defendants to admit him to North Central High School without first complying with the school's regulation as to length of hair. The plaintiff was entitled to secure re-admission to school at such time as he complied with the announced hair style requirement of "above the collar, over the ears, and above the eyes." Judgment for the defendants was entered in accordance with this opinion. (p. 1377)

Citation: Giangreco v. Center School District, 313 F. Supp. 776 (W.D.Mo. 1969)

Facts: The plaintiff on September 2, 1969, was fully qualified by prior scholastic achievement and conduct for admission to the senior class of Center High School unless he was validly refused admission because of the condition of the hair on his head and face. When the plaintiff presented himself for admission to Center High School on September 2, 1969, the opening day of the fall semester, he had grown an untrimmed full face beard, including unshaven and untrimmed side face hair, mustache and untrimmed lip, chin and neck hair. Further, the hair of his head and temples had been permitted to grow without trimming so that it covered his ears and his shirt collar in back joining his full face and neck hair. His hair was parted in the middle and brushed or combed so that it did not cover his eyes. (p. 777)

On September 2, 1969, the opening day of the fall term, the defendant Gene Banaka, principal of Center High School, in performance of his official duties, refused the plaintiff admittance under the regulations of the Center School District No.58, approved and pub-

lished in the student handbook by the Board of Education, Center School District No. 58:

> "5. Extreme hair styles should be avoided. The hair should be kept neatly combed, brushed and trimmed, and of a length and style that will not interfere with normal school routine.
> "6. Fads and extreme styles with regard to personal grooming are to be discouraged." (pp. 777-778)

The minor plaintiff was orally advised by Principal Banaka that he would have to shave off his beard before he would be admitted. The plaintiff did not again apply for admission until the following Monday, September 8, 1969. On Sunday, September 7, the plaintiff, according to his testimony, voluntarily shaved off his mustache and chin hair, leaving on his face full untrimmed muttonchop type side face hair which overhung his lower jaw. The plaintiff then again presented himself for admission and was again refused admission on the same grounds. On September 9, 1969, the plaintiff filed this action seeking a temporary restraining order, a preliminary injunction, and a declaratory judgment and permanent injunction prohibiting the defendants from refusing him admission to the fall term. (p. 778)

In his complaint, the plaintiff claimed that the refusal to permit him to attend school in his present condition denied him the right of free speech guaranteed by the First Amendment of the Constitution. (p. 778)

Issues: Does a regulation requiring public high school students to avoid extreme hair styles, to keep their hair neatly combed, brushed, and trimmed and of length and style that would not interfere with normal school routine abridge the student's First Amendment right to free speech? (p. 776)

Holding: The District Court for the Western District of Missouri, Western Division, held that the regulation was constitutionally valid and as applied to a student who failed to comply with the regulation, did not abridge the student's right to free speech where the ordinance was adopted to prevent verbal and violent distraction and disruption because of hair styles, and it was not shown that the regulation was applied to the student for the purpose of restraining his exercise of the right of free speech. (p. 776)

Reasoning: In his testimony at the hearing on the motions for a restraining order and a temporary injunction,

Principal Banaka, who has had 17 years experience as an educator in the public schools, stated that the regulations against extreme hair styles and against untrimmed long head and face hair, were based upon generally accepted expert educational opinion that extreme and untrimmed hair styles tended to cause distractions in the classrooms and to cause disruptions both in and out of the classrooms resulting from reactions of other students. The evidence showed that the plaintiff's hair style caused some distractions and disruptions in some classes in the current term between September 9 and September 15. (pp. 778-779)

The testimony of Principal Banaka showed that there was real justified apprehension on his part that physical violence might occur to the plaintiff at the hands of other students, and that failure to enforce the school regulations probably would result in disruptions of the school processes by other students who were required to comply with the regulations. (p. 779)

In his testimony, the plaintiff made no claim that his hair style constituted any type of expression comprehended within the concept of free speech. Nor did he claim he was motivated by any religious beliefs. He stated that his motive in growing the hair and beard resulted from a belief that it was a part of himself, and that to cut it would be the same as cutting off his fingers. The credibility of this statement is belied by the fact that he voluntarily shaved his mustache and chin whiskers on Sunday, September 7. He further made a statement, incredible under the circumstances, that he never intended to cut his head and face hair again because he expected it to grow to a certain length and naturally cease to grow thereafter. On the plaintiff's own evidence, it is found that his conduct was designed to attract attention and to provoke the school authorities to deny him attendance for the purpose of creating what has come to be known as a "confrontation." (p. 779)

The evidence shows that there is substantial justification for the regulation because of the distraction and disruption, both verbal and violent, which is reasonably apprehended as a result of the extreme hair style of the plaintiff worn in a high school and which in fact has occurred. As stated, the evidence shows that there has been distraction in classes and in study periods resulting from the plaintiff's appearance, both in the last school year when his hair was shorter and he had no beard and in the period between September 9 and September 15 in the present school year. In this case, there is no showing that there has been any denial of free speech under the regulation. This case does not fall within the rule of Tinker v.

Des Moines Community School District, 89 S. Ct. 733, which concerned the wearing of an armband for the purpose of expressing certain views about the Vietnam war, as a symbolic act within the free speech clause of the First Amendment. It is important to note that in the Tinker case, it was expressly stated that the problem of free speech was not related to regulation of dress, hair style or deportment. (pp. 779-780)

Disposition: The district court ordered that the plaintiff's motion for a temporary restraining order and for a preliminary injunction be denied. (p. 781)

Citation: Miller v. Gillis, 315 F. Supp. 94 (N.D.Ill. 1969)

Facts: In this case, the plaintiffs, David Miller, a minor, and his parents and next friends, Ben F. Miller III and Alice Miller, brought action against the Board of Education of School District 224 in Lake County, Illinois, the defendants, asking for an injunctive order compelling the school board and its members to admit David Miller to the Barrington Consolidated High School, and preventing them from suspending or expelling him from that school subsequent to his admission. (p. 96)

During 1968-1969, David Miller allowed his hair to grow until, at the end of the school year, it was one-inch or less shorter than the shoulder length it was at the time of the hearing in this case. Although the length of the plaintiff's hair during the last school term exceeded the standards set out in the dress code, David was allowed to remain in school until the end of the term at his mother's request, because it was thought by her that dismissal or suspension would have an adverse psychological effect on the boy. (p. 96)

Two weeks before the day set for this year's enrollment, the school board circulated to every prospective student a document entitled, "1969-1970 Student Handbook, Barrington Consolidated High School." Among the regulations, there is a section concerning hair style of students, which reads as follows:

> IV. Hair
> A. Hair should always appear clean and neat, tapered up the back of the neck, and not protruding over the ears or the eyebrows.
> 1. Students must be clean-shaven and sideburns should not extend lower than the earlobes. (pp. 96-97)

On August 26, 1969, when David Miller presented himself for enrollment, he was told that he would not be allowed to enroll until he cut his hair in compliance

with the dress code. Subsequently, on September 8, 1969, David, by his parents and next friend, filed this suit alleging that the dress code was a violation of his rights under the First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States. They asked this court to hold the "dress code" unconstitutional, and thereby the action of the board barring David's enrollment unconstitutional. They further asked this court to enjoin the defendants from enforcing the dress code and from barring David Miller's attendance, and for a judgment in the sum of $300.00 actual damages and $1,000.00 punitive. (pp. 97-98)

On September 11, 1969, the plaintiffs moved this court for temporary injunctive relief to enjoin the defendants from barring David Miller's enrollment, and once he was enrolled from suspending or expelling or otherwise punishing him because of his violation of the dress code. (p. 98)

Issues: The ruling in this case is based on an equal protection claim under the Fourteenth Amendment. However, the court also addresses a First Amendment issue, namely whether the school's hair style regulation infringes upon a student's right to free speech. (p. 95)

Holding: With regard to the First Amendment issue, the District Court for the Northern District of Illinois, Eastern Division, held that the student's freedom of speech was not violated by the school's hair style regulation (p. 99). The court did find, however, that the regulation denied the student equal protection of the law under the Fourteenth Amendment. (p. 94)

Reasoning: This court cannot agree with the contention that the plaintiffs rights under the First Amendment have been violated. The plaintiffs have cited numerous cases which show that the freedom of speech has been extended far beyond the use of actual words and that acts themselves can, under certain situations, constitute speech protected by this Amendment. Thus, in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, the Supreme Court held that a school board did not have the right to proscribe the wearing of armbands worn as a symbol of students' dislike for the war in Vietnam. Likewise, the wearing of freedom buttons was held to be an act of free speech and therefore protected by the Constitution. See Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966). (p. 99)

These are the only two cases cited by the plaintiffs which pertain directly to the appearance of the student or to something worn by such students and which

involved a violation of the First Amendment. It is clear that these cases may be distinguished on the grounds that they pertain to objects which are symbols of movements or ideas easily expressed and readily identifiable. David's wearing of his hair at shoulder length has never been contended by him to be part of a movement of hair growers, nor is it a symbol of some easily identifiable idea. It is a mere exercise of the wearer's choice of hair style. (pp. 99-100)

There is no question about the fact that the board has the power to promulgate regulations which prevent lewd or obscene behavior and which promote the orderly conduct of the educative process. However, this court cannot believe that regulations which strictly, and admittedly conservatively, lay out severe and unduly restrictive limits of dress and personal appearance bear any rational relationship to the orderly conduct of the educative process. (p. 100)

It must be shown, and clearly so, that the particular style of dress and appearance complained of would in fact be actually disruptive. The evidence in this case clearly is to the contrary. The only examples of student misbehavior over dress seems to be a single incident in the cafeteria this year not personally involving David Miller and one last year when one individual wore beads to a classroom. If these are the only incidences of alleged disturbance because of violations of the dress code over the past two years in a school of 2,500 students, the point sought to be made is absurd. (pp. 100-101)

The school board and its lawyers, having exhaustively argued and extensively briefed this point, have failed to show that the dress code, in its present form, is necessary to prevent disruptive incidents in the school. Apparently, the purpose of its promulgation and enforcement was to thwart ahead of time what the board feared might eventually become a problem of student restlessness in Barrington. There is no evidence that the "dress code" would bring about this goal, or that restlessness in Barrington High School is an eventuality to be anticipated or precluded. It is a well-known principle of educational administration that schools do not automatically obtain good student behavior by inaugurating uniformity of dress. Conformity of this type is antithetical to education's wide aims. And it may well be that uniformity of dress is likely to create a greater evil than would a broad spectrum of appearance. (p. 101)

There is no question about the fact that the regulation of dress and appearance creates an arbitrary class of those few people who wish to wear their hair

> in a manner differing from the masses—arbitrary in that the regulation makes the acquisition of all education depend upon the length of one's hair. (p. 101)
>
> Finally, it is a clear stroke of arbitrariness to operate on the basis that the appearance of a student with long hair would be substantially disruptive, when in the same school teachers who stand before these 2,500 students wearing hair equally long or longer are not disciplined or suspended or made to conform to the school code. How is it possible to hold that the student's presence is disruptive and therefore within the purview of the board's power to discipline, when the same board allows its teachers to breach the same standards? When the dress code applies a standard to students which cannot be applied to teachers, students arbitrarily are discriminated against in violation of the Equal Protection Clause of the Fourteenth Amendment. (p. 101)
>
> In final analysis, this court finds that the code of dress of Barrington High School, as applied to both boys and girls, in regard to both hair and attire, is so minutely detailed and restrictive that its compliance would violate that highly protected freedom of people to present themselves physically to the world in the manner of their own individual choice and is therefore in violation of a basic value "implicit in the concept of ordered liberty." See Palko v. Connecticut, 58 S. Ct. 149, (1937). (p. 101)

Disposition: The board of education was enjoined from continuing to enforce said section of the dress code and from initiating the expulsion or suspension or other disciplining of the plaintiff solely by reason of a violation of that section of the dress code. The court ordered that there be expunged from the school's records any mention revealing any disciplinary action taken this school year against the plaintiff by reason of violation of the dress code. The plaintiff's request for $300.00 actual damages and $1,000.00 punitive damages was denied. (p. 101)

Citation: Westley v. Rossi, 305 F. Supp. 706 (D.Minn. 1969)

Facts: In conflict in this case is a 17-year-old boy who wears his hair at shoulder length and the members of the board of education, having jurisdiction over the Little Falls, Minnesota, public high school where the school authorities adopted a rule providing: "Boys should have neat conventional male haircuts and be clean shaven." On August 25, 1969, at the opening of the fall term which would have started the plaintiff's senior year, he was brought or sent into the principal's office. The principal testified at the trial

that the plaintiff's long hair was not combed, that he wore sandals and no socks, and that his feet were dirty. He was told in substance by the principal to "shape up and cut your hair" before he attempted, or would be allowed, to enroll in school. "Shape up" to the principal meant clean up.

The next day the plaintiff attended school in the same condition but was not permitted to stay even through the first hour of classes. The third day, August 27th, after the principal had called the plaintiff's mother on the telephone, the plaintiff and his mother appeared at the principal's office. At this time the plaintiff wore socks but his hair was the same shoulder length. Since that time, he has not attended school nor has he been permitted so to do without shortening his hair.

The defendants contend fundamentally that their action is reasonable and appropriate and that they are not unreasonably discriminating against the plaintiff and have good cause for enforcing the rule. The plaintiff foundations his cause of action on the Civil Rights Act, Title 42 U.S.C. Section 1983. It long has been settled that actions of a school board are "state action" within the meaning of Title 42 United States Code Section 1983. The question in this case is whether there has been a violation of the plaintiff's constitutional rights, specifically his First Amendment right of expression. Accordingly, the plaintiff seeks an injunction against school officials' action of not allowing him to attend school without shortening his hair. (pp. 708-709)

Issues: Pertinent to this case is the First Amendment issue of freedom of expression. In specific, are school officials entitled to control expression of opinion by students as evidenced by the manner of wearing their hair and dress if, in fact, the style of hair and dress is clean, sanitary, and no hazard to other students? (p. 707)

Holding: The District Court of Minnesota, Fifth Division, held that the plaintiff could not be prevented from attending public high school because the length of his hair violated a school rule stating that boys should have neat conventional male haircuts and be clean shaven. There was apparently no health hazard in wearing long hair so long as it was clean and no showing that shoulder-length hair would materially and substantially interfere with the requirement of appropriate discipline in the operation of the school. The restriction was one of appearance, not based on health or morals. (p. 707)

Reasoning: The court cannot sustain the school board's position that it is entitled to control expression of opinion by students as evidenced by their manner of wearing their hair and dress if in fact such was clean, sanitary, and no hazard to other students. A point was made that at the opening of school the plaintiff appeared with dirty feet and no socks and wearing sandals. Despite the plaintiff's statement on the stand that he is entitled to come to school filthy dirty if he wishes, the court does not so rule nor in any way approve of such; nor in the court's view is a decision necessary on that point because it appears that by the third day the plaintiff had socks on and stated he will, if readmitted, to school conform to the dress code in all ways except for his hair style. (p. 711)

The court regards this case as solely a "long hair" case. The restriction is one of appearance, not based on health or morals. The rule here has effect beyond school, so were a school to prohibit a boy attending school with no shirt and bare to the waist, if he desires to go bare waisted in life at home or beyond the school, he may take off the shirt as he leaves the school grounds. Such is not the case with hair. Even as to smoking, the restriction is lost if the pupil leaves the school grounds. The hair restriction, however, invades private life beyond the school jurisdiction. The rule is an attempt to impose taste or preference as a standard. The standards of appearance and dress of last year are not those of today nor will they be those of tomorrow. Regulation of conduct by school authorities must bear a reasonable basis to the ordinary conduct of the school curriculum or to carrying out the responsibility of the school. No moral or social ill consequences will result to other students due to the presence or absence of long hair nor should it have any bearing on the wearer or other students to learn or to be taught. (pp. 713-714)

Disposition: The district court granted the plaintiff's request for injunctive relief. (p. 714)

Citation: Brick v. Board of Education, School District No. 1, Denver, Colorado, 305 F. Supp. 1316 (D.Colo. 1969)

Facts: This action is for a declaratory judgment and injunction in which the plaintiffs seek to have certain portions of the dress code of South High School declared unconstitutional. (p. 1318)

John Brick, one of the plaintiffs in this cause, is a nineteen-year-old senior at South High School. On October 1, 1969, Brick was late for school for a justifiable reason. He appeared at the administrative of-

fice of South High School to secure permission to re-enter classes, but was told by the defendants, Peonio, Conklin, and Cohen, the principal, vice-principal, and assistant dean respectively, that although he might return to classes for that day, he would not be permitted to attend school thereafter until he had his hair cut in compliance with the South High School dress code. (p. 1318)

On October 16, 1969, the plaintiffs met with the Denver school board. The School Board on October 20, 1969, determined by a 5-1 vote that the regulation was proper; that John Brick had violated the regulation; and that the South High administration's decision to suspend him until he got a haircut was correct. (p. 1318)

At the hearing on the motion for preliminary injunction, the plaintiff, John Brick, testified in his own behalf. He acknowledged that his long hair did not express any political, ideological, or religious belief, but was rather an expression of his individuality. The plaintiffs' witnesses also included three teachers, two of whom taught at South High School. Brick had been enrolled in the classes of the latter teachers. They testified that Brick was not a discipline problem, although one mentioned that Brick's hair had caused some discussion among other students. (p. 1318)

Defendants Peonio and Conklin testified that the South High School dress code was adopted pursuant to Denver Public School Policy 1214A which gives individual schools discretion to adopt rules pertaining to pupil conduct, and that it was not promulgated solely as an expression of the views of the administration. Both parents and students played a significant role in the drafting and adoption of all aspects of the code. The code is periodically reviewed and is presently under review by a committee consisting of two parents, two students, two teachers, and two administrators. A survey of students taken in connection with this review indicated that, while the students favor changes in other portions of the code, the overwhelming majority wished to maintain the regulation on hair length. (pp. 1318-1319)

Peonio and Conklin, in testifying to the purpose of the code provision on hair length, stated that there had been two or three fights over the past few years which had resulted directly from student harassment of male pupils with long hair. Aside from these incidents of disruption, the administrators stated that long hair caused distraction among both teachers and students. Students often discuss these extreme hair

styles at times when they should be listening to class lectures or discussions. This in turn requires teachers to interrupt their lectures in order to deal with the problem. (p. 1319)

Issues: Does the high school's dress code limiting the length of male students' hair constitute an infringement on a form of symbolic expression protected by the First Amendment? (p. 1319)

Holding: The District Court of Colorado proclaimed that the portion of the high school's dress code limiting the hair length of male students did not deny the student's First Amendment right of expression. (p. 1316)

Reasoning: In applying the law to this case, the court must note from the outset that our jurisdiction is strictly limited to the question of whether the plaintiffs' rights, guaranteed by the Constitution of the United States, have been or are being violated. It is not our function to pass judgement on the wisdom of this regulation, nor does this court act as a reviewing body for a school board decision whereby it can determine that there has been an abuse of discretion. (p. 1319)

The plaintiffs' assertion is that the length and style of one's hair is in itself a form of symbolic speech protected by the First Amendment; that conduct, like words, can be an expression or dramatization of a moral, sociological, political, religious, or ideological viewpoint. It does not follow, however, that all such action is protected by the First Amendment. The Supreme Court has limited the scope of the symbolic speech protection. (p. 1319)

In the present case, the plaintiff has acknowledged that his hair style does not symbolize any political, religious, sociological, or moral point of view; stating that the length of his hair was an expression of his individuality. Such symbolic expressions of individuality are not within the First Amendment. See Davis v. Firment, 269 F. Supp. 542. It protects expressions of ideas and points of view which make a significant contribution to the "marketplace of ideas." (p. 1320)

In this case, the state is advancing a most important interest, that of providing for and promoting the education of its citizens. In this regard, those activities which have a disruptive effect on the learning atmosphere in public schools are proper subjects for regulation by the state and its authorized agents. See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. In the present case, the evidence shows that the dress code provision pertaining

to hair length was intended to prevent disruption and distraction in the school. This court feels that it is within the constitutional power of the state or its agencies to deal with such a problem. (p. 1320)

Nor can the constitutionality of the dress code provision here in question be determined merely by a finding that John Brick was or was not a discipline problem or a disruptive influence. The reasonableness of this regulation must be considered in light of the overall situation at South High School and the evidence which showed a substantial need for such a measure. (p. 1320)

On the basis of all of the evidence, it is impossible to conclude that the regulation is unreasonable. The entire dress code at South High School is a product of the efforts of students, parents, faculty, and administrators. Surveys have been taken to determine whether the students wish to retain portions of the dress code, and in the latest survey, the students manifested support for the restriction on hair length. The regulation is very specific as to permissible hair length and prohibits only what could be termed "extremes," leaving ample latitude for the various hair styles which appeal to the overwhelming majority of male students. (pp. 1320-1321)

Finally, some mention should be made of the Supreme Court case of Tinker v. Des Moines Community School District, 89 S. Ct. 733 (1969), which the plaintiffs rely upon to support their claim that the South High School regulation of hair length is unconstitutional. The Tinker case does not aid the plaintiffs' cause. In holding that a school could not constitutionally prohibit students from wearing black armbands in protest of the Vietnam war, the Supreme Court specifically distinguished school regulations of hair style and length. (p. 1321)

Disposition: The plaintiff's application for a preliminary injunction was denied. (p. 1322)

Citation: Stevenson v. Wheeler County Board of Education, 306 F. Supp. 97 (S.D.Ga. 1969)

Facts: In preparation for the approaching term the board of education adopted on August 5, 1969, certain Policies Governing Students." At a pre-school planning session, the policies were discussed by the members of the faculty. They were implemented in certain respects by spelling out "Neat Haircuts," proper length of dresses, etc. At some point, the faculty adopted a "clean-shaven" rule for male students. None of these faculty regulations were printed or posted; they are still only in the form of notes. However, they were

announced to all the students at a school assembly. This included the "clean-shaven" regulation. The policies were also announced by the teachers to the students in the various classrooms. (pp. 98-99)

The "good grooming" policies have been uniformly enforced and there has been no racial discrimination. Four white students have been warned by teachers to cut their hair or shave, otherwise not to come back to school. In each case they complied. Nine black youths have been similarly warned. All of them complied. Three other black students (the plaintiffs) refused to do so. They were respectively suspended on October 17th, 20th, and 23rd. They are still out of school. (p. 99)

The complaint charges that the expulsion of the plaintiffs has deprived them of rights protected by the Fourteenth Amendment. While petitioners do not allege a First Amendment right to wear a mustache and to attend school unshaven, they assert that the constitutionally protected right to express one's individuality is involved. Ethnic factors are also claimed. The suit alleges that as a result of slavery, the ancestors of the petitioners were dehumanized and their manhood emasculated. They claim that the wearing of mustaches and facial hair growths are symbols for them and other black youths of their masculinity. (p. 99)

There were no racial overtones in the adoption of the "clean-shaven" policy. Among the witnesses for the board was a black high school teacher who strongly stressed the importance of good grooming in the educational process. She testified that shaving comes under it. All members of the faculty approved the rule that young men should be clean-shaven. School officials testified that any unusual diversion from the norm has a diverting influence on the student body. The basis of the rule in controversy is that mustaches and facial hair growth are distractive. (p. 99)

Issues: The plaintiffs charge that their expulsion due to failure to obey the school's "clean-shaven" regulation deprived them of rights protected by the Fourteenth Amendment. While they do not specifically allege a First Amendment right to wear a mustache and to attend school unshaven, the students do assert that they have a constitutional right to express their individuality in such a manner. (p. 99)

Holding: The District Court for the Southern District of Georgia, Dublin Division, held that the mere fact that mustaches and beards grown by public high school students never created any incidents or commotion in the school system did not warrant the conclusion that the

regulation adopted by school authorities requiring clean shaving was unreasonable and arbitrary, especially where the regulation was adopted in good faith and was not racially oriented. (p. 97)

Reasoning: In Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, the Supreme Court indicated that hair style may be distinguished from other forms of expression and that it is not a direct, primary First Amendment right. The court said:

> The problem presented by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment. It does not concern aggressive, disruptive action or even group demonstration. Our problem involves direct, primary First Amendment rights akin to 'pure speech.' (p. 100)

There are district court decisions contrary to what is held here, including Griffin v. Tatum, 300 F. Supp. 60, and Breen v. Kahl, 296 F. Supp. 702. These decisions would place an intolerable burden on federal courts to examine each case minutely on its facts in order to determine whether, in a particular instance, the mode of dress or hair style is actually disruptive to the successful operation of the school. In Breen, the district judge justified such attention to detail by treating the right to wear long hair as if it were protected by the First Amendment. That theory was expressly rejected in Tinker. (p. 101)

Among the things a student is supposed to learn at school is a sense of discipline. Of course, rules cannot be made by authorities for the sake of making them, but they should possess considerable leeway in promulgating regulations for the proper conduct of students. Courts should uphold them where there is any rational basis for the questioned rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools. By accepting an education at public expense, students at the elementary or high school level subject themselves to considerable discretion on the part of school authorities as to the manner in which they deport themselves. Those who run public schools should be the judges in such matters, not the courts. The quicker judges get out of the business of running schools, the better. Except in extreme cases, the judgment of school officials should be final in applying a regulation to an individual case. (p. 101)

Counsel for the plaintiffs makes much of the fact that the existence of facial hair growth of a student has never created any incidents or commotion in the

to hair length was intended to prevent disruption and distraction in the school. This court feels that it is within the constitutional power of the state or its agencies to deal with such a problem. (p. 1320)

Nor can the constitutionality of the dress code provision here in question be determined merely by a finding that John Brick was or was not a discipline problem or a disruptive influence. The reasonableness of this regulation must be considered in light of the overall situation at South High School and the evidence which showed a substantial need for such a measure. (p. 1320)

On the basis of all of the evidence, it is impossible to conclude that the regulation is unreasonable. The entire dress code at South High School is a product of the efforts of students, parents, faculty, and administrators. Surveys have been taken to determine whether the students wish to retain portions of the dress code, and in the latest survey, the students manifested support for the restriction on hair length. The regulation is very specific as to permissible hair length and prohibits only what could be termed "extremes," leaving ample latitude for the various hair styles which appeal to the overwhelming majority of male students. (pp. 1320-1321)

Finally, some mention should be made of the Supreme Court case of Tinker v. Des Moines Community School District, 89 S. Ct. 733 (1969), which the plaintiffs rely upon to support their claim that the South High School regulation of hair length is unconstitutional. The Tinker case does not aid the plaintiffs' cause. In holding that a school could not constitutionally prohibit students from wearing black armbands in protest of the Vietnam war, the Supreme Court specifically distinguished school regulations of hair style and length. (p. 1321)

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Issues: The plaintiffs charge that their expulsion due to failure to obey the school's "clean-shaven" regulation deprived them of rights protected by the Fourteenth Amendment. While they do not specifically allege a First Amendment right to wear a mustache and to attend school unshaven, the students do assert that they have a constitutional right to express their individuality in such a manner. (p. 99)

Holding: The District Court for the Southern District of Georgia, Dublin Division, held that the mere fact that mustaches and beards grown by public high school students never created any incidents or commotion in the

school system did not warrant the conclusion that the regulation adopted by school authorities requiring clean shaving was unreasonable and arbitrary, especially where the regulation was adopted in good faith and was not racially oriented. (p. 97)

Reasoning: In Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, the Supreme Court indicated that hair style may be distinguished from other forms of expression and that it is not a direct, primary First Amendment right. The court said:

> The problem presented by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment. It does not concern aggressive, disruptive action or even group demonstration. Our problem involves direct, primary First Amendment rights akin to 'pure speech.' (p. 100)

There are district court decisions contrary to what is held here, including Griffin v. Tatum, 300 F. Supp. 60, and Breen v. Kahl, 296 F. Supp. 702. These decisions would place an intolerable burden on federal courts to examine each case minutely on its facts in order to determine whether, in a particular instance, the mode of dress or hair style is actually disruptive to the successful operation of the school. In Breen, the district judge justified such attention to detail by treating the right to wear long hair as if it were protected by the First Amendment. That theory was expressly rejected in Tinker. (p. 101)

Among the things a student is supposed to learn at school is a sense of discipline. Of course, rules cannot be made by authorities for the sake of making them, but they should possess considerable leeway in promulgating regulations for the proper conduct of students. Courts should uphold them where there is any rational basis for the questioned rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools. By accepting an education at public expense, students at the elementary or high school level subject themselves to considerable discretion on the part of school authorities as to the manner in which they deport themselves. Those who run public schools should be the judges in such matters, not the courts. The quicker judges get out of the business of running schools, the better. Except in extreme cases, the judgment of school officials should be final in applying a regulation to an individual case. (p. 101)

Counsel for the plaintiffs makes much of the fact that the existence of facial hair growth of a student has

never created any incidents or commotion in the Wheeler schools system and that the regulation requiring shaving is therefore without basis in reason and is arbitrary. The mere fact that a particular hair style on one's face has not created a classroom disturbance is not conclusive of its unreasonableness. Students wearing mustaches or beards in a high school may be a distracting influence on a student body which does not wear them. Teachers have a right to teach in an atmosphere conducive to teaching and learning and unkempt faces do not contribute much to it. This court finds the regulation under attack reasonable and not arbitrary. It was adopted in good faith and is not racially oriented. (p. 97)

Disposition: The plaintiffs' request for injunctive relief was denied. (p. 101)

Citation: Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970)

Facts: This case involves the subject of long hair worn by teenage male high school students. (p. 214)

The Metropolitan Board of Education of Nashville and Davidson County, Tennessee, adopted a "hair" regulation in 1961. Under this regulation the students at Donelson High School were told, as to hair on male students, that hair in the front may not come below the eyebrows, ears must show clear of hair and hair in the back is to be tapered and not be long enough to turn up. (pp. 214-215)

Two male students, Michael Jackson and Barry Steven Barnes, who were members of a combo band permitted their hair to grow longer than prescribed by school officials. After conferences with the students and their parents, the students were suspended by the principal and sent home for violation of the regulation. After additional conferences, a hearing was conducted before the board of education. The board sustained the action of the principal. (p. 215)

The district court conducted an extensive hearing and denied injunctive relief. The court made an affirmative finding of fact to the effect that the evidence unquestionably establishes that the regulation has a real and reasonable connection with the successful operation of the educational system, in that it is reasonably calculated to maintain school discipline. The court held that the evidence failed to show that the students have been deprived of any constitutional rights. The students and their parents appealed. (p. 215)

Issues: Although this case focuses on the Fourteenth Amendment's due process, a question of First Amendment rights is also answered. That is, is the length of male students' hair, when not intended for expression but rather for the purpose of performing in a musical group, protected by the First Amendment's guarantee of freedom of speech and expression? (p. 213)

Holding: The Court of Appeals for the Sixth Circuit found that the wearing of excessively long hair by male students for purely commercial purposes, such as performing in a band, was not protected by the First Amendment's guarantee of free speech and expression. In addition, the appeals court supported the district court's finding that the wearing of excessively long hair by male students at the high school disrupted classroom atmosphere and decorum, caused disturbances and distractions among other students, and interfered with the educational process. (p. 213)

Reasoning: There is evidence to support the conclusion that the wearing of excessively long hair by male students at Donelson High School disrupted classroom atmosphere and decorum, caused disturbances and distractions among other students, and interfered with the educational process. Members of the faculty of Donelson High School testified that the wearing of long hair by Jackson and Barnes was an obstructing and distracting influence to a wholesome academic environment. The principal of Donelson High School testified that he had complaints from teachers that Jackson and Barnes, because of their long hair, were a disturbance and distracting influence in their classes. The record establishes that the deliberate flouting by Jackson and Barnes of this well-publicized school regulation created problems of school discipline. (pp. 216-217)

It is contended that enforcement of the regulation deprived the two students of freedom of speech and expression in violation of the First Amendment. Neither of the students testified that his hair style was intended as an expression of any idea or point of view. This court agrees with the finding of the district court that this record does not disclose that the conduct of Jackson and Barnes and the length of their hair were designed as an expression with the concept of free speech. Therefore Tinker v. Des Moines School Independent Community District, 89 S. Ct. 733, has no application. The Supreme Court in that case said:

> "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. C.f. Ferrell v. Dallas Independent School

District, 5 Cir., 392 F.2d 697," 89 S. Ct. 737. (p. 217)

The record supports the finding of the district court that Jackson and Barnes pursued their course of personal grooming for the purpose of enhancing the popularity of the musical group in which they performed. This court agrees with the district court that "the growing of hair for purely commercial purposes is not protected by the First Amendment's guarantee of freedom of speech." (p. 217)

Disposition: The decision of the District Court for the Middle District of Tennessee was affirmed. (p. 219)

Citation: Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970)

Facts: The plaintiff, a seventeen-year-old boy, was suspended from school at the beginning of his senior year because he refused to cut his hair, which a local newspaper story introduced into evidence described as "falling loosely about the shoulders." The defendant, the principal of the high school in Marlboro, Massachusetts, admits that there was no written school regulation governing hair length or style but contends that students and parents were aware that "unusually long hair" was not permitted. (pp. 1281-1282)

On these sparse facts, the parties submitted the case posed by the plaintiff's request for injunctive relief against the deprivation of his rights under Title 42 U.S.C. Section 1983. Each relied on the failure of the other to sustain his burden of proof, the plaintiff claiming that he should prevail in the absence of evidence that his appearance had caused any disciplinary problems, and the defendant maintaining that the plaintiff had failed to carry his burden of showing either that a fundamental right had been infringed or that the defendant had not been motivated by a legitimate school concern. The district court granted the plaintiff's request for a permanent injunction and ordered the plaintiff reinstated. Richards v. Thurston, 304 F. Supp. 449 (D.Mass. 1969). The defendant appealed. (p. 1282)

Issues: Two primary issues are involved in this appeal, one implicates the First Amendment's guarantee of free expression and free speech and the other involves the Fourteenth Amendment's protection of personal liberty via the Due Process Clause. In particular, the two constitutional questions are: 1) Is a high school student's hair length of sufficiently communicative character to warrant full protection of the First Amendment? 2) Is the suspension of a high school student

for wearing his hair long a violation of the student's personal liberty under the Fourteenth Amendment? (p. 1281)

Holding: The Court of Appeals for the First Circuit held that: 1) a high school student's hair length was not of a sufficiently communicative character to warrant full protection of the First Amendment against suspension for refusal to cut his hair, and 2) suspension of a high school student for refusing to cut his hair violated his personal liberty right and was improper in absence of state justification for the intrusion. (p. 1281)

Reasoning: What appears superficially as a dispute over which side has the burden of persuasion is, however, a very fundamental dispute over the extent to which the Constitution protects such uniquely personal aspects of one's life as the length of his hair. For this reason, the court resists the understandable temptation to proceed directly to an application of the constitutional doctrine without attempting to ascertain its source as precisely as possible. (p. 1283)

It is perhaps an easier task to say what theories do not apply here. This court recognizes that there may be an element of expression and speech involved in one's choice of hair length and style, if only the expression of disdain for conventionality. However, the court rejects the notion that the plaintiff's hair length is of a sufficiently communicative character to warrant the full protection of the First Amendment. See United States v. O'Brien, 88 S. Ct. 1673; Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. That protection extends to a broad panoply of methods of expression, but as the nonverbal message becomes less distinct, the justification for the substantial protections of the First Amendment becomes more remote. (p. 1283)

The court's rejection of those constitutional protections in this case is not intended to denigrate the understandable desire of people to be let alone in the governance of those activities which may be deemed uniquely personal. The court believes that the Due Process Clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests. (p. 1284)

Determining that a personal liberty is involved answers only the first of two questions. The second is whether there is an outweighing state interest justifying the intrusion. The answer to this question must take into account the nature of the liberty asserted,

the context in which it is asserted, and the extent to which the intrusion is confined to the legitimate public interest to be served. For example, a school rule which forbids skirts shorter than a certain length while on school grounds would require less justification than one requiring hair to be cut, which affects the student twenty-four hours a day, seven days a week, nine months a year. See Westley v. Rossi, 305 F. Supp. at 713-714. (p. 1285)

Once the personal liberty is shown, the countervailing interest must either be self-evident or be affirmatively shown. This court sees no inherent reason why decency, decorum, or good conduct requires a boy to wear his hair short. Certainly eccentric hair styling is no longer a reliable signal of perverse behavior. The court does not believe that mere unattractiveness in the eyes of some parents, teachers, or students, short of uncleanliness, can justify the proscription. Nor, finally, does such compelled conformity to conventional standards of appearance seem a justifiable part of the educational process. (p. 1286)

Disposition: Absent an inherent, self-evident state justification for the suspension, the appellate court affirmed the judgment of the District Court of Massachusetts in favor of the plaintiff student and against the defendant principal. (p. 1287)

Citation: Corley v. Daunhauer, 312 F. Supp. 811 (E.D.Ark. 1970)

Facts: This is a suit brought by Chris Corley, a 12-year-old seventh-grade public school student, enrolled in the Forest Heights Junior High School in the City of Little Rock, Arkansas, against his band director, the principal of the school, the superintendent of the Little Rock Public Schools, and the members of the Little Rock School Board. At issue is the federal constitutionality of a Little Rock school policy directed at students who take music education or, as it is more commonly called "play in the band," as to the length at which their hair must be worn. (p. 813)

Students who desire to participate in the band program must conform their hair lengths and styling to the requirements of their band director, subject to the approval of the school principal, and that a student who refuses to do so may be excluded from the band. (p. 813)

The plaintiff is wearing his hair long in protest against continued participation by the United States in the war in Vietnam. This court will assume for purposes of discussion that the child's opposition to the

war is sincere, and that he sincerely believes that to wear his hair long is a proper and legitimate means of expressing his protest and opposition to our continued involvement in the conflict.

In early January 1970, the defendant band director advised the plaintiff that he would have to shorten his hair or get out of the band; later the director relented temporarily to the extent of permitting the plaintiff to attend band classes and practice sessions but with the stipulation that he could not appear in public band performances. (pp. 813-814)

While this case involves band students only and while the only thing immediately involved in the case is the right of a long haired band student to continue to play in the band, it is obvious that a much broader issue is lurking in the background, namely the right of the Little Rock schools to exclude from all classes students who wear their hair at what the school authorities deem to be an unreasonable, outlandish, or nonconforming length. That broad issue has been presented in other cases. With regard to those cases, it may be said that the plaintiffs therein have not enjoyed uniform success; neither have they experienced uniform failure; they have won some cases, and they have lost some. (p. 814)

Issues: A major issue in this case is whether, in light of the relevant provisions of the First Amendment, the specific "hair length" policy of the Little Rock schools directed at band students is constitutionally valid. Provisions of the Fourteenth Amendment are also implicated. (p. 814)

Holding: The District Court for the Eastern District of Arkansas, Western Division, held that the public school system had a right to require students who desire to participate in the school band program to conform their hair length to reasonable requirements of the band director. Application of such policy to students who departed from the normal standard of dress and appearance as a means of social protest did not unconstitutionally deprive them of their federally protected right of free speech. (p. 811)

Reasoning: This court finds that, assuming the validity of the policy, its application to the plaintiff was proper or at least reasonably justified. The court further finds that the school authorities propose to exclude the plaintiff from the band solely because of the length of his hair. No claim is made that his hair is dirty or unkempt or presents a health hazard; nor is it claimed that apart from hair length, there ex-

> ists any reason for excluding the plaintiff from this particular school program. (p. 815)
>
> There is no evidence here that the school is trying to prevent the plaintiff from protesting against the Vietnam war or against anything else, or that it is trying to punish him for his protest. The school authorities simply think that a member of the school band ought to conform to generally accepted norms as to hair length and styling and should be willing to make a choice between leaving the band, on the one hand, or conforming his or her hair to school requirements, on the other hand. (p. 815)
>
> Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, cited by both sides, reiterates the established principle that, up to a point at least, federal constitutional rights, including rights protected by the First Amendment, follow students and teachers into the classrooms. While Tinker did not involve hair length, but rather black armbands worn in protest against the Vietnam conflict, and while the court was careful to point out that the problem presented did not relate to regulation of the length of skirts or the type of clothing, or to hair style or deportment of students, 89 S. Ct. 733, the decision is obviously instructive in cases involving efforts of school authorities directed at any visual expression of protest or dissent. (p. 815)
>
> Tinker recognized that school officials necessarily have a broad discretion in running the schools and in regulating student life, and that day to day conflicts arising in the schools between pupils and those in charge of them should not ordinarily be matters of judicial concern. But, the court also recognized that judicial problems may arise when the exercise of constitutional rights comes into conflict with school rules. The court held that a prohibition against expression of opinion without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others constitutes a violation of the First and Fourteenth Amendments. (p. 815)
>
> While public school students in the course of their school attendance are entitled to recognition and protection of certain constitutional rights, they are subject to certain restrictions not imposed on adult citizens of the "free world." Their rights must be measured and applied "in light of the special characteristics of the school environment." See Tinker, 89 S. Ct. at 736. Public school students are subject to institutional discipline and to punishment, at times

more or less summary, for infractions of school rules. (p. 816)

Reasonable restrictions on students in the fields of conduct, dress, and appearance are desirable if the schools are to operate effectively and efficiently. That is necessarily so because learning for many people is a discipline rather than a pleasure, and if it is to be practiced successfully, the practice must be carried out in dignified and orderly surrounding. Whatever may be thought about conformity in general, it seems clear that reasonable conformity to established norms of dress and appearance contributes to orderly administration of classrooms, and that uncontrolled individuality of appearance tends to disrupt it. (p. 816)

But, a school regulation or policy directed at a given pupil or group of students must, like any other administrative dictate, be reasonable and must be rationally related to a legitimate educational objective such as the imparting of knowledge or the maintenance of discipline so that students may learn. An unreasonable or arbitrary regulation, or one which has no rational relationship to a legitimate educational end, or one which is out of keeping with the purpose and spirit of a public educational program cannot stand. (p. 816)

When that situation arises, the public authority must show that it has a strong interest in the enforcement of the policy or action which makes appropriate the curtailment of a constitutionally protected right. That was expressly recognized in Richards v. Thurston, 304 F. Supp. 452. (p. 817)

Finally, a school policy directed at dress or appearance that might be unreasonable or arbitrary in connection with general attendance at the school may be relevant and proper if limited to certain classes or school programs. That also was recognized in Richards v. Thurston, 304 F. Supp. at 454. (p. 817)

A public school band is a group within a group. Like any other military or concert band, it is characterized by regimentation, and it has no place for an individual exhibitionist, regardless of his motivation. Whatever distracts the attention of the audience from the band as a whole to a non-conforming individual musician mitigates against the band in the effectiveness of its performance. (p. 817)

Let it be remembered that this plaintiff's right to protest against the Vietnam war by wearing his hair long is no higher or better than the right of some

other band member to protest against something else in some other manner. What would be the effect on the band if the plaintiff appeared on the stage with his hair long in protest against the Vietnam war, while another student appeared with his head shaved in protest against the military-industrial complex, while another appeared with his uniform conspicuously sprinkled with ashes in protest against racial or economic discrimination, and while yet another student appeared clad partially in an Indian costume in protest against American treatment of the Indians? To ask that question is to answer it. (pp. 817-818)

Disposition: The plaintiff's complaint was dismissed. (p. 818)

Citation: Livingston v. Swanquist, 314, F. Supp. 1 (N.D.Ill. 1970)

Facts: Oswego Community High School had a dress code with which two teenage male students refused to conform and continued to wear their hair over the ears and shoulder length. The two students sought readmission to classes. The school authorities refused them admittance until they wore their hair in compliance with the hair grooming provision of the school's dress code. The students, both minors, thereupon brought this action, each by his father and next friend, pursuant to the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution, charging violation of their rights thereunder, and seeking equitable and declaratory relief and damages. (p. 2)

The plaintiffs named as defendants the Board of Education for School District 308 in Kendall County, Illinois, members of the school board, and Douglas Moews, the principal of Oswego Community High School. (p. 2)

Prior to the opening of the Fall 1969 term at Oswego Community High School, the school had not had a dress code with rules regulating the type and manner of students' attire and appearance. The school board, teachers, students, and the community had felt no need for such a code as there had been no serious problems and certainly no disciplinary problems regarding the dress and appearance of students. Variations from accepted standards of dress and conduct which had developed before that time had been solved by a process of persuasion. (p. 3)

However, beginning in the Fall of 1969 the influence of the student protest movement throughout the country began to be felt, and there arose in the community a demand for the adoption of a dress code for the junior and senior high schools. (p. 3)

Responding to the demands of parents, teachers, and students, the school board directed Douglas Moews, the principal at Oswego Community High School, to appoint a committee to make a study, survey public opinion, and finally to make recommendations concerning a dress code for the schools. The names of the committee members were publicly announced, and the plaintiffs made no objection to the committee as appointed. In fact, no objection was made to the membership by any person. The committee held meetings and there was wide community participation in its decisions. (p. 3)

The dress code was on the agenda of a special session of the board on November 3rd, and the board decided the dress code was essential. It concluded certain standards of dress and good grooming promote a wholesome academic atmosphere and would reflect in the well-being of the community. It also was the board's opinion that the vast majority of students wish to create a favorable impression of themselves and their schools. The board also determined that since there is so much similarity in the dress of male and female students who wear slacks and sweaters, there should be some way by which teachers could easily distinguish the boys from the girls and thus avoid difficulties which could arise if some unruly, or ill-mannered, or malicious-minded boy entered a girl's washroom or vice versa. The board decided that an effective method would be to prohibit boys from adopting girl's hair styles and that the most practical procedure would be to require the boys to have their hair cut so as to expose their ears and no longer than the top of their collars. The board also determined that the wearing of a girl-style hair-do by boys was in fact a disruptive influence and interfered with order in the classroom. (p. 3)

Copies of the dress code were made available in the school's homerooms where it was read and discussed. On November 6, 1969, the school held a general convocation for all students, and Jack Livingston and Tim Hellberg were present. The dress code was read, explained, and fully discussed. The students, including the minor plaintiffs herein, were then and there informed that the dress code would become effective; that after November 10, 1969, the code would be enforced and, further, that any student who failed to dress or groom himself or herself according to the code would not be permitted to remain in school from and after November 10, 1969. (p. 4)

On November 10, 33 of the 300 boys in the school appeared with their hair covering their ears and falling below their collars and otherwise not in compliance with the hair grooming provision of the code. Jack

> Livingston and Tim Hellberg were among the 33. The principal promptly sent all 33 students home with directions to see their barbers before returning. Most of the boys returned to school on the same day with their hair dressed in conformity with the regulation. All of the 33 boys had returned by the next day in compliance with the hair grooming provision except Jack Livingston and Tim Hellberg. All these 31 students were immediately admitted to classes. Since that time there has been no further dress or grooming problem at the school except that concerning the minor plaintiffs. (p. 4)
>
> Both Jack Livingston and Tim Hellberg left the school on November 10, 1969, after being informed they could not attend classes until they complied with the regulation concerning style and length of hair. Thereafter, school authorities urged the two students to comply with the dress code and return to school, but they refused to return unless they could do so without complying with the hair-grooming rule. It also appears that the parents of both these minors requested their children to comply and return to school, but both minors refused to do this and their parents acceded to their decision. On several occasions both Jack Livingston and Tim Hellberg returned to school without complying with the regulation and requested admission. This was denied them. (p. 4)

Issues: The First Amendment issue at hand involves the right of school authorities to adopt and enforce a dress code for high school students and to bar male students with long hair from school attendance. The constitutional question is whether, by such action, the school authorities violate the free speech and free expression rights of public school students. (p. 2)

Holding: The District Court for the Northern District of Illinois, Eastern Division, held that the school's dress code did not violate protection afforded by the Federal Constitution, where the code and its hair grooming provisions did not arbitrarily define a class to which it applied, was not discriminatory, and was equally applied to all students, and where there was no claim or showing that it was not equally enforced. Specifically, the enforcement of the dress code did not deprive the plaintiffs of freedom of speech and expression where conclusion was required that the plaintiffs did not wear their hair long for political, social, or religious reasons, or as symbols of a movement, or as a way of expressing themselves. (p. 1)

Reasoning: Jack Livingston and Tim Hellberg have never claimed they have been in compliance with the hair

grooming provision or that they did not have notice of the enactment of the dress code by the school board. (p. 4)

The minor plaintiffs simply refused to comply, wanted the code repealed, and demanded that school authorities readmit them in spite of the fact they were admittedly in violation and defiance of the hair grooming provision. They, in effect, asked that a special exception be made for them, and that the code apply to all others but not to them. This exception the school board and school authorities properly refused to grant. (pp. 4-5)

These two minors had full knowledge of the school's dress code. They were advised on November 10, and at other times, of the reason for not being admitted to school. They defied the hair grooming provision and continue to defy it on the grounds that they want to wear their hair long as an expression of their "freedom" and as each of them testified, "I like it that way." They maintain they have a constitutional right to be dressed and groomed as they see fit. Neither of the minor plaintiffs claims he has any political, racial, or religious belief involved in wearing hair long, or that there is any sanitary reason therefor. With each of the minor plaintiffs, it is merely a matter of personal choice. (p. 5)

The defendants produced four experts, each with many years of experience in teaching and in administrative capacities in education. All of these experts testified that, from their professional and educational experience and training, they were of the opinion that there is a direct correlation between dress and grooming and good behavior, discipline and a teaching climate in the classroom. None of this testimony was refuted, nor was any attempt made to refute the opinions of these experts. (p. 6)

This court finds the school board was not arbitrary or capricious, but was justified in adopting a school dress code for Oswego Community High School. There was reasonable necessity for the code in the administration of an orderly school program at the school. In this court's opinion, the defendants have established that violations of the school's dress code can be disruptive and can adversely affect discipline and decorum in the classroom. The defendants have shown a school dress code is an aid in maintaining good order in the school and a proper teaching climate. (p. 6)

School officials are best able to determine what rules are reasonable and necessary—not the federal courts. It is high time the federal courts cease interfering

with the management and enforcement of discipline in the schools and return conduct and control back to school authorities. Not only have the schools been controlled by teachers and school boards, but it has been, and is, their constitutional function under the Tenth Amendment which reserves such control to the States as part of the police power. (p. 6)

The United States Supreme Court has repeatedly reminded the lower courts that they should not interfere in the daily operation of the schools. See Tinker v. Des Moines Community School District, 89 S. Ct. 733, at 737. (p. 7)

As to Jack Livingston's and Tim Hellberg's claims that enforcement of the regulations deprived them of freedom of speech and expression under the First Amendment, this court concludes from their own testimony and otherwise that they did not wear their hair long for political, social, or religious reasons, or as symbols of a movement or as a way of expressing themselves as to come within the concept of free speech in the First Amendment. Theirs was a personal choice as to hair dress. It was not an expression of freedom of speech as in the Tinker case, where the school pupils wore black armbands to protest the government's policy in Vietnam. The parallel in the instant case is with the Ferrell case. As in the Ferrell case, the minor plaintiffs herein appear to be making a studied effort to draw attention to themselves, which is disruptive in the classroom. They want an education on their own terms. As the court said in Ferrell, "This court is concerned for the welfare of individual plaintiffs in this case, but feels the rights of other students, and the interest of the teachers, administrators and the community at large are paramount." (p. 8)

The school board had compelling reasons for adopting and enforcing the dress code, and by suspending students who wear long hair simply because they "like it that way," the board did not violate their rights under the United States Constitution and the laws of the State of Illinois. (p. 8)

In this court's opinion, this court and no other court has jurisdiction or power to interfere with such action of the board and school authorities since the action was not overreaching and did not violate the minor plaintiffs' constitutional rights. (p. 9)

Disposition: The court denied the plaintiffs the relief requested and decreed the cause dismissed. (p. 9)

Citation: Dawson v. Hillsborough County, Florida School Board, 322 F. Supp. 286 (M.D.Fla. 1971)

Facts: This is an action in which injunctive relief is sought terminating the minor plaintiffs' suspensions from Plant High School, Tampa, Hillsborough County, Florida. (p. 288)

In November 1970, the minor plaintiffs were suspended from Plant High School solely because their hair was not worn in conformity with the 1970-1971 Hillsborough County School Dress Code. In particular, minor plaintiff Lawrence E. Dawson, Jr., was suspended because (a) his ears were not entirely exposed, and (b) the back of his hair was too long, i.e., the back of the neck could not be seen. Minor plaintiff James B. Dawson was suspended because his ears were not entirely visible. (p. 288)

The 1970-1971 Hillsborough County School Dress Code was adopted by the defendant school board and is enforced by school authorities acting in the name of the board. Plant High School is a public school operated under the authority of the school board. (p. 288)

Following their suspensions, the plaintiffs exhausted all state administrative remedies. The minor plaintiffs have not attended Plant High School since their suspensions, but have attended school in Volusia County, Florida. (p. 288)

Issues: As characterized by the First Amendment's freedom of expression, is the right to wear one's hair at any desired length or manner a federally protected right which may be regulated only upon a showing of a subordinating state interest? (p. 287)

Holding: With respect to the First Amendment issue, the District Court for the Middle District of Florida held that the school board failed to show that long hair had caused disruption in the school (with the exception of incidents arising out of efforts to enforce hair restrictions), that long hair constituted any danger to the health and safety of the school community, or that there was any compelling interest which school authorities had in concerning themselves with the length of students' hair. Accordingly, the students' freedom of expression had been violated. (pp. 286-287)

Reasoning: The defendant school board has failed to show that the hair regulations contained in the 1970-1971 Code are necessary to alleviate interference with the educational process. (p. 288)

In suspending the minor plaintiffs from Plant High School for violation of the Code, the defendant school board has acted under color of state law to unlawfully

deprive the minor plaintiffs of a fundamental constitutional right. (p. 288)

This court observes that much of the school board's evidence consisted of the opinions of the school officials who are responsible for the promulgation and enforcement of the regulations under attack. Some of these opinions were vitiated by the officials' belief that long hair represents an undesirable attitude on the part of the student. It is remarkable that not one of the school officials who testified as to the deleterious effects of long hair was able to cite a single instance in Hillsborough County where long hair alone had created disruption among the students or had interfered with classroom activities. (p. 298)

The defendant argues that the Code is to be upheld because of the elaborate, participatory way in which it was adopted. But a regulation impinging upon constitutional rights cannot be justified on the basis of the procedural machinery which led to the regulation's adoption. (p. 300)

The Fifth Circuit Court of Appeals has held that the touchstone for sustaining hair regulations is the demonstration that they are necessary to alleviate interference with the educational process. This court finds that the Code cannot be sustained on the basis of its origins. The Code can be sustained only upon a showing that it is necessary to prevent educational disruption. (p. 300)

It was the defendant's position that the minor plaintiffs had failed to show that any constitutional right of theirs was infringed when they were suspended on account of their hair length. (p. 303)

The Fifth Circuit, whose decisions are binding on this court, has never ruled explicitly on the question of whether the right to wear one's hair in any desired manner is a fundamental right guaranteed by the United States Constitution. Nevertheless, that court has indicated that there is such a right. (p. 303)

In Ferrell v. Dallas Independent School District, 392 F.2d 697 (5 Circuit 1968), the panel assumed, although it did not decide, that a hair style is a constitutionally protected mode of expression. The panel then upheld a hair regulation on the general ground that constitutional rights may be abridged where there is a compelling reason for state infringement; and the compelling interest was found to be the state's interest in an effective and efficient school system. (p. 303)

In Griffin v. Tatum, 425 F.2d 201 (5 Circuit 1970), the appellate court again upheld a hair regulation where the undisputed evidence showed that long hair on boys was disruptive. The appellate court summarized the rule of Ferrell in these words: "The touchstone for sustaining such regulations is the demonstration that they are necessary to alleviate interference with the educational process." (425 F.2d at 203) (p. 304)

Other circuits have held that the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom guaranteed by the federal Constitution. See Richards v. Thurston, 424 F.2d 1281 (1st Circuit 1970); Breen v. Kahl, 419 F.2d 1034 (7th Circuit 1969); Crews v. Cloncs, 432 F.2d 1259 (7th Circuit 1970). (p. 304)

This court concludes that the right to wear one's hair at any desired length or manner is a federally protected right. If this conclusion were incorrect, then the Fifth Circuit would not have required a showing of interference with the educational process for a hair regulation to be sustained. Stated differently, there would be no reason for the courts to require evidence of classroom disruption if individuals did not have the right to wear their hair as they wish; a compelling state interest is needed only where the state encroaches upon personal freedoms, i.e., constitutional rights. (p. 304)

Disposition: Injunctive relief requiring the school board to terminate the students' suspensions for violating the long hair provision of the school dress code was granted (p. 286). The school board was directed to take all appropriate steps which would permit the minor plaintiffs to make up for all academic loss or impairment each suffered by reason of the defendant's unconstitutional suspension of the minor plaintiffs. (p. 289)

Citation: Press v. Pasadena Independent School District, 326 F. Supp. 550 (S.D.Tex. 1971)

Facts: This controversy concerns secondary school discipline. The plaintiff, an eighth-grade student, by her father as next friend, sues a school district, its board of trustees, and various school officials. The plaintiff was suspended from the Jackson Intermediate School for the remainder of the spring term as disciplinary action for her disobedience to certain school rules, to wit: the wearing of a pantsuit in violation of the dress code and participation in a demonstration in violation of the disruption policy. It is asserted that this suspension was constitutionally defective. Framing the claim as a class action, the plaintiff

seeks injunctive and declaratory relief on behalf of herself and of students similarly situated. (p. 552)

Issues: There are two First Amendment questions addressed in this case. First, is the wearing of a pantsuit by a student a form of communication protected by the First Amendment's guarantee of free expression, even if such action violated a school rule? Second, is a walkout demonstration, which occurred on school property, in violation of a school rule, at a time when the student and other demonstrators should have been engaged in classwork, but which was intended to convey the student's opposition to and disapproval of the dress code, constitutionally protected free speech and expression? (p. 551)

Holding: The District Court for the Southern District of Texas, Houston Division, held that the wearing of a pantsuit by a student, if a form of communication, was not the sort of expression protected by the First Amendment, where it necessarily entailed violation of a school rule. A walkout demonstration, which was intended to convey a student's opposition to and disapproval of the school's dress code, was not a constitutionally protected form of speech and expression, where the demonstration violated a clear and unequivocal school rule, and it occurred on school property and at a time when the student and other demonstrators should have been engaged in classwork. (p. 551)

Reasoning: The plaintiff contends that her First Amendment rights have been violated. The plaintiff testified that during the walkout demonstration she had on her maxi (long dress) over her pants and that she did not remove her maxi until she returned to the building. The wearing of the pantsuit in and of itself was not intended to convey a thought or an idea, but assuming that the pantsuit was a form of communication, it was not that sort of expression protected by the First Amendment because it necessarily entailed violation of a school rule. In Ferrell v. Dallas Independent School District, 392 F.2d 697, 703 (5th Cir. 1968), the court stated:

> The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes or hinders the state in providing the best education possible for its people, must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right. (p. 563)

For the same reason, the walkout demonstration which was intended to convey the plaintiff's opposition to

and disapproval of the school dress code, was not constitutionally protected. The demonstration violated a clear and unequivocal school rule. It occurred upon school property and at a time when the plaintiff and the other demonstrators should have been engaged in classwork. Its occurrence interrupted the pedagogical regimen of the day. It is well settled that demonstrative activity, such as this in secondary schools, which is disruptive of the educational process or is calculated to undermine the school routine, forfeits the shield of the First Amendment. See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733; Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966). (p. 563)

Furthermore, to the extent that the disruptions policy on its face serves to discourage certain forms of expression in the school atmosphere, this limited curtailment is well within the power of the State. As the Supreme Court put it in Younger v. Harris, 91 S. Ct. at 754:

> Moreover, the existence of a "chilling effect," even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. (p. 565)

Disposition: The plaintiff's motion for injunction pending appeal was denied, and the defendant's motion to dismiss was granted. (p. 567)

Citation: Rumler v. Board of School Trustees for Lexington County District No. 1, 327 F. Supp. 729 (D.S.C. 1971)

Facts: It is undisputed that on November 10, 1970, when plaintiff Rumler, who had been previously told by the high school principal that the length of his hair violated the regulations, was told that he was not to come back to school until he obtained a haircut that did comply. He was told that he could not remain in school, refused to have his hair cut, and telephoned for his mother to come for him, telling her on arrival, "Let's go get that lawyer." He testified that he had previously been in touch with a lawyer representing the ACLU, who had stated that he would be represented in the contemplated action without cost to him or his family, and that he had this action in mind

when he presented himself at school on December 2, 1970. (p. 733)

Plaintiff Rumler did not get his hair cut, and remained suspended from school for the remainder of 1970. During that time, plaintiff Nichols kept his hair cut to conform to the regulations—albeit unwillingly—and remained in school. (p. 733)

The plaintiffs testified that they didn't cut their hair because they wanted to wear it long, and that there was no reason for the rule. Both professed ignorance as to the meaning of the word "conventional," but both admitted that they had been told that the rule required that their hair be cut so that it was "off their ears, above their eyebrows, and did not hang below their collars." (p. 734)

A sixteen-year-old from Keeman High School, in Columbia, testified that wearing long hair was a method of "free expression" of one's self. He also stated that he cut his hair in the summer, when his head began to itch. Just what was meant by free expression he never explained; but, as best as can be gathered from his testimony, it is an expression of one's individual personality. (p. 734)

Both the principal and assistant principal at Lexington High School, as well as Mrs. McMahan, a classroom teacher there, and Mr. Rawl, now superintendent of the district, and formerly principal of the high school, stated unequivocally that hair that violated the regulations was distracting, tended to create disorders, attracted the attention of other students and caused whistles, jeers, laughs, and remarks, and was detrimental to the educational environment. One stated that, without enforcement of the hair grooming regulation, he did not feel that there would be any proper discipline in the schools, and that education would suffer greatly. (p. 735)

Dr. Williams, who has been in public education for many years, stated that it is his opinion that anything unusual, abnormal, out-of-the-ordinary, or not customary, has a tendency to attract attention to it; and, consequently, any unusual appearance of a pupil at school which attracts the attention of other pupils to it will unquestionably result in distractions and diversion of attention which necessarily take the pupils' minds away from their purpose in attending school—to get an education. He was clearly of the opinion that these hair regulations prescribed for male students were reasonable and served a useful purpose. (p. 735)

Issues: Does a regulation specifying the length of hair on male students in high school deny these students freedom of speech guaranteed by the First Amendment? (p. 730)

Holding: The District Court of South Carolina, Columbia Division, held that, in regard to the First Amendment, a "hair length" regulation did not deny male students in a public high school their right to free speech. Nor was the regulation void for vagueness or overbreadth. (p. 729)

Reasoning: School District Number One of Lexington County, South Carolina, acting through its authorized and qualified educators-administrators promoted certain regulations as to dress and grooming, including male haircuts. These regulations were published in the student handbook and communicated each year to the entire student body. (p. 735)

> The dress regulations, and the implementations of them, were for the purpose of securing a proper climate for pursuit of educations in the schools of the district. They were and are a part of the discipline which the educators-administrators of the district sincerely believed necessary to keep the order requisite to teaching and learning. More than an "undefined fear or apprehension of disturbance" was established by the credible testimony. Administrators, students, and others testified that extremes in hair styles have in the past created distractions and disturbances in the schools. They had reasonable basis on which to base their opinions and the resulting policies. (p. 735)
>
> The minors involved did not wear long hair as an expression of belief on any subject such as the Vietnam war, the draft, or other issues which have been the subject of Constitutional-First Amendment assemblies and protests. Their reasons for wearing long hair, as explained by each and both, was to use an apt expression "to do as I please." Nothing in this record reveals that the violation of the regulation could produce for either of them, or anyone else, a furtherance, improvement, or complement to the educational processes to which the schools are, traditionally, dedicated and supported by tax dollars. In fact, there was no showing that a violation of the regulation could be beneficial to anyone connected with the entire school system; the contrary was clearly evidenced. (pp. 735-736)
>
> The record is void of any showing either minor plaintiff suffered any harm by obeying haircut regulations. As long as they obeyed the same regulations required

of everyone else, they remained in school. Their suspension from school could at any time have been avoided or terminated by their having their hair cut. (p. 736)

The regulation was sufficiently clear and concise, and the plaintiffs fully understood its meaning and purpose. They deliberately and intentionally allowed their hair to exceed acceptable limits in order to test the authority of the school administrators. Their action was deliberately improper and prompt discipline was justified. (p. 736)

The regulation and its implementation are neither vague nor too broad. There appears to be nothing arbitrary, unreasonable, or capricious in the promulgation or implementation of the regulation. Its interpretation and enforcement have a real and reasonable connection with successful school operations, and the discipline which is a necessary part thereof. The defendants have established that the excessively long hair is disruptive of, and a barrier to, the learning processes which the schools seek to develop. The regulation, the implementation is/was necessary in the orderly operation of the school program. (p. 736)

Does the regulation under attack deny the plaintiffs that freedom of speech guaranteed by the First Amendment to the United States Constitution? Of necessity the court's attention is directed to Tinker, which directed that, "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." This court is not convened to interpret Tinker, rather to follow and apply; therefore, the language of the majority opinion is here employed:

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. 89 S. Ct. 733, 740, citing Blackwell v. Isaquena County Board of Education (CCA 5 1966), 363 F.2d 749 (p. 740)

This court has discussed the failure of the plaintiffs to pitch their case on expression of support of any idea or ideology. The case, therefore, does not involve rights akin to pure speech. The plaintiffs can find no constitutional shelter under the First Amendment. Again relying on the language of Tinker:

> The problem imposed by the present case does not relate to regulation of the length of skirts or

> the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech. (p. 740)
>
> Additionally, there is no suggestion here that the activities of the plaintiffs were expressing such political or social thought as to entitle them to First Amendment protection. (p. 740)

Disposition: The plaintiff students were entitled to no injunctive relief under the First Amendment. (p. 740)

Citation: Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971)

Facts: In three cases involving the regulation of hair styles of male students in state public schools, the United States District Court of Utah, Freeman v. Flake, 320 F. Supp. 531, and the United States District Court of Colorado, White v. Board of Education of Hobbs Municipal School District No. 16, upheld regulations, and the plaintiffs appealed. In Cranson v. East Otero School District R-1, the United States District Court of New Mexico rejected the regulations, and the defendants appealed. (p. 258)

Issues: In this case, three issues are relevant to students' First Amendment rights to freedom of expression and freedom of speech: 1) Is the wearing of long hair in a public school akin to pure speech? 2) Does recognition of the principle that neither students nor teachers shed their constitutional rights to freedom of expression or speech at the schoolhouse gate imply that the First Amendment contains an express command that the hair style of male students in public schools lies within a protected area? 3) May states determine what hair regulation is necessary to the management of their schools? (pp. 258-259)

Holding: The Court of Appeals for the Tenth Circuit held that the United States Constitution and statutes did not impose on federal courts the duty and responsibility of regulating hair styles of male students in public schools. The problem, if any, was one for the states and should be handled through state procedures. The appellate court further noted that the wearing of long hair to school was not akin to pure speech. It was, at most, symbolic speech indicative of expressions of individuality rather than a contribution to the marketplace of ideas. Recognition of the principle that public school teachers and students did not shed their constitutional rights of expression and speech at the schoolhouse gate did not mean that the First Amendment contained an express command that hair

styles of male students in public schools was within a protected area. The court emphasized that the states, acting through their local authorities and courts, should determine what, if any, hair regulation was necessary to the management of their schools. (pp. 258-259)

Reasoning: This court is convinced that the United States Constitution and statutes do not impose on the federal courts the duty and responsibility of supervising the length of a student's hair. The problem, if it exists, is one for the states and should be handled through state procedures. (p. 259)

This court has three cases, one each from Utah, New Mexico, and Colorado. In each, one or more students were suspended for violation of the school regulation on the length of hair of male students. Although the regulations differ in language, they essentially require that the hair should not hang below the collar line in the back, the ears on the side, or the eyebrows in front. The evidence need not be detailed. It is remarkably similar in each case. The students desired to express their individualities and the school boards offered justification for the regulations. No claim is made of any racial or religious discrimination. This court finds nothing in the record to indicate that the hair regulations were motivated by other than legitimate school concerns. The federal district courts in Utah, Freeman v. Flake, 320 F. Supp. 531, and Colorado upheld the regulations and in New Mexico the regulation was rejected as infringing on constitutional rights. (pp. 259-260)

The federal circuits are sharply divided on the constitutionality of regulations pertaining to the length of the hair of male students in state public schools. The students have prevailed in the First and Seventh Circuits. See Richards v. Thurston, 1 Cir., 424 F.2d 1281, and Crews v. Cloncs, 7 Cir., 432 F.2d 1259. The school regulations were upheld in the Fifth, Sixth, and Ninth Circuits. See Ferrell v. Dallas Independent School District, 5 Cir., 392 F.2d 697; Jackson v. Dorrier, 6 Cir., 424 F.2d 213; and King v. Saddleback Junior College, 9 Cir., 445 F.2d 932. (p. 260)

No apparent consensus exists among the lawyers for the students as to what constitutional provision affords the protection sought. Reliance is variously had on the First, Fourth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States and on the penumbra of rights assured thereby. The uncertainty of position complicates, rather than clarifies, the issue. The briefs and arguments for the students cavalierly dismiss, or entirely fail to dis-

cuss, the problem of federal intervention in the control of state schools in the absence of a direct and positive command stemming from the federal constitution. The hodgepodge reference to many provisions of the Bill of Rights and the Fourteenth Amendment shows uncertainty as to the existence of any federally protected right. (p. 260)

All of the briefs for the students rely on Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. Tinker was concerned with the suspension of three students for wearing to school black armbands to publicize their objection to Vietnam hostilities. The Court held that the conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. The Court said that the wearing of armbands was closely akin to pure speech and that, 89 S. Ct. 737:

> The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. (p. 260)

This court believes that the effect of this statement is to eliminate hair style from any impact of the decision. The wearing of long hair is not akin to pure speech. At the most it is symbolic speech indicative of expressions of individuality rather than a contribution to the storehouse of ideas. With reference to symbolic speech, the Supreme Court said in the draft card burning cases, United States v. O'Brien, 88 S. Ct. 1673, 1678:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. (pp. 260-261)

Recognition of the principle that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," 89 S. Ct. at 736, does not mean that the First Amendment contains an express command that the hair style of a male student in the public schools lies within the protected area. (p. 261)

Perhaps the strongest constitutional argument which can be made on behalf of the students is based on the "liberty" assurance of the Due Process Clause of the Fourteenth Amendment. It was on this ground that the First Circuit held for the student in Richards v. Thurston, see 424 F.2d at 1284-1286, a case in which no justification was offered for the regulation. Reliance on justification carries with it the concept that

a regulation affecting the due process guarantee of liberty depends for its validity on the reasonableness of the limitation placed on the regulated conduct. The evanescent nature of this standard is illustrated by the three cases before this court. On unsurprisingly similar justifications two federal district courts upheld the regulations and one held to the contrary.

This court doubts the applicability of the test of reasonableness in the determination of the nebulous constitutional rights here asserted. The issue should not turn on views of a federal judge relating to the wisdom or necessity of a school regulation controlling the length of hair worn by a male student in a state public school. In Ferguson v. Skrupa, 83 S. Ct. 1028, 1031, the Court said that the courts will not "substitute their social and economic beliefs for the judgment of legislative bodies." The same principle is pertinent to dress codes of school boards. (p. 261)

The states have a compelling interest in the education of their children. The states, acting through their school authorities and their courts, should determine what, if any, hair regulation is necessary to the management of their schools. In speaking of judicial interposition in the operation of the public school systems, the Supreme Court said in Epperson v. Arkansas, 89 S. Ct. 266, 270:

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. (pp. 261-262)

Whether the allegations of a complaint state a claim for relief is a question of law. Complaints which are based on nothing more than school regulations of the length of a male student's hair do not "directly and sharply implicate basic constitutional values" and are not cognizable in federal courts under the principles stated in Epperson v. Arkansas. It follows that each of the complaints with which this court is concerned should have been dismissed for failure to state a claim on which relief can be granted. (p. 262)

Disposition: The Court of Appeals for the Tenth Circuit affirmed the judgments of dismissal by the District Court of Utah (Freeman, 320 F. Supp. 531) and the District Court of Colorado (White). The judgment for the students by the District Court of New Mexico (Cranson) was reversed, and the case was remanded with directions to dismiss. (p. 262)

Citation: Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971)

Facts: The school administration of St. Charles, Missouri, in March 1970, suspended fifteen-year-old Stephen Bishop from school attendance solely because his hairstyle violated provisions of the school dress code. Stephen and his parents brought this action seeking to obtain his readmission, and a declaratory judgment overturning the dress code regulations governing the hair length and style of male students. The plaintiffs assert that these regulations violate Stephen's, and his parents', personal rights guaranteed by the United States Constitution. After the district court denied the Bishops any relief, they brought this timely appeal. (p. 1070)

A few days after school opened in September 1969, the physical education teacher objected to Stephen's hairstyle because it was not tapered in the back and above the ears as was then required by the existing regulations. Following several conferences involving Stephen, his parents, the principal, and the assistant principal, Stephen's hair was trimmed to conform to the regulations. In November, the same teacher protested the length of Stephen's hair, and following additional conferences with the administration, Stephen again cut his hair. In January 1970, after the hair-length regulations had been modified to allow for a block cut, Stephen's mathematics teacher complained that Stephen's hair was too long in the back and over the ears. In response, Stephen trimmed his hair in back, and after additional conferences between the assistant principal and Stephen's father, Stephen's hair was made to comply with the regulations by also trimming it over the ears. Finally, in February 1970, Stephen and his parents refused to acquiesce in the further demands of the school administration that Stephen's hair be trimmed again. Stephen was suspended a few days later, and the instant litigation followed. (p. 1071)

Issues: Although the decision in this case rests primarily on the Fourteenth Amendment's Due Process Clause, a First Amendment issue is also implicated. The issue is whether hair length and style regulations for male students violate the students' First Amendment rights absent any showing that the hair length and style represent a symbolic expression of any idea. (p. 1070)

Holding: With respect to the First Amendment issue, the Court of Appeals for the Eighth Circuit concluded that: (1) all conduct cannot be labeled speech for First Amendment purposes, even when the actor intends thereby to express an idea; and (2) conduct not intended to express an idea cannot be afforded First

Amendment protection as speech. (p. 107) The appeals court relied on the Fourteenth Amendment as well as the Ninth Amendment, in holding that a public high school's dress code regulating the hair length and style of male students was invalid and unenforceable, where the regulation was not necessary to carry out the educational mission of the school because students possessed a constitutionally protected right to govern their personal appearance while attending public high school. (pp. 1069-1070)

Reasoning: This court deems the First Amendment contention to be without merit in the context of this case, because the record contains no evidence suggesting that Stephen's hairstyle represented a symbolic expression of any kind. The appellants concede that Stephen never considered his hairstyle to be symbolic of any idea. They argue, however, that a "[nonconforming hairstyle] need not symbolize anything at all to be a constitutionally protected expression." The court cannot accept this unusually broad reading of the First Amendment. Because all conduct cannot be labeled speech even when "the [actor] intends thereby to express an idea," United States v. O'Brien, 88 S. Ct. 1673, 1678, certainly conduct not intended to express an idea cannot be afforded protection as speech. (p. 1074)

This court holds that Stephen possessed a constitutionally protected right to govern his personal appearance while attending public high school. The determination that Stephen possesses this personal freedom, however, does not end our inquiry into the constitutionality of the challenged regulations. Personal freedoms are not absolute; they must yield when they intrude upon the freedoms of others. The task, therefore, is to weigh the competing interests asserted here. In doing so, the court proceeds from the premise that the school administration carries the burden of establishing the necessity of infringing upon Stephen's freedom in order to carry out the educational mission of St. Charles High School. (pp. 1075-1076)

The case presented by the school administrators fails to demonstrate the necessity of its regulation of the hair length and style of male students. The court holds this regulation invalid and its terms unenforceable. (p. 1077)

Disposition: The appeals court reversed the ruling made by the District Court for the Eastern District of Missouri and remanded the case for the entry of judgment in conformity with this opinion. (p. 1077)

Citation: Church v. Board of Education of Saline Area School District, Michigan, 339 F. Supp. 538 (E.D.Mich. 1972)

Facts: This case involves a school dress and grooming code adopted by the Saline Area Board of Education in Washtenaw County, Michigan, pursuant to authority granted to it under the laws of the State of Michigan. The plaintiff, Don Leslie Church, Jr., is presently a twelfth grade student attending school under a preliminary injunction issued by this court on September 30, 1970, after his suspension from school for violation of the dress and grooming code. (p. 538)

This court's jurisdiction is invoked by the plaintiff under Title 42 U.S.C. Section 1983, alleging a denial of his constitutional rights by the defendants' acting under color of state law. (p. 539)

The plaintiff contends that the code infringes his fundamental constitutional right of freedom of speech under the First Amendment and that there is no countervailing compelling interest to justify the alleged infringement of this constitutional right. In this regard, it is contended that since the only purposes of the regulation are the alleged stifling of dissent and the enforcement of social conformity, the regulation is constitutionally impermissible and invalid on its face. It is also said that the school authorities cannot show any legitimate educational objectives to justify the regulation in question. (p. 539)

The defendants submit that the doctrine of in loco parentis should be applied to the instant action and that under such theory the court should dismiss the case. (p. 539)

Issues: Is a high school student's First Amendment freedom of expression and speech denied when he is suspended for violating the school's dress and grooming code by wearing his hair long? (p. 538)

Holding: The District Court for the Eastern District of Michigan, Southern Division, ruled that the suspension of a public high school student for not adhering to the dress code violated his First Amendment rights to expression and speech, where the student was symbolically expressing a political viewpoint by wearing his hair long and no danger of violence or other impediment of school activities occurred. (p. 538)

Reasoning: This court finds totally unpersuasive the in loco parentis argument advanced by the defendants in their suggestion that the case should be dismissed. The contention that the school stands in place of the

parent in matters such as the length of hair is untenable, especially since there is no indication that any disturbance to the educational system resulted thereby. In fact, the plaintiff in this case had total parental support in his decision to grow his hair; his father, for reasons similar to that of his son, also allowed his hair to reach a length apparently considered undesirable by the citizens of the Saline community. There is no question that the school is expected to stand in the parents' place in certain areas during school hours, but with respect to "intimately personal matters such as dress and grooming," it must share that responsibility with the parents. See Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969) affirming 296 F. Supp. 702 (D.C. 1969) (pp. 540-541)

The plaintiff's argument is that the regulation in question infringes his right to freedom of speech under the First Amendment to the U.S. Constitution. The stipulated facts indicate that the plaintiff had a twofold purpose in growing his hair longer that permissible under the code. His first purpose was "to present . . . a tangible continuously visible symbol of his personal viewpoint on the Vietnam war [since] the plaintiff knew that his long hair would be identified by those in the Saline community with opposition to the war," and secondly, he allowed his hair to grow "in order to symbolize the importance of dissent generally" in opposition to the "oppressive intolerance for any dissent, which . . . was paradigmatically expressed by the Saline community in its school hair code." (p. 541)

It should be noted at the outset what this case does not present. The situation here does not fall in the category of the First Amendment argument advanced in Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), where the court found no protected First Amendment right because the plaintiffs allowed their hair to grow in violation of the grooming code for purely commercial purposes. Nor does this case elicit the confrontation between one's First Amendment rights and the recognized responsibility of a school administration to maintain the decorum necessary to further the educational processes. Rather, the situation here is clear; it is stipulated that the plaintiff was symbolically expressing a political viewpoint and that no danger of violence or other impediment of school activities occurred. (p. 541)

It is the view of this court that the suspension of the plaintiff under the school dress code violated his First Amendment rights within the meaning of the U.S. Supreme Court decision in Tinker v. Des Moines Inde

pendent Community School District, 89 S. Ct. 733. (p. 541)

Tinker made clear the proposition that symbolic acts, when communicative intent is present, may fall within the Free Speech Clause of the First Amendment. It is the view of this court that the stipulated facts in the instant case show that the political expression intended by the growing of long hair places the act within the ambits of the First Amendment as considered by Tinker. The facts here show the long process by which the plaintiff arrived at his decision to grow his hair beyond the length permissible. This was not a mere whim or attempt to keep in tune with current fashion trends. Rather, there was clear communicative intent which was perceived by those at whom it was directed as a symbol of political expression. This court concludes that every serious First Amendment question has been raised under the facts of this case and that the plaintiff's First Amendment rights have been violated. Accordingly, the court finds that the regulation is unconstitutional as applied to plaintiff Don Leslie Church, Jr., and those similarly situated. It is the further view of this court that the regulation may not be enforced against any other students in the Saline High School in light of the peculiar circumstances present in this record; where the school authorities offer no cognizable educational justification for the regulation, this court holds that the effect of enforcement is to create a "chilling effect" on First Amendment rights of free speech and thus may not be enforced. See Dombrowski v. Pfister, 85 S. Ct. 1116. (pp. 541-542)

Disposition: The court ordered that the plaintiff and those similarly situated, as well as any other student having been suspended as a result of the provision at issue, be immediately reinstated with all the privileges and rights accorded them. It was further ordered that all evidence of student suspensions or any other disciplinary proceedings related to the hair length provision be totally expunged from any and all school records of the defendant school district by the appropriate officials. (p. 542)

Citation: Wallace v. Ford, 346 F. Supp. 156 (E.D.Ark. 1972)

Facts: This is a civil action brought by the plaintiffs, on their own behalf and on behalf of the class of all those similarly situated, seeking declaratory relief, a temporary restraining order and a permanent injunction prohibiting and restraining the members of the school board for the Perryville, Arkansas, School District and the superintendent from enforcing certain of

the provisions of the school's dress code which the plaintiffs claim are unconstitutional. (p. 157)

Issues: Although primarily a Fourteenth Amendment case, one question in this case has First Amendment implications. Specifically, does a secondary school's dress regulation precluding clothing having slogans, pictures, or emblems, except school-approved emblems, violate students' First Amendment rights of free expression and free speech? (p. 157)

Holding: The District Court for the Eastern District of Arkansas, Western Division, upheld certain portions of the dress code, such as those prohibiting skirts more than six inches above the knees and prohibiting excessively tight skirts or pants, but held invalid regulations precluding modest forms of dress, such as "knicker suits" and "jump suits," precluding skirts more than six inches below the knees, and precluding frayed trousers or jeans, shirttails outside pants, and tie-dyed clothing. Regarding the First Amendment issue, though school officials may prohibit the display of obscene or profane slogans or emblems and may limit speech in the classroom context if it substantially disrupts the educational mission of the school or substantially interferes with the rights of others, secondary school dress regulations precluding clothing having slogans, pictures, or emblems, except school-approved emblems, violated the students' freedom of expression and speech. (pp. 156-157)

Reasoning: The last provision of the dress code provides that: "Shirts or clothing having slogans, pictures, or emblems, etc. will not be worn except school approved emblems." It is clear that this provision is aimed at the legitimate objective of prohibiting obscene or profane slogans or emblems from being displayed. The regulation, however, goes much too far. It has the effect of excluding other legitimate forms of expression and speech and thus violates the students' First Amendment rights. It is therefore invalid. This is not to say that certain forms of speech cannot be regulated and prohibited by the schools. Certainly they can prohibit obscene speech or expression, since they are not constitutionally protected forms of speech. And other forms of speech or expression can be limited or prohibited in the classroom context if such speech substantially disrupts the educational mission of the school or substantially interferes with the rights of others. It should be emphasized, however, that any such restriction must not exceed that which is absolutely necessary to carry out such legitimate objectives. (p. 165)

Disposition: The judgement was for injunctive relief that prevented the enforcement of certain provisions of the school's dress code. (p. 156)

Citation: New Rider v. Board of Education of Independent School District No. 1, Pawnee County, Oklahoma, 480 F.2d 693 (10th Cir. 1973)

Facts: Three minor Pawnee Indian students, by and through their next friends, appeal from the order of the trial court denying a permanent injunction and dismissing their complaints following a full evidentiary hearing. The appellants are members of the Pawnee Tribe. They were each enrolled as seventh-grade students in Pawnee Junior High School until they were indefinitely suspended on April 24, 1972. (p. 695)

The appellees are members of the board of education, the principal and superintendent of School District No. 1 of Pawnee County, Oklahoma. It is one school system, consisting of about 940 students, grades K through 12. There are three main ethnic groups among the students: some 61 percent white, some 33 percent Indian and some 6 percent black. (p. 695)

The injunctive relief sought was predicated on allegations that the hair regulation at issue violated the appellants' rights under the First and Fourteenth Amendments and Title 42 U.S.C. Section 1983. The appellants contend that their guarantees of freedom of speech, free exercise of religion, equal protection of the law and due process of law were violated. (p. 695)

The subject hair regulation is part of a school dress code. There is no dispute that the hairstyle of the three appellants violated the regulation. (pp. 695-696)

On May 1, 1972, following a hearing, the trial court issued a preliminary injunction. In ordering the reinstatement of the three appellants, the court found that the wearing of long braided hair is an expression of a long-standing tradition and heritage of the Pawnee Indians, and that it was a symbol of religious identity. Following a hearing held on June 5, 1972, issuance of a permanent injunction, the court reversed its prior findings. It held that no substantial constitutional questions cognizable in the federal courts existed. It dismissed the complaint. The court stated that the plaintiffs should seek their remedy in the state courts. (p. 696)

On Motion for Reconsideration filed by plaintiffs-appellants, the lower court conducted a full evidentiary hearing on August 7, 1972. In a detailed Memorandum

Opinion dated August 10, 1972, the trial court again found that the schoolboard dress-hair code did not: (a) violate any of the plaintiffs' rights regarding any religious creed or belief, nor is the enforcement of the code a restriction of any religious belief, but 'at most a restriction upon a religious act'; or (b) discriminate against the plaintiffs on the basis of race, religion, or culture. The trial court also found that wearing of long hair is not akin to pure speech, and that a federal constitutional issue must exist not only in mere form, but in substance, and not in mere assertion, but in essence and effect. The plaintiffs-appellants appealed. (p. 696)

Issues: First Amendment rights are among several constitutional rights implicated in this appeal. The significant First Amendment issues are: (1) Is a junior high school hair regulation unconstitutional as denying the right of free speech? (2) Does the regulation bear a rational relationship to the state objective of instilling pride and initiative in students? (p. 694)

Holding: The Court of Appeals for the Tenth Circuit held that the attack on a school regulation, which prohibited hairstyles extending beyond the shirt collar, on grounds that it violated Pawnee Indian students' guarantees of freedom of speech, free exercise of religion, equal protection, and due process did not present a substantial constitutional question where the regulation bore a rational relationship to the state objective of instilling pride and initiative in students, the regulation was not drafted or enforced so as to discriminate against Pawnee Indian students, who wished to wear their hair in long braids because of pride in their ancestry, and it was not shown that the regulation was otherwise inherently suspect in its form or application; its sole purpose of regulation was not to chill assertion of constitutional rights by penalizing those who chose to exercise them. (p. 694)

Reasoning: The appellants contend that this court's decision in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), does not control in the case at bar in light of fundamentally distinguishable facts bearing upon religious, cultural, and racial issues. This court did note in that decision—involving, as here, school hair codes—that no claim was made of any racial or religious discrimination. The complaining students in Freeman simply wished to express their individualities by wearing their hair so long that they violated the school hair codes. They contended that such expression was guaranteed them under the First Amendment Free Speech Clause. In Freeman, this court held:

> The states have a compelling interest in the education of their children. The states, acting through their school authorities and their courts, should determine what, if any, hair regulation is necessary to the management of their schools. 448 F.2d at 261. (p. 698)

This court explicitly held that the wearing of long hair is not akin to pure speech. The court reaffirms that holding and thus put down any challenge to the subject regulation by the appellants here on a First Amendment free speech basis. (p. 698)

This court's careful review of the record has not disclosed any facts which would give rise to a federal court's duty to entertain the complaints or to afford any relief. Federal courts have the duty to entertain only solid claims of constitutional restraints under "color" of state law. Courts must conduct the "balancing test" referred to in Barker v. Wing, Warden, 92 S. Ct. 2182, in avoiding rigidity which would frustrate common sense, even when dealing with constitutional rights. Constitutional rights, including First Amendment rights, are not absolutes. Courts must balance them against a compelling public interest. The court cannot condemn the subject regulation unless it does, in fact, impinge on the exercise of fundamental constitutional rights or liberties.

In this case, there is neither a fundamental right at issue nor a suspect classification being applied. The hair code regulation bears a rational relationship to a state objective, i.e., that of instilling pride and initiative among the students lending to scholarship attainment and high school spirit and morale. It can hardly be contended from this record that the hair code regulation has . . . no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them . . ." See United States v. Jackson, 581, 88 S. Ct. 1209, 1216. (p. 698)

This court believes that it would create a veritable quagmire for school boards, administrators, and teacher personnel, to attempt to wade through in their promulgation and enforcement of dress-hair codes which they may deem necessary to accomplish the objectives the court has previously referred to were it to hold that the subject dress-hair regulation implicates basic constitutional values. The court shall not assume the responsibility of undermining the operations of the public school system by the various states through their duly chosen school authorities on such tenuous grounds. The judiciary is not designed to operate and manage school systems. (p. 700)

Disposition: The appeals court affirmed the ruling of the District Court for the Northern District of Oklahoma. (p. 700)

Citation: Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974)

Facts: The parents of children attending public schools in Canton, Oklahoma, brought this civil rights suit asserting several federal constitutional claims against local school officials and the local district attorney. The United States District Court for the Western District of Oklahoma dismissed and the parents appealed. Injunctive and declaratory relief and damages are sought. (pp. 1189-1190)

The plaintiffs are husband and wife, Viola Hatch being an American Indian and an enrolled member of the Arapaho Tribe. They have three school-age children who have, until recently, regularly attended Oklahoma public schools, two daughters and one ten-year-old son, Buddy. Defendant Cash is Superintendent of the Canton Public Schools and defendant Dow is the elementary principal in Canton. Defendants Herman Haigler, Hoots, Garriott, Bob Haigler and Acre comprise the Canton Board of Education. Defendant Goerke is the District Attorney for the district in which Canton is situated. (p. 1191)

On or about September 20, 1972, Buddy Hatch is alleged to have been summarily expelled without a hearing from the fifth grade by Principal Dow for failure to have his hair cut in accordance with the school rules for student appearance. Those rules provided, among other things, that boys' hair should be kept trim and neatly groomed and should not extend below the eyebrows or on the collar. Buddy was wearing his hair in braids, in traditional Indian fashion, with the full approval and encouragement of his parents. (p. 1191)

Issues: In addition to the issue of parental rights, a First Amendment issue is addressed in this case. That is, does the school's hairstyle regulation lend itself to the control of pure speech or any form of "symbolic speech" that falls within the protection of the First Amendment? (p. 1190)

Holding: The Court of Appeals for the Tenth Circuit determined that the school's hairstyle regulation did not lend itself to the control of pure speech or any form of "symbolic speech" that was encompassed within the parameters of the First Amendment. (p. 1190)

Reasoning: An order of the trial court concluded that the plaintiffs had failed to distinguish their case from Freeman v. Flake, 448 F.2d 258 (10th Cir.). The plain-

tiffs say their case is distinguishable from Freeman v. Flake, supra, since the court there dealt only with student rights, and not parental rights. They assert that their constitutional rights, as parents, include the basic freedom to bring up their children according to their own religious, cultural, and moral values, relying on Wisconsin v. Yoder, 92 S. Ct. 1526; Pierce v. Society of Sisters, 45 S. Ct. 571; and Meyer v. Nebraska, 43 S. Ct. 625. They argue that the challenged hair length regulation violates this parental right by imposing the school's non-Indian standard of appearance on their son, even in the privacy of their own home. (pp. 1191-1192)

This court must agree with the trial court that the distinction sought to be drawn does not avoid the reasoning in Freeman v. Flake. Freeman held that the Federal Constitution and statutes do not impose on the federal courts the duty and responsibility of supervising the length of a student's hair, and that the problem if it exists, is one for the states and should be handled through state procedures. (448 F.2d at 259) And Freeman concluded that "[c]omplaints which are based on nothing more than school regulations of the length of a male student's hair do not 'directly and sharply implicate basic constitutional values' and are not cognizable in federal courts under the principles stated in Epperson v. Arkansas." 448 F.2d at 262. See also New Rider v. Board of Education, 480 F.2d 693 (10th Cir.). (p. 1192)

In view of this reasoning, the court feels that the complaint against the hairstyle regulation lacks constitutional substance regardless of who makes the challenge. That the claim is one of invasion of parental rights is not, therefore, grounds for avoiding the Freeman holding, reaffirmed in New Rider. (p. 1192)

In connection with the claim of overbreadth, this court notes that the statute on its face makes no attempt to regulate free speech. And its application through the hairstyle rule does not control pure speech nor any form of "symbolic speech" within the protection of the First Amendment. See Freeman, supra, 448 F.2d at 260-261. This case is thus unlike Cox v. Louisiana, 85 S. Ct. 453. In view of these circumstances and the terms of the statute, the court is convinced that the claim of overbreadth is likewise without merit. See Broadrick v. Oklahoma, 93 S. Ct. 2908; Parker v. Levy, 94 S. Ct. 2547. The real controversy here is with the local student appearance rule and, as stated, no substantial challenge can be made to it in view of Freeman and New Rider. (p. 1193)

Disposition: The decision of the District Court for the Western District of Oklahoma was affirmed in part, vacated in part, and remanded for further proceedings. (p. 1195)

Citation: Gano v. School District 411 of Twin Falls County, Idaho, 674 F. Supp. 796 (D.Idaho 1987)

Facts: The plaintiff, Rod Gano, a Twin Falls High School student, was requested by members of the senior class to draw a caricature of three administrators: (1) Twin Falls High School Principal Frank Charlton; (2) Vice Principal Norman Thomas; and (3) Dean of Men Richard Baun. The plaintiff drew the caricature, and it was transferred to t-shirts to be sold to other students during homecoming week. One of those t-shirts was made a part of the record in this case. It shows the three administrators sitting against a fence labeled "Bruin Stadium, Home of the Bruins." Each administrator is holding a different alcoholic beverage and is acting drunk. (p. 797)

When the administrators discovered the t-shirts, and the plan to sell them to students, they suspended the plaintiff. The suspension lasted two days, October 5 and 6, 1987, and the plaintiff returned to school on October 7, 1987. The unrebutted affidavits of the administrators establish that this disciplinary action has been removed from the plaintiff's file. For attendance purposes, the plaintiff was not cited for being absent on October 5 and 6, 1987. He is noted as being absent during second period on October 8, 1987. On that date he wore the t-shirt to school, and was told to go home and change shirts during second period. He wore the t-shirt again on October 15, 1987, and was sent home to change it. Although he was free to return to school without the t-shirt, he failed to return on October 16, 1987, and is listed as being absent on that date. If the plaintiff continues to wear the t-shirt, he will be sent home to change it. For the purposes of this case, there are no other absences or disciplinary actions at issue. (p. 797)

On October 16, 1987, the plaintiff filed this action along with a motion for preliminary injunction. The motion seeks to enjoin defendants "from suspending or interfering with the plaintiff's attendance at Twin Falls High School for wearing a t-shirt with the caricature on it until such time as those matters alleged by way of the verified complaint filed herein have been litigated or otherwise resolved." (p. 797)

Issues: Does the First Amendment's guarantee of freedom of speech entitle a high school student to a preliminary injunction enjoining school administrators from sus-

pending him for wearing a t-shirt falsely depicting administrators in an alcoholic stupor? (p. 797)

Holding: The District Court of Idaho ruled that a preliminary injunction enjoining school administrators from suspending a student for wearing a t-shirt was not warranted. (p. 796)

Reasoning: The plaintiff argues that his First Amendment freedom of speech right will be abridged if he is disciplined for wearing the t-shirt. Unfortunately, neither the plaintiff, nor the plaintiff's counsel, was able to articulate the expression which was in danger of suppression. Did the t-shirt represent a political protest? Was it a criticism of administration policies? Testimony and argument from the plaintiff, his counsel, and other witnesses indicated that the t-shirts were not intended to criticize or be disrespectful to the administrators. What message is conveyed by the t-shirts? (p. 798)

The t-shirt portrays the three administrators with alcoholic beverages on school property during a homecoming activity. It is a misdemeanor to consume alcoholic beverages on school property at any school activity. There is no evidence in the record that the three administrators have ever so imbibed. The plaintiff's t-shirt thus falsely accuses the three administrators of committing a misdemeanor. For this expression, the plaintiff demands protection. Is he so entitled? The United States Supreme Court has stated that students cannot be disciplined for wearing black armbands to protest the Vietnam War, but can be disciplined for making sexually explicit speeches at school assemblies. Compare Tinker v. Des Moines Community School District, 89 S Ct. 733, with Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159. To understand these cases, one must first understand that discipline and debate are equally effective teaching tools. A robust exchange of ideas can only occur effectively within a civilized context. The school is actively engaged in teaching when it sets the bounds for proper conduct. As the United States Supreme Court stated in the Bethel case:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; school must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the es-

sential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in [here]. (p. 798)

In the present case, the school has determined that the t-shirt—which is clearly offensive—cannot be tolerated. In this state, schools are statutorily charged with teaching about the "effects of alcohol." When the school disciplines the plaintiff for wearing a t-shirt falsely depicting the administrators in an alcoholic stupor, it is engaged in its statutory duty. It is teaching the students that falsely accusing one of being drunk is not acceptable. The administrators are role models, as stated by the United States Supreme Court, and their position would be severely compromised if this t-shirt was circulated among the students. This case appears to clearly fall within the Bethel precedent. (pp. 798-799)

Disposition: The district court denied the plaintiff's motion for a preliminary injunction. (p. 799)

Citation: Olesen v. Board of Education of School District No. 228, 676, F. Supp. 820 (N.D. Ill. 1987)

Facts: This case is about a boy, a school board, and a rule. The boy is the plaintiff Darryl Olesen, Jr., a senior at Bremen High School in Midlothian, Illinois. The school board is the Board of Education of School District No. 228, which is responsible for the operation of four high schools including Bremen. The board's rule forbids all gang activities at the schools, including the wearing of gang symbols, jewelry, and emblems. The wearing of earrings by male students is included in that ban. (pp. 820-821)

Darryl Olesen wishes to wear an earring to Bremen because he believes it expresses his individuality and may be attractive to the young women in his school. He has worn his earring to school on several occasions, each time with identical results—he has been suspended. Olesen now challenges the constitutionality of the school rule claiming that it violates his right of free speech and expression under the First Amendment and his right to equal protection under the Fourteenth Amendment. (The ban does not, on its face, forbid earrings on girls.) Olesen seeks an injunction against the enforcement of the school policy and an expungement from his school records of all disciplinary action taken against him under the school rule. (p. 821)

Issues: Does a high school's anti-gang rule prohibiting the wearing of earrings by male students violate a student's right of free speech and expression? (p. 820)

Holding: The District Court for the Northern District of Illinois, Eastern Division, held that the rule did not violate the student's right of free speech and expression where the student's only message was one of his "individuality," and such "message" was not within the protected scope of the First Amendment. (p. 820)

Reasoning: The board's policy banned the wearing or display of any gang symbol, any act or speech showing gang affiliation, and any conduct in furtherance of gang activity. The board policy did not specifically ban the wearing of earrings. The board recognized, however, that each school might effectuate the gang policy in different ways. The administration at Bremen concluded that many of the male students at that school wear earrings to demonstrate their gang affiliation. Accordingly, Bremen's handbook of rules for students not only contained the board's anti-gang policy, but also a specific prohibition against the wearing of earrings by male students. The earring prohibition is contained in the student dress code section because the Bremen administration believes that the students were more likely to read the dress code. (pp. 821-822)

The board's gang policy has been successful. Both the principal and the dean of students at Bremen testified that gang activities, once threatening to pervade the school, have been brought under control. (p. 822)

The Board of Education of School District No. 228 is elected by the citizens of that district to oversee the operation of its high schools. That board has the responsibility to teach not only English and History, but the role of young men and women in our democratic society. Students learn to think and to question. But students are also expected to learn the rules which govern their behavior not only in school but also in society. They are taught that they have individual rights and that those rights must be balanced with the rights of others. The direction and manner of this instruction rests with the board, not the federal court. See Bethel District No. 403 v. Fraser, 106 S. Ct. 3159. (p. 822)

Olesen claims that the school's anti-gang policy, which includes a prohibition against males wearing earrings, violates his right of free speech and expression. This court disagrees. In order to claim the protection of the First Amendment, Olesen must demonstrate that his conduct intended "to convey a particularized message ... and ... the likelihood [is] great that the message would be understood by those who viewed it." See Spence v. Washington, 94 S. Ct. 2727, 2730. Olesen's only message is one of his "individual-

ity." In order to send that message, he is willing to violate school rules designed to protect him and his fellow students. The court finds that his "message" is not within the protected scope of the First Amendment. See, e.g., Fowler v. Board of Education of Lincoln County, Kentucky, 819 F.2d 657 (6th Cir. 1987) (p. 822)

Disposition: The plaintiff student's motion for a temporary injunction and other relief was denied. (p. 823)

Citation: McIntire v. Bethel School, Independent School District No. 3, 804 F. Supp. 1415 (W.D.Okl. 1992)

Facts: Jana Corso, one of the minor plaintiffs in this action, designed a t-shirt in November of 1991. She testified that the shirt was designed to portray on the back a typical teenager in 1991—a figure wearing "Guess" jeans, "Adidas" shoes and a "Raiders" baseball cap. She testified that she did not recall where the statement on the back of the shirt came from but stated that she collects "sayings," writing them down and hanging them on the walls of her room. She testified that to her the words "[t]he best of the night's adventures are reserved for people with nothing planned" conveyed the message "be spontaneous, have fun; if you plan things, they often turn out wrong." She further testified that she had six of the shirts printed and that she wore her t-shirt to school approximately ten times between late November of 1991 and February of 1992 and wore it over her cheerleading uniform before and at halftime at basketball games. (p. 1422)

The principal of Bethel High School, Charles Franklin, corroborated Jana Corso's testimony that students wore the shirts in question to school from November of 1991 through February of 1992. During this time, he took no action against the students, while admitting that enforcement of the school dress code is his duty. He stated that he never knew during that time frame that the slogan on the shirts was from a liquor ad. He stated that, in his opinion, the shirts don't violate the dress code. He also testified that he was not aware of any disturbance or disruption in or at school or at an extracurricular activity resulting from the wearing of these t-shirts. (p. 1422)

Principal Franklin testified that on March 3, 1992, he was directed by Superintendent James Harrod to suspend from school any students who wore the shirts. They were to be sent home and given unexcused absences. (p. 1422)

Defendant James Harrod testified that to his knowledge the first time the shirts were worn to school was on March 3, 1992, which was when the students were suspended at his direction for wearing the shirts. He further testified that if the saying on the shirts did not appear in a liquor ad, the t-shirts would not violate the school dress code. (p. 1423)

The only disturbance or disruption at school to which Superintendent Harrod testified was that which occurred as a result of the protest of his ban of the shirts—the presence of media, and attorneys at the school on March 3, 1992. (p. 1423)

Bethel Jr. High School principal Gary Cartright was called as a witness by the defendants. He testified that allowing the students to wear the shirts in question looks like the school is allowing the students to promote alcohol and/or drugs, which can be disruptive, and gives the appearance that the schools support these activities. He admitted, however, that there are many possible interpretations of the words on the shirt that have nothing to do with the sale or consumption of alcohol, even if one knows the phrase came from a liquor ad. (p. 1423)

A number of expert witnesses were called by the plaintiffs and by the defendants. Robert E. Hammack, an advertising expert, testified that the Bacardi Black ad campaign in which the headline which was borrowed for the shirts appeared also used several other headlines and that the most recent ad he could locate using this particular headline appeared in June of 1991. He testified that in his opinion the t-shirt is not an advertisement for Bacardi Black because it does not bear Bacardi Black's registered slogan "The taste of the night," and bears no reference to the product. (p. 1423)

Dr. Belinda Biscoe testified on the defendants' behalf. She explained the federally-funded Drug Free Schools Program and the message of "no use" of alcohol which school districts in this program are required to convey. She testified that the alcohol industry targets youth, among others, and that it often employs "hidden messages" because they appeal to teenagers. She testified that studies reveal that alcohol advertising is designed to promote an attitude as well as alcohol consumption. In her opinion, the superintendent's decision was an educationally sound and reasonable one. She testified that the superintendent, because of what he knew and what the students knew at the time he "banned" the shirts, would have been negligent if he had not "banned" them. (p. 1424)

Issues: In this case, the First Amendment issue is whether high school students are entitled to a preliminary injunction preventing the superintendent from applying the dress code prohibition on wearing apparel bearing a message advertising alcoholic beverages on t-shirts bearing the phrase "The best of the night's adventures are reserved for people with nothing planned." (p. 1417)

Holding: The District Court for the Western District of Oklahoma held that: (1) material issue of fact as to whether the t-shirts violated the school's dress code precluded summary judgment on qualified immunity grounds for the superintendent; (2) the members of the school board were entitled to qualified immunity on the students' First Amendment claims; and (3) the students were entitled to a preliminary injunction against the superintendent, but not the school board members and the school district. (p. 1416)

Reasoning: The court finds that the plaintiffs have met their burden of demonstrating a substantial likelihood of success on the merits of their Section 1983 claims for deprivation of their First Amendment rights. The phrase "The best of the night's adventures are reserved for people with nothing planned" which is displayed on the back of the t-shirts worn by the students and which they desire to wear, because it conveys an idea, is speech presumptively protected by the First Amendment. See Roth v. United States, 77 S. Ct. 1304, 1309. Because the enforcement of the Bethel Public School Dress Code restricts the exercise of the students' First Amendment rights, the defendants bear the burden of establishing that the t-shirts are proscribed by the dress code and that the dress code as applied is constitutional. (pp. 1424-1425)

The court finds that the defendants have failed to prove by a preponderance of the evidence that the message on the t-shirts advertises an alcoholic beverage. The defendants failed to prove by a preponderance of the evidence that a reasonable person, or even a reasonable student at Bethel High School, viewing the statement on the t-shirts, would understand the message as an advertisement for liquor or that the association between the statement and the Bacardi Black advertisement is so strong such that the statement or message had acquired "secondary meaning" or something akin thereto, so that a reasonable person or student viewing the message on the t-shirt would perceive it as advertising Bacardi Black. The defendants also failed to prove that the t-shirt message was, in fact, perceived by students at Bethel High School as an advertisement for an alcoholic beverage, at least prior to the suspensions on March 3, 1992. There was no evi-

dence that the student who designed the shirt intended any association between the statement on the t-shirt and Bacardi liquor or even knew that the statement came from a liquor advertisement. In the absence of evidence that the Bethel High School students knew the derivation of the statement on the t-shirts, associated the statement with Bacardi Black or an alcoholic beverage, or actually perceived or understood the message on the t-shirts as advertising, i.e., calling attention to an alcoholic beverage, the court is persuaded by the testimony of Robert E. (Bob) Hammack and Charles Edgeling, the plaintiffs' experts, that the t-shirt message does not constitute an advertisement for Bacardi Black, that is, that a reasonable person would not perceive the message as such because the message is not accompanied by any reference to Bacardi Black or to any alcoholic beverage or even by a drawing of a bottle; the message is not accompanied by Bacardi Black's registered slogan; the ad campaign employing the "headline" used on the t-shirts is not of sufficient recency for any association between the statement and Bacardi Black to have endured; and the ad campaign utilizing the "headline" later used on the t-shirts was limited and employed other headlines. The defendants have advanced no grounds for suspending students who wore the shirt or for prohibiting their wearing the shirts in the future other than that the shirts violate the school dress code because they bear a message which advertises an alcoholic beverage. (pp. 1425-1426)

The court concludes that the dress code provision proscribing the wearing of apparel bearing a message which advertises alcoholic beverages is not facially unconstitutional. However, the defendants have failed to meet their burden of proving that the policy as applied to the t-shirts in question does not unconstitutionally infringe the students' First Amendment rights. (p. 1426)

Because the court concludes that the message on the t-shirts is speech protected by the First Amendment and the defendants have failed to prove that the speech is an advertisement for an alcoholic beverage and that the prohibition and punishment of such speech is rationally related to a legitimate pedagogical concern, or that the speech is inconsistent with the school's educational mission, or any basis for a reasoned forecast that the t-shirt message would be perceived as an advertisement for an alcoholic beverage and would substantially interfere with or disrupt the work or discipline of the school or infringe on the rights of other students, the plaintiffs have made a prima facie showing of a deprivation of their First Amendment rights. (p. 1427)

Disposition: The superintendent and any agents, employees, or persons acting in concert with him or at his direction were enjoined from applying any Bethel Public School Dress Code provision prohibiting the wearing of clothing bearing the message which advertises alcoholic beverages on t-shirts bearing the words "The best of the night's adventures are reserved for people with nothing planned" when worn to Bethel public schools during regular school hours and were enjoined from prohibiting the wearing of said t-shirts to Bethel public schools during regular school hours, and from suspending, expelling, or otherwise punishing students for same. (p. 1430)

Citation: Broussard by Lord v. School Board of the City of Norfolk, 801 F. Supp. 1526 (E.D.Va. 1992)

Facts: This action was brought pursuant to Title 42 U.S.C. Section 1983 by a public school student of Blair Middle School in Norfolk, Virginia. The matter comes before the court after a trial on the plaintiff's assertions that school administrators violated her Fourteenth and First Amendment rights. The plaintiff, by her next friend, asserted that her suspension for refusing to change out of a shirt printed with the words "Drugs Suck!" violated her rights of due process and free speech. The plaintiff seeks declaratory and injunctive relief. (p. 1527)

Issues: The First Amendment issue in this case is whether public school officials may regulate the form of a message, rather than the message, without abridging a student's freedom of speech. (p. 1527)

Holding: The District Court for the Eastern District of Virginia, Norfolk Division, ruled that a one-day suspension for refusing to change shirts did not violate a student's free speech rights, nor did it violate due process protection. (p. 1526)

Reasoning: The plaintiff asserts that the school may prohibit expression only when there is a showing of a reasonable forecast that the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. The defendants contend that the school may regulate students' offensive speech in school in an attempt to promote decency and values in students. (p. 1532)

The court finds that a reasonable middle school administrator could find that the word "suck," even as used on the shirt, may be interpreted to have a sexual connotation. Although the anti-drug message itself admittedly makes no sexual statement, the use of the word

"suck," and its likely derivation from a sexual meaning, is objectionable. The court finds that, regardless of whether the word connotes a sexual meaning, its use is offensive and vulgar to many people, including some students between the ages of eleven and fifteen. The court finds that the use of the expression under these circumstances in this school was disruptive. (p. 1534)

The parties agree that the Blair Middle School administrators sought to suppress the manner in which the message was conveyed, not the message itself. Thus, the case concerns only the authority of school officials to regulate language displayed on clothing that they reasonably regard as inappropriate and offensive. Reasonable and nondiscriminatory regulations on time, place, and manner are permissible restrictions upon expression. (p. 1534)

Tinker v. Des Moines Independent School District, 89 S. Ct. 733, is the high-water mark for public school students' First Amendment rights. In Tinker, the school sought to suppress not the form of the message, but the message itself. Under Tinker, a school must show that engaging in forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. Id. 89 S. Ct. at 738. A school may regulate conduct that materially disrupts classwork or involves substantial disorder or invasion of rights of others. Id. 89 S. Ct. at 738. The Tinker court stated that the disruption must be more than hypothetical: there must be at least a reasonable forecast of disruption. Id. 89 S. Ct. at 740. The defendants dispute that Tinker reflects the current state of the law. Even if Tinker were the appropriate test, however, the school met the Tinker requirements. (pp. 1534-1535)

The defendants argue that the Tinker standard of a reasonable forecast of material and substantial interference with discipline is no longer the only circumstance in which a school may regulate student expression. The defendants assert that schools may regulate a student's speech in its role as instructor of the boundaries of socially acceptable behavior. It seems clear that, when schools seek to regulate the form of the message rather than the message, they may do so. See Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159. (p. 1535)

The Fraser court enunciated a balancing test: the freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Id.

106 S. Ct. at 3163. Public school students have fewer rights in school than do adults in other settings. Id. 106 S. Ct. at 3159. The Fraser court found that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." Id. 106 S. Ct at 3164. The Fraser court upheld the student's suspension on the basis of the school's responsibility to teach students socially appropriate behavior and to disassociate the school from inappropriate behavior. (pp. 1535-1536)

Speech need not be sexual to be prohibited by school officials; speech that is merely lewd, indecent, or offensive is subject to limitation. "The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech." Id. 106 S. Ct. at 3164. (p. 1536)

The Supreme Court has given great deference to school boards, as in Fraser. Recent cases have evidenced a concern for values and decency in addition to school order. This court, too, believes that school boards, school administrators, principals, and teachers must be permitted to govern schools attended by children. The school's authority to control the presentation of the lesson must remain unfettered. The federal courts, ill-suited as they are to second guess decisions of school authorities, should interfere only in the most strident circumstances. (p. 1536)

The court holds that, even if the defendants were held to the Tinker standard, the defendants demonstrated a reasonable forecast of disruption. Under either Tinker, a content-based case, or Fraser, which, like this case, is content-neutral, the defendants did not violate Kimberly's First Amendment rights by suspending her for refusing to change her shirt. (p. 1537)

Disposition: The court found in favor of the defendant on the First Amendment claim as well as on the due process claim. The court denied the plaintiff's request for relief. (p. 1537)

Citation: Alabama and Coushatta Tribes of Texas v. Trustees of the Big Sandy Independent School District, 817 F. Supp. 1319 (E.D.Tex. 1993)

Facts: The plaintiffs, the Alabama and Coushatta Tribes of Texas ("Tribe") and twelve Native American students, through their parents and guardians, commenced this action for injunctive relief and monetary damages against the Trustees of the Big Sandy Independent School District ("Trustees"), individually and in their official capacities as Trustees, Thomas Foster, super-

intendent of the Big Sandy Independent School District, individually and in his official capacity, and Robert Fountain, principal of Big Sandy Independent School District, individually and in his official capacity. The plaintiffs allege, among other claims, that their constitutional rights to free exercise of religion and free speech under the First Amendment have been violated by a school dress code. (p. 1323)

The Big Sandy Independent School District has enforced a dress code restricting the hair length of all male students for the past twenty-five years. It does not appear that the hair code was enacted for any discriminatory purpose. (p. 1323)

Eighty-nine students at the Big Sandy Independent School District are members of the Tribe. The Native American male students who are named plaintiffs in this action wear their hair long, in violation of the school's dress code. (p. 1324)

One of the plaintiffs, Gilman Abbey, age seventeen, a tenth grader, was told by Robert Fountain, principal of Big Sandy, to cut his hair at the beginning of the school year. Abbey refused, and, on September 2, 1992, he was taken out of scheduled classes and placed in in-school detention. (p. 1324)

Abbey testified that his desire to wear his hair long was reinforced when he attended the Heart of the Earth Survival School in Minneapolis, Minnesota, during the summer of 1992. The school was a part of the American Indian Movement and approximately two hundred students, grades kindergarten through twelfth, were involved. The school taught the students that long hair has religious significance, and that it is part of their Native American heritage. Abbey believes that the only time he should cut his hair is to show mourning when a close family member dies. However, Abbey has been baptized in the Christian faith, and occasionally attends a Christian church. (pp. 1325-1326)

The plaintiffs have established that the minor members of the Tribe have a sincerely held religious belief in the spiritual properties of wearing the hair long. The majority of the Native American parents of the students do not themselves believe that long hair is a fundamental tenet of their own Christian religious practices; however, the parents fully support their children's belief in the spiritual aspects of hair, and actively encourage their children to respect their tribal heritage and participate in Native American traditions. (p. 1326)

A few teachers and teacher's aides testified that, since the entry of the temporary restraining order in this case, they have noticed increased disciplinary problems, such as tardiness, student responses in Alabama-Coushatta language, and racial epithets, and social polarization between the Native American male students and other students. However, trustee Paul Cain testified that, while it could be better, the educational environment at Big Sandy schools has not been diminished. Superintendent Foster was unaware of any major disciplinary problems, and there have been no reports of increased disciplinary problems to the board. No one could say whether the alleged disciplinary problems were attributable to the wearing of long hair by Native American male students. (p. 1327)

Issues: The First Amendment issue at hand is whether the school district's dress code restricting the hair length of male students abridges the free speech rights of Native American students, who desire to wear their hair longer than the allowed length as silent, passive expression of their faith and heritage. (p. 1321)

Holding: The District Court for the Eastern District of Texas, Lufkin Division, determined that the dress code regulation, as applied to the plaintiff students, violated the First Amendment's Free Speech Clause. (p. 1334)

Reasoning: The plaintiffs assert that a number of constitutional rights are affected by the hair length restriction. With respect to the First Amendment, they claim that to wear one's hair long is an expressive or communicative activity to a Native American, especially with regard to the performance of ceremonial dances, and that, as such, it is protected by the First Amendment Free Speech Clause. The Fifth Circuit rejected a similar argument in Karr, 460 F.2d 609. However, the plaintiffs in Karr did not state any facts to support a claim that the wearing of long hair is a form of expressive activity. In contrast, the testimony of tribal members and the expert testimony of the anthropologist, Dr. Gregory, was compelling evidence that long hair in Native American culture and tradition is rife with symbolic meaning. (p. 1333)

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736. They cannot be punished merely for expressing their personal views on the school premises unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or im-

pinge upon the rights of other students." See Tinker, 89 S. Ct. at 738. (p. 1333)

In Tinker, the Supreme Court held that students could not be prohibited from wearing black armbands in protest of American involvement in Vietnam, when the armbands did not cause disruption of school discipline or decorum. (89 S. Ct. at 735) The expressive activity at issue in Tinker was considered "closely akin to pure speech" protected by the First Amendment. Id. 89 S. Ct. at 736. See also West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178, (under the First Amendment, students may not be compelled to salute the flag). (p. 1334)

While a few teachers and teachers' aides testified that there had been an overall increase in disciplinary problems at Big Sandy Independent School District since the entry of the temporary restraining order in this case, none could establish any connection whatsoever between the wearing of long hair and the perceived problems. Anticipation of disruption due to the wearing of long hair does not justify the curtailment of the students' silent, passive expression of their faith and heritage. (p. 1334)

As with the armbands, the wearing of long hair by Native American students is a protected expressive activity, which does not unduly disrupt the educational process or interfere with the rights of other students. (p. 1334)

Disposition: The court ordered that the plaintiffs were entitled to a preliminary injunction on the defendants from enforcing the Big Sandy School District's hair regulation against Native American students. (p. 1338)

Citation: Jeglin v. San Jacinto Unified School District, 827 F. Supp. 1459 (C.D.Cal. 1993)

Facts: The plaintiffs, acting through their appointed guardians ad litem, are Marvin H. Jeglin II, a fourteen-year-old attending a middle school; Alan A. Jeglin, a twelve-year-old attending a middle school; Ariel A. Jeglin, a nine-year-old attending an elementary school; Elisa C. M. Jeglin, a seven-year-old attending an elementary school; and Darcee M. Le Borgne, a seventeen-year-old attending high school. The defendants are the San Jacinto Unified School District and its Board of Trustees, charged under state law and school district rules with the setting of policy and administration of public schools within the school district; the individual members of the Board of Trustees; the superintendent of the school district; the principal of the high school; the principal of the

middle school; and the principal of the elementary school attended by two of the plaintiffs. (p. 1460)

The offending restrictions are found in the February 23, 1993, revisions to school district Administrative Regulation AR 5131.2 entitled "Students Dress and Grooming and Board Policy" number BP 5131.2(a) entitled "Students Disruptions to the Learning Process." The revisions in essence deny San Jacinto Unified School District students the right to wear clothing bearing writing, pictures, or any other insignia which identifies any professional sports team or college on school district campuses or at school district functions. (p. 1460)

The record herein reflects that after written notification to parents of the adoption of BP 5131.2 and AR 5131.2 with the February 23, 1993, revisions, enforcement commenced immediately. Thereafter, on March 3, 1993, the plaintiffs Alan and Marvin Jeglin were sent to his office by Monte Vista Middle School Principal Jacobs. There Alan was told that his wearing of a University of California, Riverside sweatshirt was in violation of the dress code, and Marvin was told his wearing of a Chicago Bears professional sports team jacket was also in violation of the dress code. Both were told that any further violation of the dress code would lead to their removal from their regularly scheduled classes and placement in alternative education for a day, and that any subsequent violation would lead to their suspension from school. (p. 1460)

Then on March 5, 1993, Ariel Jeglin and Elisa Jeglin were found in violation of the dress code by De Anza Elementary School staff for the wearing by Ariel of a blue sweatshirt identifying the University of California, Los Angeles and the wearing by Elisa of a shirt identifying the Twins, her brother's baseball team at Valley Wide Recreation District as well as a professional sports team. Principal Harrison subsequently met with the mother of Ariel and Elisa, advised her they had committed a first violation of the dress code and told her that further violations would result in alternative education away from their regular classrooms and suspension for any additional violation. (p. 1461)

It also appears from the record that defendant Ron White, principal of San Jacinto High School, has stated he will enforce the dress code and personally informed plaintiff Darcee Le Borgne that she would be disciplined pursuant to the dress code if she wore her university and sports clothing which included a University of San Diego sweatshirt and Los Angeles Lakers and Dodgers t-shirts. (p. 1461)

The plaintiffs thereafter filed their complaint for declaratory and injunctive relief alleging restriction, prevention, deprivation, and denial of their right to free speech guaranteed by the First Amendment of the United States Constitution and California Education Code Section 48907. (p. 1461)

Issues: The salient First Amendment issue centers on the school's dress code. Specifically, the issue is whether the school's dress code prohibiting clothing which identifies professional teams or colleges violates the free speech rights of elementary, middle, and high school students. (p. 1460)

Holding: The District Court for the Central District of California held that the dress code violated the free speech rights of elementary and middle school students, but not high school students. (pp. 1459-1460)

Reasoning: The teachings of Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, and Karp v. Becken, 477 F.2d 171 (9th Cir. 1973) are clear that public school students have a right to freedom of speech which is not shed at the schoolhouse gates. This speech, in our view, encompasses the wearing of clothing that displays a student's support of a college or university or a professional sport team. (p. 1461)

It is equally clear that daily administration of public education is committed to school officials and that such responsibility carries with it the inherent authority to prescribe and control conduct in the schools. The interest of the state in the maintenance of its education system is a compelling one and provokes a balancing of First Amendment rights with the state's efforts to preserve and protect its educational process. It is also well established that the First Amendment does not require school officials to wait until disruption actually occurs before they may act to curtail exercise of the right of free speech but that they have a duty to prevent the occurrence of disturbances. (p. 1461)

When a conflict arises between a public school student's right of free speech and the authority of officials to prescribe and control conduct in the schools, a student's free speech right may not be abridged in the absence of facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities. Such justification for curtailment of the student's exercise of the right of free speech does not demand a certainty that disruption will occur, but only the existence of facts which might reasonably lead school

officials to forecast substantial disruption. Because of the state's interest in education, the level of disturbance required to justify intervention is relatively lower in a school than it might be on a street corner, and the court may consider all circumstances confronting the school administrators which might reasonably portend disruption. (p. 1461)

To impose discipline resulting from a public school student's use of free speech under the First Amendment, school officials have the burden to show justification for their actions. In the absence of such justification, they may not discipline a student for exercising those rights. (p. 1461)

As for the elementary school population of the San Jacinto School District, the defendants have offered no proof at all of any gang presence at those schools or of any actual or threatened disruption or material interference with school activities. There accordingly is no justification for application of the restrictive dress code to that elementary school population and the abridgment of free speech rights resulting therefrom. (pp. 1461-1462)

As for the middle school population, although some evidence of gang presence is offered, that evidence shows only a negligible presence and no actual or threatened disruption of school activities. It is our view again that the defendants have not carried their burden of showing justification for application of the restrictive dress code to that middle school population and the abridgment of free speech resulting therefrom. (p. 1462)

Evidence concerning the situation at San Jacinto High School is conflicting. There is, for example, a substantial dispute as to whether the wearing of sports oriented clothing is even a showing of gang colors on the San Jacinto High School campus. Reliable student testimony indicates that gang members do not wear university or sports clothing on that campus but instead identify themselves by wearing white t-shirts and dickies, the latter being a brand of work pants. (p. 1462)

Other evidence supports the school district position and in our view, the defendants have carried their burden of showing both a gang presence, albeit of undefined size and composition, and activity resulting in intimidation of students and faculty that could lead to disruption or disturbance of school activities and may justify curtailment of student First Amendment rights to the extent found in enforcement of the district's dress code. While it is by no means certain

that the otherwise offending dress code will negate that presence and possible disruption, this court assumes that in carrying out their duties, the defendants will recognize, and from time to time, review their encroachments on First Amendments rights of their student population and revise any restrictions to conform to the existing situation. (p. 1462)

In sum, this court finds and concludes that the defendants have failed to carry their burden of proof of justification for the curtailment of elementary and middle school students free speech contained in that portion of their dress code forbidding the wearing of clothing free of writing, pictures or any insignia which identifies any professional sports team or college. (p. 1462)

Disposition: The defendants were immediately and permanently enjoined from enforcing those portions of the San Jacinto Unified School District policy which prohibited elementary and middle school students from wearing clothing bearing insignia, writing, or pictures that identify a professional sports team or a college. The court also ordered that the plaintiffs recover their costs of the suit. (p. 1464)

Citation: Pyle by and through Pyle v. South Hadley School Committee, 861 F. Supp. 157 (D.Mass. 1994)

Facts: Two students at South Hadley High School wore t-shirts—one reading "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick" and the other reading "Coed Naked Band: Do It To the Rhythm"—that teachers, school administrators and, ultimately, the town's school committee decided were unacceptable school dress. (p. 158)

The students then sued the superintendent and school board, claiming that the school's dress code generally, and its application to the two t-shirts specifically, violated their First Amendment rights. This court denied the students' motion for preliminary injunction, which sought an immediate order barring the school's prohibition of the particular t-shirts. A four-day bench trial followed regarding the shirts and two provisions of the dress code, one addressing vulgarity and the other harassment. (pp. 158-159)

Issues: 1) Under the First Amendment, may school officials promulgate a dress code restricting vulgar expression and speech, even if there is no risk of substantial disruption? 2) Does the dress code provisions which prohibits clothing that "harasses, threatens, intimidates, or demeans" individuals or groups violate students' First Amendment rights to the extent that it

restricts expression which is neither vulgar nor disruptive? (p. 157)

Holding: 1) The District Court of Massachusetts held that: 1) School officials may restrict vulgar expression by students, regardless of whether there is any risk of substantial disruption, and 2) the dress code provision prohibiting apparel which "harasses" violates students' First Amendment rights. (p. 157)

Reasoning: The First Amendment limits minimally, if at all, the discretion of secondary school officials to restrict so-called "vulgar" speech, including speech containing sexual innuendo, however lukewarm by some standards. The sexual witticism at issue in this case is almost identical in tone to the student's remarks reported to Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159. In that case, the Supreme Court affirmed the school's power to curb and even discipline the speaker. Similarly, the school's exercise of its authority to limit the sexual double entendre on these t-shirts, even where there was no immediate prospect of disruption, did not run afoul of the First Amendment. The plaintiffs argue that, even if school administrators have the hypothetical power to limit "vulgar" speech, this court must itself weigh the slogans on its own scale of offensiveness and conclude that these particular t-shirts were not vulgar. The question then becomes, who decides what is "vulgar"? The answer in most cases is easy: assuming general reasonableness, the citizens of the community, through their elected representatives on the school board and the school administrators appointed by them, make the decision. On questions of coarseness or ribaldry in school, federal courts do not decide how far is too far. This is because people will always differ on the level of crudity required before a school administrator should react. In assessing the acceptability of various forms of vulgar expression, the rules may even vary from one school district to another as the diversity of culture dictates. The administrators have acted within reason, and the court's inquiry need go no further. (p. 159)

With respect to the second aspect of the dress code—the ban on clothing that "harasses, threatens, intimidates, or demeans certain individuals or groups"—the plaintiff's motion will be allowed. Enforcement of this portion of the code will be enjoined, except in circumstances where the clothing in question also creates a substantial risk of a material and substantial disruption to the daily operation of the school described in the Supreme Court's decision in Tinker v. Des Moines School District, 89 S. Ct. 733. Any other ruling would permit school officials to circumscribe improperly the expression of opinion on controversial

issues, even where that opinion contained no vulgarity and offered no threat to the orderly performance of the school's educational mission. The First Amendment does not permit official repression or homogenization of ideas, even odious ideas, and even when the expression of ideas may result in hurt feelings or a sense of being harassed. A school committee may not ban speech other than that reflecting the dominant or most comforting ethos. The "harassment" provision at issue here, while it obviously has laudable goals, gives school personnel precisely that excessive authority. Of course, as this court has emphasized, school officials have the authority to limit expression that "would substan- tially interfere with the work of the school or impinge upon the rights of other students." See Tinker, 89 S. Ct. 733, 738. But where it is not disruptive or vulgar, a student's personal expression may not be censored on the basis of content. (pp. 159-160)

Disposition: The defendants were enjoined from enforcing the "harassment" section of the South Hadley High School dress code, except to the extent that the clothing worn substantially interferes with the work of the school or impinges upon the rights of other students. On all other claims, the court ordered judgement for the defendants. (p. 174)

Citation: Bivens by Green v. Albuquerque Public Schools, 899 F. Supp. 556 (D.N.M. 1995)

Facts: In this civil rights action under Title 42 U.S.C. Section 1983, plaintiff Richard Bivens challenges his suspension from high school for violation of the school dress code against wearing sagging pants. At the time the complaint was filed, the plaintiff was a minor who appeared by and through his next friend and mother, Susan Green. (P. 558)

During the first semester of the 1993-1994 school term, the plaintiff was enrolled as a ninth-grader at Del Norte High School, a school operated and maintained by Albuquerque Public Schools (APS) in Albuquerque, New Mexico. During the first week of the fall semester, the assistant principal warned the plaintiff that his wearing of sagging pants violated the Del Norte student dress code, and that he would not be allowed to wear them to school. The plaintiff persisted in wearing his sagging pants to school, and was given numerous verbal warnings and subjected to a few short-term suspensions ranging from one to three days between August and October 1993. (p. 558)

Finally, in late October 1993, the plaintiff was given a long-term suspension. He was required to turn in his

school books and was sent home from school. A due process hearing was scheduled for several days after the suspension, and notice of the hearing was sent to the plaintiff's mother. The notice was not actually received by Ms. Green until the day after the hearing, and the plaintiff and his mother did not appear at the hearing. The plaintiff's suspension through the rest of the semester was upheld. This lawsuit followed. (p. 558)

Issues: The primary First Amendment issue is whether a school infringes upon a student's freedom of speech and expression by suspending him for wearing sagging pants in violation of the school's dress code. (p. 556)

Holding: The District Court of New Mexico determined that wearing sagging pants was not "speech" for First Amendment purposes. Specifically, engaging in the practice of sagging was not "speech" or expressive activity protected by the First Amendment, despite student's contentions that wearing sagging pants was part of a style known as "hip hop," the roots of which were African-American and that the style, therefore, was, in large part, a matter of group identify. (p. 556)

Reasoning: The prohibition against sagging pants is part of a dress code that was adopted at Del Norte High School in response to a gang problem. The plaintiff does not deny that a gang problem exists at the school, but maintains that he has never been a gang member, is not affiliated with gangs, and is not aspiring to be a member of a gang. The defendants do not contend that the plaintiff is connected with gangs. The plaintiff asserts that he wears sagging pants as a statement of his identify as a black youth and as a way for him to express his link with black culture and the styles of black urban youth. (p. 558)

The plaintiff claims that the defendants' actions in suspending him from Del Norte High School for wearing so-called sagging pants are violative of his First Amendment rights to freedom of speech, expression, and association. He asserts that the ban on sagging pants is unconstitutional as applied to him, because the defendants cannot demonstrate that his wearing of sagging pants interferes with appropriate discipline in the operation of the school. (p. 559)

Freedom of speech, while not absolute, is a paramount constitutional guarantee in our democracy. Although the First Amendment literally forbids the abridgement only of freedom of speech, its protection has long been recognized as reaching a wide variety of conduct that communicates an idea. See Texas v. Johnson, 109

S. Ct. 2533, 2538. Governmental constraints on individuals' communication of ideas must be measured against substantial and compelling societal goals such as safety, decency, individual rights of other citizens, and the smooth functioning of government. See, e.g., United States v. O'Brien, 88 S. Ct. 1673, 1678-1682. (p. 559)

Public school students enjoy a degree of freedom of speech within the schoolhouse gates that is balanced against the added concern of the need to foster an educational atmosphere free from undue disruptions to appropriate discipline. See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 737. (p. 559)

Not all conduct, however, can be labeled speech. See United States v. O'Brien, 88 S. Ct. 1673, 1678. The wearing of a particular type or style of clothing usually is not seen as expressive conduct. See Tinker, 89 S. Ct. at 736-737 ("The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment.") (p. 560)

The defendants argue that the plaintiff has no constitutional right to engage in the practice of sagging because sagging is not speech, nor is it expressive conduct protected by the First Amendment. They assert that the mere fact that the plaintiff may intend to convey some message by his conduct does not bring that conduct within the protection of the First Amendment. Rather, they contend, the message subjectively intended to be conveyed must be a particularized rather than a nebulous one, and there must be a great likelihood that the message would be understood by people who observe it objectively. The defendants also argue vigorously that if sagging is somehow protected by the First Amendment, the school dress code that prohibits sagging still passes constitutional muster. (p. 560)

Not every defiant act by a high school student is constitutionally protected speech. Under Texas v. Johnson, 109 S. Ct. 2533, the flag burning case, a two part test must be met for nonverbal conduct to be "expressive conduct" and therefore, speech protected under the First Amendment. First, the actor must intend to convey a particularized message, and second, there must be a great likelihood that the message would be understood by those who observe the conduct. Id. 109 S. Ct. at 2538. (p. 560)

The defendants have presented evidence in the form of affidavits that the plaintiff's subjective message supposedly conveyed by wearing sagging pants is by no

means apparent to those who view it. For example, sagging is understood by some as associated with street gang activity and as a sign of gang affiliation. Sagging pants and other gang style attire is also understood by some as would-be gang affiliation, because it is often adopted by "wannabes," those who are seeking to become affiliated with a gang. Sagging is not necessarily associated with a single racial or cultural group, and sagging is seen by some merely as a fashion trend followed by many adolescents all over the United States. (p. 561)

In his response, the plaintiff merely argues that "there is a great likelihood that those who observe this expressive conduct will understand the message." The plaintiff has failed to come forward with any exhibits or affidavits tending to show a triable issue of fact on this, the objective prong of the Texas v. Johnson test. This court concludes that the plaintiff has failed to meet his burden to demonstrate a genuine issue for trial as to whether his wearing of sagging pants is constitutionally protected speech under the First Amendment. (p. 561)

Disposition: The district court ordered that the defendant's motion for summary judgment be granted and that the plaintiff's motion for leave to amend be denied. (p. 564)

Citation: Denno v. School Board of Volusia County, 959 F. Supp. 1481 (M.D.Fla. 1997)

Facts: Wayne Denno was a student at Pine Ridge High School in Volusia County in December 1995 when he was suspended for nine school days for displaying a four-inch by four-inch Confederate battle flag during the school lunch period. Wayne was displaying the flag to his friends in the high school courtyard on December 13, 1995, when a school administrator approached Wayne and demanded that he put the Confederate flag away. The administrator also demanded that other students wearing apparel bearing Confederate symbols remove the items. (p. 1483)

When Wayne attempted to explain why he was displaying the Confederate flag, the administrator ordered Wayne to accompany him to the high school student resource center for disciplinary action. On the way to the resource center, the administrator repeatedly told Wayne to "shut up" when he attempted to explain that he was displaying the Confederate flag because of its historical significance as a symbol of Southern heritage. The administrator told Wayne that he considered the flag to be a racist symbol and that Wayne did not have

> the First Amendment right to wear or display the Confederate flag on school grounds. (p. 1483)
>
> While at the student resource center, another student was detained for wearing a t-shirt with a Confederate flag on it. When school administrators demanded that the student remove his shirt or turn it inside out, Wayne urged the student to "adhere to his principles." Wayne was suspended by defendants Roberts and Wallace for nine school days for the following reasons: "attempting to incite a riot by parading the Confederate flag during lunch period/became insubordinate to administrator and disruptive in student resource center by continuing to incite student [unrest]." The defendants recommended the expulsion of Wayne. Subsequent to Wayne's suspension, the media reported the events at Pine Ridge High School. A demonstration by the Ku Klux Klan followed. (p. 1483)
>
> One week after Wayne's suspension, the defendants filed a criminal complaint against Wayne, alleging that he disturbed a school function in violation of Florida Statute Section 871.01. The plaintiff filed the instant suit in this court on July 15, 1996, seeking to recover compensatory and punitive damages for the alleged violation of Wayne's rights to free speech, peaceful assembly, due process and equal protection under Title 42 U.S.C. Section 1983. The plaintiff also seeks to recover for the defendants' alleged malicious prosecution of Wayne in filing the criminal complaint against him. (pp. 1483-1484)

Issues: The First Amendment issue at hand is whether school administrators unconstitutionally interfere with a student's freedom of speech by forbidding him to display the Confederate flag. (pp. 1482, 1487)

Holding: The District Court for the Middle District of Florida, Orlando Division, held that public school students enjoy First Amendment rights, but these rights are curtailed somewhat by deference to school administrators' judgements as to what speech is appropriate in the public school context. (p. 1482) Given the facts of this case, telling a student to put away or stop wearing the Confederate flag, a symbol found by the former Fifth Circuit to be racially controversial, was a legitimate exercise of the school administrators' inherent authority to curtail disruption. Therefore, the student's First Amendment right to freedom of speech was not violated. (p. 1487)

Reasoning: Count I of the Complaint asserts that the defendants violated Title 42 U.S.C. Section 1983 in depriving Wayne of his First, Fifth, and Fourteenth Amendment rights by disciplining him for displaying a Con-

federate flag. Over the last twenty years, the Supreme Court has defined the First Amendment protections available to public school students via three cases. Compare Tinker v. Des Moines Independent School District, 89 S. Ct. 733, 735-736, (school could not prohibit students from wearing black armbands to protest Vietnam war) with Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159, 3165, (school could sanction student for lewd and indecent speech at school assembly) and Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, (school could censor content of school newspaper). In these cases, the Supreme Court has struck a delicate balance between recognition of students' constitutional rights to freedom of speech or expression and deference to school officials' duty to enforce discipline. (p. 1484)

In Tinker, the Supreme Court upheld the students' right to wear black armbands in protest against the war in Vietnam, holding that unless the prohibited conduct would "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,'" the prohibition would violate the First Amendment. See Tinker, 89 S. Ct. at 738. In contrast, in Hazelwood, the Court upheld a school's decision to censor the content of a school-sponsored newspaper. (108 S. Ct. at 571) The Court held that schools may control "the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." Id. While students still enjoy First Amendment rights, these rights are curtailed somewhat by the Supreme Court's deference to school administrators' judgments as to what speech is appropriate in the public school context. (p. 1484)

In this case, the court finds that Roberts and Wallace are entitled to dismissal on the basis of qualified immunity because the law is not so "clearly established" in such a "concrete and factually defined context" to make it obvious to all reasonable government actors that telling a public school student to put away a Confederate flag violated the First Amendment. To the contrary, two appellate courts have affirmed district court findings that the display of a Confederate flag was a focal point of racial irritation, offensive to a racial minority, and contributed to violence and the disruption of the school. See Augustus v. School Board of Escambia County, Florida, 507 F.2d 152, 155 (5th Cir. 1975) (district court found that the Confederate flag was racially irritating to many black students); Melton v. Young, 465 F.2d 1332, 1334 (6th Cir. 1972) (Confederate flag was a "precipitating cause" of tension and disorder), cert. denied,

411 S. Ct. 1926. In Melton, the Sixth Circuit affirmed the district court's holding that a student's suspension was a legitimate exercise of a school official's inherent authority to curtail disruption elicited by wearing of the Confederate flag. (465 F.2d at 1334) In light of these holdings, this court cannot find that the law is so "clearly obvious to all reasonable government actors" that telling a student to put away the Confederate flag, a symbol recognized by the former Fifth Circuit to be racially controversial, violated the First Amendment in a public school setting. The claims in Count I alleged against Roberts and Wallace in their individual capacities are due to be dismissed. (pp. 1486-1487)

Disposition: Relevant to the First Amendment issue, the claims against the defendant school administrators in their individual capacities were dismissed as were any attendant punitive damages claims. (p. 1488)

Citation: Stephenson v. Davenport Community School District, 110 F.3d 1303 (8th Cir. 1997)

Facts: In February of 1990, Brianna Stephenson tattooed a small cross between her thumb and index finger. She was an eighth-grade student in Davenport Community School District (District) at the time, and wore the tattoo without incident while enrolled in the District for the next thirty months. Stephenson intended her tattoo to be a form of "self expression." She did not consider the tattoo a religious symbol. She also did not intend the tattoo to communicate gang affiliation. (p. 1305)

Stephenson eventually enrolled at West High School, within the District, where, despite a learning disability, she worked her way onto the honor roll and served as a homeroom representative. Her report cards characterize Stephenson as "conscientious & diligent" and a "pleasure to have in class." Stephenson had no record of disciplinary problems and was never involved in gang activity. (p. 1305)

While Stephenson attended West High School, gang activity within the District's schools increased. Students brought weapons to class and violence resulted from gang members threatening other students who displayed rival gang signs or symbols. Furthermore, gang members attempted to intimidate students who were not members into joining their gangs. (p. 1305)

The District worked closely with local police to address these problems. In August 1992, Superintendent Peter F. Flynn sent a letter to District parents that included the District's "Proactive Disciplinary Posi-

tion K-12." That regulation states that "[g]ang related activities such as display of 'colors,' symbols, signals, signs, etc., will not be tolerated on school grounds. Students in violation will be suspended from school and/or recommended to the Board for expulsion." (p. 1305)

On August 31, 1992, Stephenson visited Counselor Wayne Granneman to discuss her class schedule. Granneman noticed Stephenson's tattoo, considered it a gang symbol, and notified Associate Principal Jim Foy. Foy consulted Police Liaison Officer David Holden who, based on a drawing and description of the tattoo, stated his opinion that it was a gang symbol. Aside from the tattoo, there was no evidence that Stephenson was involved in gang activity and no other student complained about the tattoo or considered it a gang symbol. (p. 1305)

Foy phoned Stephenson's mother and informed her that Stephenson was suspended for the day because her tattoo was gang-related. Stephenson's parents met with Foy the following morning and agreed that Stephenson would continue to attend school on a temporary basis with the tattoo covered. Foy informed Stephenson's parents that she needed to remove or alter the tattoo, otherwise the school would initiate disciplinary procedures and suspend Stephenson for ten days. Stephenson chose not to alter the tattoo because she did not want a larger tattoo and feared school administrators or police would also classify it as a gang symbol. She then met with a tattoo specialist who advised her that laser treatment was the only effective method to remove the tattoo. (p. 1305)

On September 9, Officer Holden examined Stephenson's tattoo and confirmed his earlier opinion that it was a gang symbol. Holden contacted another officer who, without viewing the tattoo, also considered it a gang symbol. (p. 1305)

School officials warned Mrs. Stephenson that if Stephenson did not remove the tattoo by September 25, the school "would suspend her at that time and recommend to the Advisory Council she be excluded from school by the Davenport Board of Education." (pp. 1305-1306)

On September 25, Stephenson and her mother again met with Foy and Rettko and confirmed that she was completing laser treatment for removal of the tattoo later that day. The procedure, which cost about $500, left a scar on Stephenson's hand. (p. 1306)

Stephenson filed suit. On February 14, 1996, the district court granted summary judgment for the appellees

and dismissed Stephenson's cause of action. Stephenson appealed. (p. 1306)

Issues: Two primary questions implicating the First Amendment are evident in this appeal: 1) Is a school district's regulation prohibiting gang symbols without providing any definition of "gang" void for vagueness? (2) Where school officials amend a regulation to define gang symbols and activity, is a high school student's challenge of the school district's regulation prohibiting gang symbols as overbroad under the First Amendment moot? (p. 1304)

Holding: The Court of Appeals for the Eighth Circuit determined that 1) a school district's regulation prohibiting gang symbols without providing any definition of "gang" was void for vagueness and 2) a student's challenge of a regulation prohibiting gang symbols as overbroad under the First Amendment was moot because the school had amended the regulation to define what constituted gang symbols and activity. (pp. 1303-1304)

Reasoning: Stephenson brings her claim pursuant to Title 42 U.S.C. Section 1983. That provision states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (p. 1306)

To recover under Section 1983, Stephenson must demonstrate that the appellees deprived her of a right secured by the Constitution while acting under "color of state law." The appellees concede they acted under "color of state law" and only contest Stephenson's assertion of a constitutional deprivation. (p. 1306)

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736. Nevertheless, "[j]udicial interposition in the operation of the public school system raises problems requiring care and restraint." See Epperson v. Arkansas, 89 S. Ct. 266, 270. Accordingly, this court enters the realm of school discipline with caution, appreciating that its perspective of the public schools is necessarily a more distant one than that of the individuals working within these schools who must "'prepare pupils for

citizenship in the Republic. [They] must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'" See Bethel School District v. Fraser, 106 S. Ct. 3159, 3163. (p. 1306)

Among other issues, Stephenson asserts that the regulation is void-for-vagueness and overbroad. (p. 1306)

"The void-for-vagueness doctrine is embodied in the due process clauses of the Fifth and Fourteenth Amendments." See D.C. and M.S. v. City of St. Louis, Mo., 795 F.2d 652, 653 (8th Cir. 1986). A vague regulation is constitutionally infirm in two significant respects. First, the doctrine of vagueness "incorporates notions of fair notice or warning," Smith v. Goguen, 94 S. Ct. at 1247, and a regulation "violates the first essential of due process of law" by failing to provide adequate notice of prohibited conduct. See Connally v. General Construction Company, 46 S. Ct. 126, 127. In short, a regulation is void-for-vagueness if it "forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Id. Second, the void-for-vagueness doctrine prevents arbitrary and discriminatory enforcement. See Goguen, 94 S. Ct. at 1247. (p. 1308)

Stephenson makes a facial challenge to the District regulation, thus this court's "first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 102 S. Ct. 1186, 1191. The regulation's description of forbidden gang activities states:

> Gang related activities such as display of "colors," symbols, signals, signs, etc., will not be tolerated on school grounds. Students in violation will be suspended from school and/or recommended to the Board for expulsion. (p. 1308)

As this litigation demonstrates, common religious symbols may be considered gang symbols under the District regulation. The meaning of Stephenson's tattoo, a cross, is contested by the parties as Stephenson considers it simply a form of "self-expression" while the appellees believe it is a gang symbol. A significant portion of the world's population, however, views it as a representation of their Christian religious faith. Indeed, the list of "prohibited" materials under the regulation includes other potential religious symbols. The District regulation, then, sweeps within its

parameters constitutionally protected speech. (p. 1308)

The court also notes that "[t]he degree of constitutional vagueness depends partially on the nature of the enactment." See Video Software Dealers Association v. Webster, 968 F.2d 684, 689 (8th Cir. 1992). Here, for example, this court addresses a regulation in the public school setting. Accordingly, "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the board disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." See Fraser, 106 S. Ct. at 3166. On the other hand, because the literal scope of the District regulation "is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." See Goguen, 94 S. Ct. at 1247; Video Software Dealers Association, 968 F.2d at 689-690 ("A stringent vagueness test applies to a law that interferes with the right of free speech."). Accordingly, while a lesser standard of scrutiny is appropriate because of the public school setting, a proportionately greater level of scrutiny is required because the regulation reaches the exercise of free speech. (pp. 1308-1309)

The Seventh Circuit held a prison regulation virtually identical to the District regulation unconstitutionally vague. See Rios v. Lane, 812 F.2d 1032, 1038 (7th Cir. 1987). In Rios, a prison regulation prohibited "engaging or pressuring others to engage in gang activities or meetings, displaying, wearing or using gang insignia, or giving gang signals." See Rios, 812 F.2d at 1034. These terms were undefined. (p. 1309)

The Seventh Circuit held that the regulation was vague because it "failed to approximate the parameters of fairness" and gave "no prior warning that [the] conduct might be proscribed. Indeed, aside from the sparse text of the Rule itself, no material whatsoever was available describing what conduct was prohibited by the Rule." Id. at 1038. (p. 1310)

Unlike the prison environment of Rios, the District's regulation is in the public school setting where students are afforded greater constitutional protections. Both regulations, however, leave "gang" undefined, yet it represents the sole adjective for the prohibited "'colors,' symbols, signals, signs, etc." In fact, this court previously observed that the failure to define the pivotal term of a regulation can render it fatally vague. See Video Software Dealers Association, 968 F.2d at 690. Accordingly, the District regulation

fails to provide adequate notice of prohibited conduct because the term "gang," without more, is fatally vague. (p. 1310)

The District regulation suffers from an additional defect because it allows school administrators and local police unfettered discretion to decide what represents a gang symbol. The National Institute of Justice acknowledged that "traditional law enforcement efforts sometimes exacerbate gang problems by overlabeling people as gang members. Some police departments have recognized this problem and improved their ability to identify gang members. The key to the approach is to establish a set of restrictive definitions." See Catherine H. Conly, et al., National Institute of Justice, Street Gangs: Current Knowledge and Strategies 50 (1993). The District regulation contains no such restricting definitions, thereby failing to remedy the danger of overlabeling. Also, the Supreme Court emphasized the importance of defining prohibited conduct with specificity in Goguen. (p. 1310)

Gang symbols take many forms and are constantly changing. Accordingly, the District must "define with some care" the "gang related activities" it wishes students to avoid. The regulation, however, fails to define the term at all and, consequently, fails to provide meaningful guidance for those who enforce it. (p. 1310)

Furthermore, there is no evidence District students perceived Stephenson's tattoo as a gang symbol or complained about the tattoo during the thirty months Stephenson had it on her hand. Indeed, the District regulation contains no requirement that students consider a symbol gang-related before disciplinary action is taken. In this case, Stephenson underwent medical treatment, incurred expense, and suffered physical injury solely on the basis of the subjective opinion of school administrators and local police who had no other evidence Stephenson was involved in gang activity. Thus, the essentially unfettered discretion of these individuals placed a high school student in the unenviable position of removing her tattoo by scarring her body or suffering suspension from her educational pursuits for ten days and face possible expulsion. The District regulation, therefore, violates a central purpose of the vagueness doctrine that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." See City of Rockford, 92 S. Ct. at 2299. (pp. 1310-1311)

Sadly, gang activity is not relegated to signs and symbols otherwise indecipherable to the uninitiated. In fact, gang symbols include common, seemingly benign

jewelry, words and clothing. For example, color combinations frequently represent gang symbols. Indeed, the colors red and blue are the colors of our flag and the colors of two prominent gangs: The Bloods and Crips. Baseball caps, gloves and bandannas are deemed gang-related attire by high schools around the country, Paul D. Murphy, Restricting Gang Clothing in Public Schools: Does a Dress Code Violate A Student's Right to Free Expression? A male student wearing an earring, Olesen v. Board of Education of School District No. 228, 676 F. Supp. 820, 821 (N.D. Ill. 1987) is engaging in actions considered gang-related. (p. 1311)

Accordingly, the District regulation violates the central purposes of the vagueness doctrine because it fails to provide adequate notice regarding unacceptable conduct and fails to offer clear guidance for those who apply it. A person of common intelligence must necessarily guess at the undefined meaning of "gang related activities." See, e.g., Murphy, supra at 1356 (citing examples of high school gang regulations that offer "very specific" guidelines for proscribed behavior). The District regulation is void-for-vagueness. (p. 1311)

Stephenson challenges the District regulation as facially overbroad. "The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others." See Massachusetts v. Oakes, 109 S. Ct. 2633, 2637. This exception protects the First Amendment freedoms of other individuals, not before the court, whose speech may be chilled as a result of the regulation. Id. Stephenson argues that even if her tattoo does not represent speech protected by the First Amendment, this exception to traditional standing requirements allows the court to consider her overbreadth challenge. (p. 1312)

This court disagrees. As the court noted, the District amended the regulation. The Supreme Court holds that "overbreadth analysis is inappropriate if the statute being challenged has been amended or repealed." See Oakes, 109 S. Ct. at 2637. Accordingly, Stephenson's facial overbreadth challenge to the District regulation is moot. This court also declines to hold the regulation overbroad as applied to Stephenson because her tattoo does not merit First Amendment protection. (p. 1312)

Disposition: The ruling of the District Court for the Southern District of Iowa was affirmed in part, re-

versed in part, and remanded for further proceedings consistent with this opinion. (p. 1313)

Student Protests

Citation: Einhorn v. Maus, 300 F. Supp. 1169 (E.D.Pa. 1969)

Facts: This case involves a civil rights action brought under Title 42 United States Code Section 1983 by twelve minor plaintiffs and their parents to enjoin the defendant school officials from placing any notation upon the school record of any student who distributed literature or wore an armband bearing the legend "HUMANIZE EDUCATION" at the graduation ceremonies of Springfield Township Senior High School on June 5, 1969. (p. 1170)

The plaintiffs also seek to restrain the defendants from communicating to any school, college, university, institution of higher learning, or employer the fact that any student wore such an armband or distributed such literature at the graduation ceremonies or that such students ignored an order of the school authorities not to engage in such activities.

The only communication intended to be transmitted by defendants to the colleges and universities at which the minor plaintiffs hope to matriculate was a letter stating a true factual account of what occurred at the graduation exercises, without expression of opinion as to the lawfulness or propriety of the demonstration. (p. 1170)

Issues: Although this suit is based on a civil rights action under Title 42 United States Code Section 1983, a First Amendment question of free expression by public school students is implicated. (p. 1169)

Holding: The District Court for the Eastern District of Pennsylvania ruled that students who, in orderly demonstration, distributed literature or wore certain armbands at graduation ceremonies, although they were requested not to do so, were not entitled to a preliminary injunction against school officials placing notations upon school records or communicating facts to institutions of higher learning, for lack of showing of immediate, irreparable harm, where proposed communications were true, factual information. (p. 1169)

Reasoning: Because this is a motion for preliminary injunction, it is fundamental that the plaintiffs, in order to prevail, must demonstrate the likelihood of immedi

ate, irreparable harm flowing from the defendants' proposed conduct. (p. 1170)

An expression of opinion by students through the medium of armbands in an orderly demonstration is constitutionally protected and cannot be circumscribed. See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. (p. 1170)

The students in this case demonstrated in an orderly manner and simply publicized their views upon the humanizing of education by wearing armbands. No disciplinary action whatsoever was taken by the school officials against the students, although they had been instructed not to deviate from the formal graduation attire. (pp. 1170-1171)

This court perceives no threatened irreparable harm flowing from the proposed letter nor have the plaintiffs offered any evidence to demonstrate any likelihood thereof. School officials have the right and a duty to record and to communicate true factual information about their students to institutions of higher learning, for the purpose of giving to the latter an accurate and complete picture of applicants for admission. (p. 1171)

The contention that the defendant school officials may attempt to prevent succeeding graduates from expressing their views in graduation exercises in June 1970, or thereafter, does not warrant a grant now of extraordinary relief by this court in the form of a preliminary injunction, since the action of the school officials alleged by plaintiffs to be anticipated does not pose a threat of immediate irreparable harm. What future graduating students may do or refrain from doing neither the court nor the defendant school officials can forecast. When such student action or inaction becomes reasonably determinable in light of the present suit, the school officials then in charge will be guided in their actions by Tinker v. Des Moines Independent Community School District, and any relevant interim decisions. If they fail to do so, remedy is not lacking. (p. 1171)

Disposition: The plaintiffs' motion for a preliminary injunction was denied. (p. 1171)

Citation: Hatter v. Los Angeles City High School District, 310 F. Supp. 1309 (C.D.Cal. 1970)

Facts: Shasta Hatter and Julie Johnston, the plaintiffs, are students at Venice High School. A dress code has been put into effect in the school establishing certain approved standards of wearing apparel and per-

sonal appearance with which all students are required to conform. The plaintiffs have taken exception to the code and have endeavored to bring about its modification but without success. (p. 1310)

In order to demonstrate their dissatisfaction with the dress code, the plaintiffs have undertaken to boycott the school's annual chocolate drive, an activity sanctioned by the administration by which students raise money through the sale of candy to finance some of their functions. In furtherance of the boycott, Shasta and others, from a position off the school grounds but across the street, passed out leaflets urging other students to join the boycott. This was in violation of a rule adopted by the Los Angeles Unified School District requiring all matter distributed or exhibited on school property to be authorized by a responsible member of the administration. Such a regulation was in effect at Venice High School. For this activity, Shasta was suspended from November 25 to December 3, 1969. Julie Johnston's participation in the boycott consisted of wearing a tag on her dress during school hours with the words "boycott chocolates." This, she alleges, was ripped from her dress and she was threatened with suspension if she were to wear it again. Both plaintiffs bring this action on their own behalf and on behalf of others similarly situated, alleging infringement of their constitutional rights of free speech and due process. They seek injunctive relief, a judgment declaring their rights, an order requiring the defendants to expunge from the school records references to Shasta's suspension, compensatory and punitive damages, and costs. (pp. 1310-1311)

This matter is presently before this court on an application for preliminary injunction. (p. 1311)

Issues: Two issues related to the First Amendment are implicated in this case. First, is that which the student wishes to say of such importance so as to justify the court's interference with the school authorities' attempt to regulate where, when, and how she shall say it? Second, in weighing the importance of maintaining administrative authority to regulate and discipline students against the students' personal rights to instigate a boycott of the school's candy drive as a protest against the school dress code, does the right to boycott rise to a constitutional level? (p. 1310)

Holding: The District Court for the Central District of California held that where a suspended high school student had been reinstated and the dress code which she and another plaintiff objected to had been modified, although not completely to their satisfaction, the questions presented were moot, and preliminary

injunction would be denied. In weighing the importance of maintaining administrative authority to regulate and discipline students against the students' right to instigate a boycott of the school's candy drive as a protest against the school dress code, the latter activity was without weight or substance and raised no question of constitutional proportions. (pp. 1309-1310)

Reasoning: It appears that at this time the precise controversy upon which this case is predicated no longer exists. Shasta is back in school, the chocolate drive is over, the dress code has been modified, although not to plaintiffs' complete satisfaction, and there appears no threat of any immediate action which could be described as an "emergency" or "a situation of great urgency" or which might lead to irreparable injury to the plaintiffs. It would seem, therefore, that the questions raised here are now moot. (p. 1311)

The plaintiffs contend, however, that the incidents related in the complaint and in the affidavits of other students, filed herein in support of plaintiffs' position, are all typical of the oppressive practices which the administration has followed and will continue to follow unless restrained. It is the threat of future disciplinary measures that plaintiffs say has a chilling effect upon their constitutional right of free expression. They, therefore, seek a declaration of their rights. (p. 1311)

However, there are no allegations of a present threat of any specific act as to which this court can make an adjudication. A mere intention on the part of the administration to take some action at some future time, which, if it does occur, might constitute a cause of action does not present a justiciable question. (p. 1311)

In Blackwell v. Issaquena County Board of Education, 363 F.2d 749 at 753 (5th Cir. 1966), the court said:

It is always within the province of school authorities to provide by regulation the prohibition and punishment of acts calculated to undermine the school routine. This is not only proper in our opinion but is necessary.

Cases of this nature, which involve regulations limiting freedom of expression and the communication of an idea which are protected by the First Amendment, present serious constitutional questions. A valuable constitutional right is involved and decisions must be made on a case by case basis, keeping in mind always the fundamental constitutional rights of those being

affected. Courts are required to 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' which are asserted to have given rise to the regulations in the first instance. (p. 1311)

It is the duty of the court in each case to ask whether that which the student wishes to say is of such importance as would justify the court in interfering with the school authorities' attempt to regulate where, when and how he shall say it. (p. 1312)

The plaintiffs rely on two cases. The first is Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. In this case, the United States Supreme Court struck down, as constitutionally impermissible, a school regulation prohibiting the wearing of a black armband at school, protesting the war in Vietnam. The second case is Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966), where the Fifth Circuit held that a regulation prohibiting a student from wearing a "freedom button" protesting segregation violated the plaintiff's First Amendment rights. These two cases are distinguishable from the one which this court is presently considering for several reasons. (p. 1312)

In the first place, in both cases the plaintiffs were young children protesting on the very periphery of large protest movements, conceived and carried on by adults outside of the school community and as to issues wholly unrelated to the school program. (p. 1312)

But the important distinction is that in both cases the issues, as to which the plaintiffs were attempting to express an opinion, were matters of great national concern. In this context, the court in both cases found that, in the absence of any appreciable disruption of the school program, the regulation was an infringement upon the plaintiffs' First Amendment rights. (p. 1312)

In weighing the importance of maintaining administrative authority to regulate and discipline students against the plaintiffs' personal rights to stir up a boycott of the school's candy drive to protest the school dress code, this court finds the latter to be without weight of substance and that it raises no question of constitutional proportions. (p. 1312)

Disposition: The district court ordered that the application for a preliminary injunction be denied. The court further ordered that the plaintiffs' complaint be dismissed. (p. 1313)

Citation: Press v. Pasadena Independent School District, 326 F. Supp. 550 (S.D.Tex. 1971)

Facts: This controversy concerns secondary school discipline. The plaintiff, an eighth-grade student, by her father as next friend, sues a school district, its board of trustees, and various school officials. The plaintiff was suspended from the Jackson Intermediate School for the remainder of the spring term as disciplinary action for her disobedience to certain school rules, to wit: the wearing of a pantsuit in violation of the dress code and participation in a demonstration in violation of the disruption policy. It is asserted that this suspension was constitutionally defective. Framing the claim as a class action, the plaintiff seeks injunctive and declaratory relief on behalf of herself and of students similarly situated. (p. 552)

Issues: There are two First Amendment questions addressed in this case. First, is the wearing of a pantsuit by a student a form of communication protected by the First Amendment's guarantee of free expression, even if such action violated a school rule? Second, is a walkout demonstration, which occurred on school property, in violation of a school rule, at a time when the student and other demonstrators should have been engaged in classwork, but which was intended to convey the student's opposition to and disapproval of the dress code, constitutionally protected free speech and expression? (p. 551)

Holding: The District Court for the Southern District of Texas, Houston Division, held that the wearing of a pantsuit by a student, if a form of communication, was not the sort of expression protected by the First Amendment, where it necessarily entailed violation of a school rule. A walkout demonstration, which was intended to convey a student's opposition to and disapproval of the school's dress code, was not a constitutionally protected form of speech and expression, where the demonstration violated a clear and unequivocal school rule, and it occurred on school property and at a time when the student and other demonstrators should have been engaged in classwork. (p. 551)

Reasoning: The plaintiff contends that her First Amendment rights have been violated. The plaintiff testified that during the walkout demonstration she had on her maxi (long dress) over her pants and that she did not remove her maxi until she returned to the building. The wearing of the pantsuit in and of itself was not intended to convey a thought or an idea, but assuming that the pantsuit was a form of communication, it was not that sort of expression protected by the First Amendment because it necessarily entailed violation of a school rule. In Ferrell v. Dallas Independent School District, 392 F.2d 697, 703 (5th Cir. 1968), the court stated:

> The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes or hinders the state in providing the best education possible for its people, must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right. (p. 563)

For the same reason, the walkout demonstration which was intended to convey the plaintiff's opposition to and disapproval of the school dress code, was not constitutionally protected. The demonstration violated a clear and unequivocal school rule. It occurred upon school property and at a time when the plaintiff and the other demonstrators should have been engaged in classwork. Its occurrence interrupted the pedagogical regimen of the day. It is well settled that demonstrative activity, such as this in secondary schools, which is disruptive of the educational process or is calculated to undermine the school routine, forfeits the shield of the First Amendment. See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733; Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966). (p. 563)

Furthermore, to the extent that the disruptions policy on its face serves to discourage certain forms of expression in the school atmosphere, this limited curtailment is well within the power of the State. As the Supreme Court put it in Younger v. Harris, 91 S. Ct. at 754:

> Moreover, the existence of a "chilling effect," even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. (p. 565)

Disposition: The plaintiff's motion for injunction pending appeal was denied, and the defendant's motion to dismiss was granted. (p. 567)

Citation: Karp v. Becken, 477 F.2d 171 (9th Cir. 1973)

Facts: Several students, including the appellant, planned a chant and "walkout" at an athletic awards ceremony which was to be held at the high school in order to

protest the refusal of the school to renew the teaching contract of an English instructor. The appellant gave notice of the plans to the news media the day before it was to occur, apparently resulting in an article about the planned walkout in the morning paper on the day of the assembly. (p. 173)

Before the ceremony began, the school officials were told by student body officers that if a "walkout" did take place, certain members of the Lettermen Club (the school athletes) would likely attempt to prevent it. Fearing a possible violent confrontation, the school officials canceled the assembly. Notwithstanding the cancellation, some students did stage a "walkout" from classes. (p. 173)

As part of his efforts to publicize a demonstration to be held later in the morning, the appellant again notified the news media. During the lunch hour, students and newsmen gathered in the area of the school's multi-purpose room. At one point, the appellant, who had been at this gathering, went out to his car in the parking lot and brought back signs supporting the English instructor and distributed them to other students. (p. 173)

The vice principal ordered the students to surrender their signs, claiming they were not permitted to have them. There was no specific rule prohibiting the bringing of signs on campus. All signs were surrendered immediately except those held by the appellant. He asserted a constitutional right to have and distribute the signs. When asked a second time, the appellant gave up the signs and then accompanied the vice principal into the administrative office, upon the latter's request. While the appellant was in the administrative office, students began chanting, and pushing and shoving developed between the demonstrators and some Lettermen. Shortly after intervention by school officials, the demonstration broke up. (p. 173)

A couple of days later, after consultation with the appellant's parents (who were out of town at the time of the activities noted), school officials advised the appellant he was to be suspended for five days. School officials then offered to reduce the suspension to three days if the appellant would agree to refrain from bringing similar signs on the campus. The appellant and his father refused to make such an agreement. (p. 174)

The appellant student then brought action in the district court pursuant to the Civil Rights Act Title 42 United States Code Section 1983 for alleged violation of his First Amendment rights of free speech. The ac-

tion was brought against school officials (appellees) who suspended the appellant for five days from Canyon del Oro High School in Pima County, Arizona. The appellant sought to enjoin the school officials permanently from enforcing the suspension order. After a trial, the district court entered findings of fact and conclusions of law in favor of the school officials. The student appealed. (p. 173)

Issues: Is a public high school student's free speech right abridged when school administrators suspend him for bringing onto campus and attempting to distribute signs protesting the nonrenewal of a teacher's contract? (p. 171)

Holding: The Court of Appeals for the Ninth Circuit determined, in absence of justification, the public high school student could not be properly suspended for exercising his free speech rights by bringing onto campus and attempting to distribute signs protesting the refusal of school authorities to renew the teaching contract of an English instructor. However, school officials could have suspended the student for violating an existing reasonable rule, such as going to the school parking lot during school hours to secure signs from his automobile. (p. 171)

Reasoning: The difficulties inherent in federal court supervision of disciplinary problems in the 23,390 public school systems of this country were anticipated by Justice Black in his dissent in Tinker v. Des Moines School District, 89 S. Ct. 73. The reason for his concern is amply demonstrated in this case, which presents a conflict between asserted constitutional rights and good-faith actions by school officials. (p. 174)

Tinker, of course, provides the standards. It is clear that public high school students have a right to freedom of speech which is not shed at the schoolhouse gates (89 S. Ct. 733). However, it is equally clear that the daily administration of public education is committed to school officials. See Epperson v. Arkansas, 89 S. Ct. 266. That responsibility carries with it the inherent authority to prescribe and control conduct in the schools. When a conflict does arise, Tinker then provides that the students' rights to free speech may not be abridged in the absence of "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." (89 S. Ct. at 740) Thus, the courts have recognized that the interest of a state in the maintenance of its educational system is a compelling one, provoking a balancing of First Amendment rights with a state's efforts to preserve

and protect its educational process. See Burnside v. Byars, 363 F.2d 744, 748 (5th Circuit 1966). (p. 174)

The court in Tinker emphasized that there was no evidence documenting the school officials' forecast of disruption of the educational processes (89 S. Ct. 733). In contrast, the record in this case justifies a reasonable forecast of material interference with the school's work. (p. 175)

The officials in Tinker anticipated a level of disruption which did not justify curtailment of free speech. The officials in this case testified that they feared the provocation of an incident, including possible violence, and that they took the signs from the appellant in an effort to prevent such an incident. Considering all the facts, this court does not find that such an anticipation, or forecast, was unreasonable. (p. 176)

However, a determination that the school officials were justified in taking the signs from the appellant (and thus curtailing his exercise of claimed First Amendment rights) does not terminate our inquiry. The second question is whether the school officials properly suspended him from school for five days. (p. 176)

The sign activity in this case constituted the exercise of pure speech rather than conduct. As such, it comes within the protective umbrella of the First Amendment. This court has already held that school officials may curtail the exercise of First Amendment rights when they can reasonably forecast material interference or substantial disruption. However, for discipline resulting from the use of pure speech to pass muster under the First Amendment, the school officials have the burden to show justification for their action. Here they failed to do so. Absent justification, such as a violation of a statute or school rule, they cannot discipline a student for exercising those rights. The balancing necessary to enable school officials to maintain discipline and order allows curtailment but not necessarily punishment. Consequently, the appellant could not be suspended for his activities with the signs. (p. 176)

What this court has said does not mean that the school officials could not have suspended the appellant for violating an existing reasonable rule. In fact, in securing the signs, he broke a regulation by going to the parking lot during school hours. However, this act was not a basis of the suspension. This court has only held that, under the circumstances of this case, the appellant could not be suspended on the sole basis of

his exercising pure free speech when no justification was demonstrated. (p. 177)

Disposition: The decision of the district court was reversed and remanded for further proceedings consistent with this opinion. (p. 177)

Citation: Cintron v. State Board of Education, 384 F. Supp. 674 (1974)

Facts: These consolidated civil rights actions were brought by public school students who were punished for violation of certain of the Regulations for Students in the Public School System of the Commonwealth of Puerto Rico. The students claim that the rules which they are alleged to have violated infringe their rights under the First, Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. They seek declaratory and injunctive relief. (p. 675)

The plaintiff in Case No. 764-72 is a junior high school student attending the Student Opportunities Center in Buchanan, Guaynabo, Puerto Rico. On August 16, 1972, he distributed handbills to other students during school hours and while on the grounds of the Center. These handbills called for the participation of students in a subdivision of a political party which advocates Puerto Rican independence. The next day the student was called in for an interview with school officials. At this interview he was informed that he had violated the student regulations and was enjoined from further distribution of the handbills on school grounds. Subsequently, the plaintiff was told that he was suspended for five days. (p. 675)

The plaintiffs in Case No. 946-72 are two high school students attending Florencio Rodriguez High School in Coamo, Puerto Rico. On October 11, 1972, the two students participated in a picket line set up outside of their school. During the picketing a loudspeaker was used. After the activity had terminated, the school director informed the students that they had violated school regulations. The next day the two were suspended for five days, after a hearing, and notices of the suspension were sent to their homes. The notices said only that the students had participated in a picket line and used a loudspeaker and had thereby "affected the institutional order" of the school. (p. 676)

In both cases temporary restraining orders were issued and a three-judge court convened. They have now been consolidated for decision. (p. 676)

Issues: Are school regulations proscribing the circulation of materials "alien to school purposes" and the re-

cruitment from the school population of followers of any organization of "political, partisan, and/or religious-sectarian character" within school so vague and overbroad as to deny students their First Amendment rights, including the right to free speech? (p. 675)

Holding: The District Court of Puerto Rico held that such regulations were vague and overbroad to the extent of unconstitutionally infringing upon the students' First Amendment guarantee of speech, assembly, and association. (p. 674)

Reasoning: The board of education's rules absolutely prohibit student picketing on school grounds, and use of loudspeakers within school premises without permission. They also proscribe these activities when carried out outside of school grounds "if they affect the institutional order." Challenge to them is based upon the assertion that they are vague and overbroad, and that they chill and infringe upon the rights of speech, assembly, and association. (p. 677)

This court agrees with the plaintiffs that the regulations in question, insofar as they impinge upon activity outside of the school premises, are vague and overbroad and violate their First and Fourteenth Amendment rights. (p. 677)

Picketing and using loudspeakers are activities intimately related to the expression of ideas, to the association of persons for concerted action, and to peaceable assembly. These are actions which are protected from governmental interference by the First Amendment to the United States Constitution. As the Supreme Court has recently said: "The right to use a public place for expressive activity may be restricted only for weighty reasons." See Grayned v. City of Rockford, 115 92 S. Ct. 2294, 2303. (p. 677)

In the school context, "weighty reasons" to restrict the kind of activity involved in this case may include insuring unobstructed ingress and egress from school buildings, and prevention of other action which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." See Tinker v. Des Moines School District, 89 S. Ct. 733, 740. But particularly where sensitive First Amendment freedoms are involved, government regulation must not be vague, inhibiting conduct outside of the forbidden zone; and it must not be overbroad, sweeping within its prohibitions protected activity. (p. 678)

These regulations are about as broad a ban upon free expression in school as can be imagined. Proscribed is

> the circulation of materials "alien to school purposes" including all political, religious, or commercial literature, notices, or posters. Also proscribed is the recruitment from the school population of followers of any organization of "political-partisan and/or religious-sectarian character" within the school. No attempt is made to restrict the operation of these rules to situations where school functioning is materially disrupted or the rights of students substantially infringed. (p. 679)
>
> The school authorities contend that these rules are needed to prevent political and other agitation current in the Commonwealth from invading the schools and disrupting the educational process. This seems to be precisely the kind of "undifferentiated fear" which the Tinker court made clear could not support infringement upon the First Amendment rights of student. See Tinker v. Des Moines School District, 89 S. Ct. 733. (p. 679)
>
> These regulations suffer from vagueness (what is "alien" to school purposes?), and most certainly from overbreadth. They also operate as a system of prior restraint upon expression, which comes into court "bearing a heavy presumption against its constitutional validity." See New York Times Co. v. United States, 91 S. Ct. 2140. Nothing in this record even approaches justification sufficient to overcome this burden. (p. 679)
>
> In view of all of this and the fact that the Commonwealth has made no attempt to find a "less drastic means" to accomplish its permissible purposes, Shelton v. Tucker, 81 S. Ct. 247, and in view of the importance which is attached to the robust and unfettered exercise of First Amendment freedoms in our schools, Shelton v. Tucker, supra, Tinker v. Des Moines School District, supra, this court finds these regulations void on their face. (p. 679)

Disposition: The suspensions and other related disciplinary actions were permanently enjoined. The court further ordered that reference to them in the students' records be expunged, but the court determined to refrain from enjoining enforcement of these regulations in order to give the Commonwealth Secretary of Education and the State Board of Education time to promulgate new rules. (p. 681)

Citation: Dodd v. Rambis, 535 F. Supp. 23 (S.D.Ind. 1981)

Facts: On Wednesday, September 30, 1981, fifty-four students of Brazil Senior High School engaged in a student walkout in protest of the enforcement of certain

school regulations dealing essentially with student smoking and student attendance. (p. 25)

Shortly after the commencement of the walkout on Wednesday, September 30, 1981, Principal Rambis left the school building to address the students gathered outside the building. At that time, Principal Rambis sought to determine the spokesperson for the group. Three students came forward as spokespersons and a dialogue concerning school discipline ensued between the students and Principal Rambis. The discussion lasted one and one-half hours. During these discussions, the number of students participating in the walkout increased. (p. 25)

Those students who participated in the walkout on Wednesday, September 30, 1981, were subsequently suspended for periods ranging from one to three days. (p. 25)

On the evening of Wednesday, September 30, 1981, two of the five plaintiffs met at the residence of the remaining two plaintiffs to discuss the events of the day. This meeting culminated in the drafting of a leaflet which advocated another walkout. (p. 25)

On the morning of Thursday, October 1, 1981, less than twenty-four hours after the walkout of Wednesday had ended, each of the five plaintiffs engaged in the distribution of the leaflets prepared the previous evening. The majority of the distribution occurred in the school halls prior to classes and during the passing periods between classes. (p. 25)

At the request of Mr. Rambis, the two plaintiffs initially discovered to have been responsible for the distribution of the leaflets appeared in the office of Principal Rambis on the afternoon of Thursday, October 1, 1981. Following a discussion of the incident in which Mr. Rambis quoted certain portions of the Brazil Senior High School Student Handbook, the plaintiffs were informed that they were suspended for three days pending a hearing on their conduct of passing out the leaflets. (p. 26)

Shortly after learning of the suspension of two of the plaintiffs, the remaining three plaintiffs and a fellow student not a party to this action, voluntarily reported to the principal's office and were likewise suspended for a period of three days pending a hearing on their involvement in passing out the leaflets. (p. 26)

Each of the plaintiffs received written notices that they were suspended pending further proceedings to

expel the plaintiffs for the remainder of the fall semester. (p. 26)

On the ninth day of October, 1981, pursuant to the statutory provisions of the Indiana Code, the plaintiffs were afforded a hearing before Mr. Kenneth L. Crabb, a hearing examiner appointed by Dr. Charles Osborn, the Superintendent of the Clay Community Schools. On the basis of his findings, the hearing examiner subsequently recommended that the plaintiffs be expelled for the remainder of the semester. The findings and recommendation of the hearing examiner were reviewed and accepted by Superintendent Osborn. (p. 26)

The plaintiffs requested and were granted review of the decisions of the hearing examiner and the superintendent by the defendants, Trustees of the Board of Education of the Clay Community Schools. On October 19, 1981, the trustees conducted inquiries into the leaflet incident with each individual plaintiff. The trustees received additional evidence from the plaintiffs and their parents during these inquiries. (p. 26)

At a meeting of the Board of Education of the Clay Community Schools, the trustees met and affirmed the plaintiffs' expulsion from Brazil Senior High School. p. 26)

Issues: A freedom of expression issue is raised by the facts of this case. The central question is whether the action of five students in distributing leaflets to other students at a high school, to protest the manner in which certain school disciplinary rules are enforced, falls within the protective umbrella of the First Amendment. (p. 23)

Holding: The District Court for the Southern District of Indiana, Evansville Division, held that: 1) the actions of students in distributing leaflets which advocated a "walk out" from the high school to protest the manner in which certain school disciplinary rules were enforced fell within the protective umbrella of the First Amendment and, as such, the action of school officials in suspending and expelling students constituted an infringement of their right to freedom of expression, but 2) in light of a prior walkout of fifty-four students and apprehension on the part of school officials that another walkout on a much larger scale would occur in response to the leaflet, school officials could properly discipline students for their action in distributing leaflets. (p. 23)

Reasoning: It is elementary that neither students nor members of the faculty "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736. Indeed, our courts have long recognized the unique primacy of the First Amendment in the context of the American educational system. School officials do not possess absolute authority over their students nor may they confine them to the expression of those sentiments that are only officially approved. What better place than a school to air controversial issues? Free expression teaches the student responsibility and at the same time demonstrates that the school itself is amenable to criticism. This is the essence of a healthy democracy. Freedom of expression demands breathing room. However, there are limits—no freedom is absolute. To allow such would violate the rights of others. In most instances it is the duty of the court to view the balance of interest—freedom of expression vs. individual rights—and to weigh the detrimental effect on each. (p. 27)

However, the courts have also recognized and acknowledged the compelling nature of the state's interest in maintaining and cultivating its educational system. The daily administration of public education is clearly the responsibility of state and local school officials, and with that responsibility school officials possess the inherent authority to prescribe and control conduct in the public schools. (p. 27)

The development of First Amendment rights has been tortuous and much difficulty has been experienced in reconciling the results in individual cases. Because of the "fine line" between what is protected and what is not protected, the cases have been "fact sensitive." Therefore, it is impossible to predict or spell out with any degree of certainty whether any particular conduct falls within or without First Amendment protection. (p. 28)

The evidence presented at the trial of this cause indicates that the suspension and subsequent expulsion of the plaintiffs was based on the action of the plaintiffs in distributing the leaflet to the other students of Brazil Senior High and the objectionable content of the leaflet in that it advocated a "walkout" from classes in violation of the Brazil Senior High School Student Handbook and of the Indiana Code. It is of no legal significance that the school authorities did not like what the students were saying, as the right to express a point of view is protected so long as it does not merge into impermissible conduct. (p. 28)

It cannot seriously be maintained that the actions of the plaintiffs in distributing the leaflets to the other students of Brazil Senior High School in protest to the manner in which certain of the school disciplinary rules were enforced and informing them of an organizational meeting to be held Thursday night did not fall within the protective umbrella of the First Amendment. As such, the action of the defendant, currently under consideration, constituted an infringement of the plaintiffs' right to freedom of expression and the court is left with the task of determining whether, consistent with the dictates of Tinker, the conduct of the plaintiffs could "reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . [or] intru[sion] in the school affairs or the lives of others." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 740; Scoville v. Board of Education, 425 F.2d 10, 13 (7th Cir.). (pp. 28-29)

In applying the forecast rule, it should be noted that the conduct of an individual claiming an infringement of his First Amendment rights on school premises cannot be severed from the reality of the situation and viewed in a vacuum. Rather, in addition to the action of the plaintiffs themselves, consideration must also be given to all other circumstances confronting the school authorities which might reasonably prompt a forecast of disruption. Thus, the fact that the evidence reveals that no serious or substantial disruption stemmed directly from the plaintiffs' distribution of the leaflets does not, of itself, invalidate the actions of the defendants in this case. (p. 29)

The defendants, of course, have the burden of bringing forth evidence justifying a reasonable forecast of material interference with the school's work, Scoville v. Board of Education, 425 F.2d 10, 13 (7th Cir.), and the courts will not merely accept bare allegations on the part of the school authorities that such forecast existed. See Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979). (p. 29)

In light of the walkout of fifty-four students which occurred on Wednesday, September 30, 1981, the apprehension on the part of the school officials that another walkout of a much larger scale would occur on Friday, October 2, 1981, in response to the leaflets distributed by the plaintiffs can hardly be characterized as merely the "undifferentiated fear or apprehension of disturbance" referred to in Tinker. In Tinker, the circumstances surrounding the students' expression were unaccompanied by any disturbances or disorders on the school premises. The First Amendment does not re-

quire school officials to forestall action until disruption of the educational system actually occurs. Indeed, this is the very essence of the forecast rule. (pp. 29-30)

Considering all the facts and circumstances surrounding this case, the court concludes that the forecast on the part of the defendant that the distribution of the leaflets by the plaintiffs would result in a substantial disruption of or material interference with the activities of the school unless appropriate action was taken was not unreasonable. As such, the court concludes that the school officials involved as defendants to this suit could properly discipline the plaintiffs for their action in distributing the above described leaflets on Thursday, October 1, 1981. (p. 30)

The plaintiffs argue that even assuming that the circumstances of this case could reasonably have led the defendant school authorities to forecast substantial disruption of or material interference with school activities, it was improper for the school authorities to impose discipline in the form of suspension or expulsion or to take any action against the plaintiffs other than ordering them to stop distributing the leaflets, and confiscating the leaflets. (p. 30)

This court is of the opinion that once a reasonable forecast of material interference with the school's work is made, school officials should be accorded a wide degree of discretion in determining the appropriate punishment to be imposed. This concept has been generally accepted by the courts. Although the court may not completely agree with the punishment imposed in this case, the punishment imposed on the plaintiffs appears to fall within the range of punishment authorized by statute. Clearly, the punishment levied on the plaintiffs was not so harsh or unreasonable as to render it arbitrary, capricious, or an abuse of discretion in contravention of their rights secured by the Fourteenth Amendment. (pp. 30-31)

It is hopeful that this decision will not be interpreted so as to result in a "chilling effect" on students advocating constitutionally protected conduct. On the other hand, the court does not intend that this ruling shall give to the school officials a license or invitation to prohibit conduct that is constitutionally protected. Rather, the court is simply saying that under the facts in this case, the principal and school officials were proper in their actions and that the court placed considerable significance to the fact that a walkout had occurred the day before. A varia-

tion in the facts as to time, place, and manner could very well change the result. (p. 31)

Disposition: The plaintiffs' application for a preliminary injunction was denied and a judgement was entered for the defendants. (p. 23)

Citation: Boyd v. Board of Directors of McGehee School District No. 17, 612 F. Supp. 86 (D.C.Ark. 1985)

Facts: On September 12, 1983, an election was conducted by the head football coach, Sammy Gill, for the position of high school homecoming queen for the 1983-84 school year. In accordance with the custom and practice of McGehee High School, only members of the high school football team were eligible to participate in the election. There were fifty-four members constituting the current team consisting of twenty-eight white and twenty-six black players. (p. 89)

Four female high school students were nominated for the position, three whites and one black. The black nominee was Jamesina Boyd. Purportedly, Boyd received the highest number of votes and should have been designated queen. (p. 89)

Practically all of the black players believed that Boyd had won the election initially and that Gill had manipulated the election so that one of the white nominees could be designated queen. A series of conferences were held between the black players, their parents, Gill, and the Board of Directors of the District. Gill refused to modify the announced election results. (p. 89)

On September 23, 1983, twenty-five of the twenty-six black players, in order to protest what they perceived to have been an act of racial discrimination in the selection of the queen, walked out of a pep rally during the afternoon and refused to participate in the game scheduled for that night.

On September 26, 1983, Johnson and the other twenty-four black players participating in the "boycott" of the scheduled game were suspended from participating on the football team for the remainder of the 1983-84 season. (p. 89)

The plaintiffs contend that the black players were suspended because of their race and as punishment for the exercise of their right of "freedom of expression." On the other hand, the defendants assert that the black players were suspended because they had violated an unwritten rule maintained by Gill to the effect that any player who missed a game or football practice

"without good cause" or "proper excuse" would be suspended from the team; and that the suspension was not because of race or the exercise of First Amendment rights. (pp. 89-90)

On October 11, 1983, Orlando Johnson filed his motion for preliminary injunction requiring the defendants to reinstate him as a player on the football team. (p. 90)

Issues: The central issue at hand involves a student's First Amendment right to freedom of expression. The relevant issue is whether a high school football coach deprives black players of their First Amendment right to free expression by suspending them from the football team for the remainder of the season after the players walk out of a pep rally and refuse to participate in a scheduled game because of their belief that the coach had manipulated an election to preclude a black female senior from serving as homecoming queen. (p. 87)

Holding: The District Court for the Eastern District of Arkansas, Pine Bluff Division, held that within the context of the facts of this case, the coach was liable for depriving the players of their right to freedom of expression as secured under the First Amendment. (p. 86)

Reasoning: While it is well settled that public education in our country is the responsibility of school administrators, and courts are reluctant to intervene in conflicts which develop in the day-to-day operation of a school system, this does not mean either that free expression, as enunciated under the Federal Constitution, must exist in a vacuum as opposed to a living reality on the school campus, or that school officials, as agents of the state, may stifle free expression, whether by written or unwritten policies, where, as here, the expression does not "materially and substantially interfere with the requirement of appropriate discipline in the operation of the school" and the rights of others. See Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966). (p. 92)

It is clear from this record that 49% of the fifty-four member football team cherished the opportunity and honor, and to this end strove conscientiously to hasten the day, when the school's first black homecoming queen could be elected. The black players believed that they had achieved that goal in the 1983 election, but only to have their hopes frustrated and the long sought after goal nullified by Coach Gill. Their first act to rectify what was perceived as racism in its truest form was to confer with Coach Gill. Without

success, the black players and their parents sought help from the board of directors. After the board assumed a posture of what the black players perceived as a hands-off approach to the problem, these players were left without any recourse other than what Americans, from the very inception of this Republic, regard as fundamental and basic in a democracy, namely, "freedom of expression," when peaceful and in good order, to communicate views on questions of group interest. First, the black players walked out of the pep rally and, secondly, refused to participate in a scheduled game. This action was without any substantial intrusion on the work and discipline of the school. Johnson has met the burden of establishing that his conduct was constitutionally protected and that his action was the motivating factor in Coach Gill's act in suspending him from the football team, in effect permanently. Coach Gill has not demonstrated that he would have suspended Johnson from the team in the absence of the protected conduct. Nor is the court persuaded that Coach Gill's unwritten policy that a player is automatically suspended who, "without good cause" or "proper excuse," misses a practice session or fails to participate in a scheduled game takes precedent over a student's right of free expression in the context of the factual setting of this case. Moreover, such a policy, which is purely subjective and depends upon the idiosyncrasies of the head football coach, can neither frustrate nor chill the First Amendment rights of students. (p. 92)

The defendants argue that what is involved here is not "pure speech"—communication of ideas—but a form of protest which is comparable to picketing. But the court hastens to emphasize that the Supreme Court has made it crystal clear that picketing and parading do constitute methods of expression warranting First Amendment protection. See Shuttlesworth v. Birmingham, 89 S. Ct. 935, 939; Cox v. Louisiana, 85 S. Ct. 453. (p. 93)

Disposition: Because of the deprivation of federal rights sustained by the plaintiff students, the court awarded them $250.00 in nominal damages. Further, because of the coach's willful, malicious, and conscious indifference to the federal constitutional rights of the plaintiff students, coupled with the coach's invidious racially discriminatory action toward the black players, the court awarded the plaintiff students $1,000.00 each in punitive damages. The plaintiff students were also entitled to recover their cost expended. (p. 94)

Symbolic Speech

Citation: Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966)

Facts: This case is a civil rights action to enjoin school officials from enforcing a regulation forbidding the wearing of buttons. The United States District Court for the Southern District of Mississippi entered an order denying injunction and the plaintiffs appealed. (p. 749)

The appellants filed a civil rights action to enjoin school officials from enforcing a regulation forbidding school children from wearing "freedom buttons" as a denial of First and Fourteenth Amendment rights under the United States Constitution. The United States District Court for the Southern District of Mississippi refused to grant a preliminary injunction. (p. 750)

Issues: The First Amendment issue presented on this appeal is whether the school's regulation forbidding the wearing of "freedom buttons" is a reasonable rule necessary for the maintenance of school discipline or an unreasonable rule which infringes on the students' right to freedom of speech. (p. 752)

Holding: The Court of Appeals for the Fifth Circuit held that where the record showed an unusual degree of commotion, boisterous conduct, collision with the rights of others, and the undermining of authority as a result of students wearing and distributing "freedom buttons," which depicted a black hand and a white hand joined and the word "SNCC," the regulation by school authorities prohibiting students from wearing such buttons was reasonable and did not infringe on students' free speech. (pp. 749-750)

Reasoning: The issue presented on this appeal, whether the school regulation forbidding the wearing of "freedom buttons" is a reasonable rule necessary for the maintenance of school discipline or an unreasonable rule which infringes on the students' right to freedom of speech guaranteed by the First Amendment of the United States Constitution, is identical to that in Burnside et al. v. Byars et al., 363 F.2d 744 (5th Cir. 1966), decided simultaneously with this case. In that case, this court recognized that the right of students to express and communicate an idea, by wearing a freedom button inscribed with "One Man One Vote," was protected by the First Amendment guarantee of freedom of speech; but this court also recognized that reasonable regulations, necessary for keeping orderly conduct during school session, could infringe upon such First Amend-

ment rights. This court held in Burnside that a school regulation forbidding the wearing of freedom buttons was unreasonable in that the presence of such buttons on school grounds did not cause a disturbance of classroom activities nor was such a rule necessary for the maintenance of order and discipline within the school under the facts and in the circumstances of that case. Therefore, this court found such regulation to be an infringement upon students' protected right of free expression. (pp. 752-753)

In the case now before this court, the affidavits and testimony from the district court present quite a different picture from the record in Burnside, where no disruption of classes or school routine appeared in the evidence. Here, the district court was presented with evidence of numerous instances where students conducted themselves in a disorderly manner, disrupted classroom procedure, interfered with the proper decorum and discipline of the school, and disturbed other students who did not wish to participate in the wearing of the buttons. Despite the factual differences in the two cases, the question the court must decide remains the same. Is the regulation forbidding the wearing of freedom buttons by school children reasonable? A reasonable regulation is one which is "essential in maintaining order and discipline on school property" and "which measurably contributes to the maintenance of order and decorum within the educational system." See Burnside v. Byars et al., 363 F.2d 744 (5 Cir. 1966). (p. 753)

The facts demonstrate that during the time students wore freedom buttons to school, much disturbance was created by these students. The record clearly indicates that actions by the students in distributing buttons, pinning them on others, and throwing them through windows constituted a complete breakdown in school discipline. (p. 753)

In the instant case, as distinguished from the facts in Burnside, there was more than a mild curiosity on the part of those who were wearing, distributing, discussing, and promoting the wearing of buttons. There was an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order, discipline, and decorum. The proper operation of public school systems is one of the highest and most fundamental responsibilities of the state. The school authorities in the instant case had a legitimate and substantial interest in the orderly conduct of the school and a duty to protect such substantial interest in the school's operation. Again, this court emphasizes the difference in the conduct here involved and that in-

volved in Burnside. In this case, the reprehensible conduct described was so inexorably tied to the wearing of the buttons that the two are not separable. In these circumstances, this court considers the rule of the school authorities reasonable. As this court said in Burnside, "It is not for us to consider whether such rules are wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities." There was an abundance of clear, convincing, and unequivocal testimony which supported the action of the district court in refusing to grant the requested preliminary injunction. This court is unable to find an abuse of discretion. (p. 754)

Disposition: The judgment of the District Court for the Southern District of Mississippi was affirmed. (p. 754)

Citation: Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733 (1969)

Facts: Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school. (p. 735)

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program. (p. 735)

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused, he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted. (p. 735)

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day. (p. 735)

This complaint was filed in the United States District Court by petitioners, through their fathers, under Section 1983 of Title 42 of the United States Code. It asked for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing the district court dismissed the complaint. It upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. The court referred to, but expressly declined to follow, the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." See Burnside v. Byars, 363 F.2d 744, 749. (p. 735)

On appeal, the Court of Appeals for the Eighth Circuit considered the case en banc. The court was equally divided, and the district court's decision was accordingly affirmed, without opinion. The Supreme Court granted certiorari. (p. 735)

Issues: The seminal First Amendment issue before the Supreme Court is whether a prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, denies students their freedom of speech. (p. 733)

Holding: The Supreme Court held that Symbolic speech was akin to "pure speech." Therefore, prohibition against such speech, when it was not disruptive and did not impinge upon the rights of others, violated the Free Speech Clause of the First Amendment. (p. 733)

Reasoning: The wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech," which is entitled to comprehensive protection under the First Amendment. First Amendment rights, applied in light of the special circumstances of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group

demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech." (p. 736)

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 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 schools or the rights of other students. Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the school or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises. The district court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from wearing the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take that risk. 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 discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. See Burnside v. Byars, 363 F.2d 744. (pp. 737-738)

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. A particular symbol—black armbands worn to exhibit opposition to this nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of one particular opinion, at least without evidence that it is necessary to avoid material and substantially interference with schoolwork or discipline, is not constitutionally permissible. In our system, state-operated schools may not be enclaves of totalitarianism. School

officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. 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 students. This is not only an inevitable part of the educational process of attending school; it is also an important part of the educational process. 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 authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. See Burnside, 363 F.2d at 749. (pp. 738-740)

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. These students, however, neither interrupted school activities nor sought to intrude in the school's affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression. (p. 740)

Disposition: The Supreme Court expressed no view as to the form of relief which should be granted, viewing that issue as a matter for the lower courts to determine. The Court reversed the court of appeals' decision and remanded the case for further proceedings consistent with this opinion. (p. 741)

Citation: Aguirre v. Tahoka Independent School District, 311 F. Supp. 664 (N.D.Tex. 1970)

Facts: There is an action filed by the next friends of five minor children, individually and as a class, all of whom are students at Tahoka Junior High School and Tahoka High School, Tahoka, Texas. By this suit, the plaintiffs seek to enjoin the Tahoka Independent School District and its officials from enforcing the school district's regulation prohibiting students from wearing "apparel decoration that is disruptive, distracting, or provocative." The decorative apparel specifically involved in this suit are brown armbands. This opinion is concerned only with plaintiffs' request for a temporary injunction against the enforcement of said regulation pending final determination of the case. (p. 665)

The parents of the plaintiffs and many other local people, mostly of Mexican-American descent, had become dissatisfied with certain educational policies and practices within the Tahoka school system. A group of these people known as "Concerned Mexican American Parents," had attempted to have these matters corrected by means of written correspondence and meetings with various school officials and attorneys advising the school. (p. 665)

In expression and support of their view that the substance of their grievances was justified and worthy of corrective action by school officials, the plaintiffs and other students wore brown armbands to school; the first such wearing being on February 12, 1970. (p. 665)

As of that date, there were no dress regulations in effect within the Tahoka school system which would have been violated by armbands such as these. Immediately, however, the board of education met and promulgated a supplement to the existing Student Handbook in which it was announced that "any act, unusual dress, coercion of other students, passing out literature, buttons, etc., or apparel decoration that is disruptive, distracting, or provocative so as to incite students of other ethnic groups will not be permitted." The date of said supplement was February 13, 1970. (p. 665)

Further implementation of this "dress" regulation was achieved by board of education approval of a new procedure under which students could be temporarily suspended from school on the ground of "incorrigibility" for violation of the new dress regulation. This new disciplinary procedure was also dated February 13, 1970. (p. 665)

This court found as a fact that although neither the dress regulation nor the disciplinary procedure spe-

cifically mentioned armbands and neither were limited to armbands or similar devices, both actions by the board of education were precipitated by and directed at the wearing of brown armbands by students as well as other activities not involved in this suit. (pp. 665-666)

The dress regulation and disciplinary procedures were made known to students and their parents, including the plaintiffs and their next friends. Despite the knowledge that suspension was a likely consequence, the plaintiffs and other students continued to wear armbands. A total of seventeen students, the plaintiffs included, had been temporarily suspended after having been given an opportunity to remove their armbands. The only condition required for reinstatement or lifting of suspension was the removal of the armbands. (p. 666)

A thorough and deliberate examination of the testimony of witnesses revealed to this court that only isolated incidents of unrest or apprehension were attributable to the wearing of the brown armbands. (p. 666)

This court finds as a fact that there has been no showing that the wearing of the armbands by the plaintiffs and the class they represent would materially and substantially interfere with the requirements of appropriate discipline or be disruptive of normal educational functions. (p. 666)

Issues: Is the wearing of brown armbands by high school students for the purpose of expressing the view that their grievances regarding certain educational policies and practices within the school system were justified protected by the First Amendment? (pp. 664-665)

Holding: The District Court for the Northern District of Texas concluded that the wearing of brown armbands by high school students for the purpose of expressing the view that the substance of their grievances respecting certain educational policies and practices within the school system was justified and worthy of corrective action came within the protection of the First Amendment. (p. 664)

Reasoning: The facts as here found put this case on all fours with that decided by the United States Supreme Court in Tinker v. Des Moines Community School District, 89 S. Ct. 733. Therefore, the law as announced in that decision controls here. This court concludes that the controlling law from Tinker is as follows:

> "The wearing of an armband for the purpose of expressing certain views is the type of symbolic

> act that is within the Free Speech Clause of the First Amendment." See Tinker, 89 S. Ct. at 736. The logic of such a conclusion is obvious when the symbol, the armband, is translated back into the expression which it symbolizes—"I support those in the community who advocate certain changes in the educational system"—and of that expression it is asked, "Is it within the protection of the First Amendment?" No room for doubt exists. (pp. 666-667)

The public school setting for the exercise of First Amendment rights by students is permissible, but there must be a careful consideration of the special circumstances involved. (p. 667)

Nothing in this opinion nor in the order of this court is to be construed as in any way to limit or take away the authority of proper officials to regulate, administer, and operate the Tahoka Independent School District and its schools. For that reason, this court retains continuing jurisdiction of this cause and will promptly hear and decide any alleged future disturbances and if it should appear that the facts and the laws justify such action, the temporary injunction here ordered will be revoked. (p. 667)

Disposition: The district court entered judgment granting temporary injunctive relief to the plaintiffs. (p. 667)

Citation: Hernandez v. School District Number One, Denver, Colorado, 315 F. Supp. 289 (D.Colo. 1970)

Facts: In September and October 1969, the plaintiffs were students attending North High School in Denver School District No. 1. (p. 290)

On October 7, the plaintiffs were suspended and this action was instituted October 17, asking for a declaration that the suspensions were in violation of the plaintiffs' federal constitutional rights. (p. 290)

The court finds from undisputed evidence that all of the plaintiffs are of Mexican descent and are referred to variously as "Mexicans," "Hispanos," and "Chicanos." In August of 1969, the plaintiff, Hernandez, the spokesman for the plaintiffs, asked if the plaintiffs would be permitted to wear black berets and long hair while in school. As reasons for the request, it was stated that the wearing of the berets would be a symbol of their Mexican culture; it would show unity among Mexicans; it would be a symbol of respect, and a symbol of their dissatisfaction with society's treat

ment of their race, and their desire to improve that treatment. (p. 290)

The principal, Mr. Shannon, himself of Mexican descent, told the plaintiffs that he was a part of the same culture to which they referred and that he was sympathetic with their desire to generate respect for the Mexican culture. He told the plaintiffs that their request to wear long hair and black berets was new, but they would be permitted to do so and "we would try and see if we could live with it." (pp. 290-291)

In September, the plaintiffs requested permission to extend into the school system, a celebration of Independence Day of the Republic of Mexico (September 16) by having a walkout of students to participate in a parade and demonstration. This caused considerable apprehension among school officials and some students and parents due to the fact that the previous spring a demonstration at West High School in the Denver system had resulted in violence, destruction of property, and confrontations between students and police. Nonetheless, Mr. Shannon not only granted the request, but he also arranged for assemblies at the school to explain the reason for and significance of the celebration on September 16 and to present appropriate Mexican entertainment. (p. 291)

In spite of the apprehension and tension attending these functions, no disruptions of the educational process, other than the absences due to the walkout, occurred. However, beginning early in September, and more particularly after September 16, the plaintiffs engaged in conduct which disrupted the school, its educational processes, and discipline. (p. 291)

The evidence is without dispute that the beret was used by the plaintiffs as a symbol of their power to disrupt the conduct of the school and the exercise of control over the student body. (p. 291)

That this conduct was disruptive, and intentionally so, is demonstrated by the following uncontroverted facts. The plaintiffs walked in the hallways during class time talking in loud voices and from time to time, shouting, "Chicano power"; during passing periods, they congregated in the hallways to block the same from free passage by other students; they refused to give their names to the teachers and explain what they were doing in the hallways during class time; on at least one occasion, they attempted to interfere with the discipline of a student by the school officials; they caused a disturbance in the lunchroom; when a teacher supervising the hallways gave some students directions, one of the plaintiffs stated: "Don't

listen to that old bag—the berets will take care of her"; when a teacher was reading in class a paper on the significance of September 16, the plaintiff, Hernandez, took the paper away from her and told her he knew more than she did about it; they attempted to induce students in class to leave the classrooms and join them in the hallways; and they refused to obey a requirement of the school board that material to be distributed on school property be submitted in advance to the principal. (p. 291)

The evidence shows repeated attempts on the part of Mr. Shannon to induce the plaintiffs to change their conduct so that the operation of the school could proceed without disruption, but without success. (p. 292)

In a last attempt to avoid the necessity of suspension of the plaintiffs, Mr. Shannon talked to their parents. In some cases he got support, and in other cases he did not; but in any event, he received no cooperation whatsoever from the plaintiffs. (p. 292)

Because the berets had become a symbol of this disruption, Mr. Shannon told the plaintiffs that they would have to cease wearing the berets within the school or be suspended. (p. 292)

The plaintiffs ignored this request and on October 7, 1969, Mr. Shannon suspended the plaintiffs for a period of five days and again attempted to resolve the difficulty by consultation with the plaintiffs and their parents, but again without success. The suspension was extended by the superintendent of schools for an additional period of ten days, or until plaintiffs removed their berets, whichever was sooner. (p. 292)

This action was started on October 17, 1969, and on October 20, 1969, the plaintiffs' and the defendants' counsel entered into a letter of understanding that the students would be allowed to return to school so long as they neither wore nor displayed their berets. Pursuant to this letter of understanding, the suspension was lifted and the plaintiffs returned to school. (p. 292)

Issues: Was the suspension of high school students of Mexican descent for wearing black berets a violation of their First Amendment rights to free expression, where such students had engaged in disruptive conduct? (p. 290)

Holding: The District Court of Colorado determined that the suspension of the students for wearing black berets did not violate their First Amendment rights to free

expression because the students had engaged in disruptive behavior. (p. 289-290)

Reasoning: The plaintiffs claim that the berets were worn as a political symbol and the ban on wearing of the berets was a violation of their constitutional right to free speech. They rely upon Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 740, which held that the students in that case had a constitutionally protected right to wear armbands in class to express a political belief. However, the opinion in that case points up the limitations of that right as follows:

> But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place or types of behavior—materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. (p. 292)

It follows that the disruptive conduct of the plaintiffs in this case is "not immunized by the constitutional guarantee of free speech." (p. 292)

Disposition: The district court concluded that the plaintiff's complaint was without merit and should be dismissed. (p. 294)

Citation: Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970)

Facts: Plaintiff-appellant, Thomas Guzick, Jr.—prosecuting this action by his father and next friend, Thomas Guzick—appeals from dismissal of his complaint in the United States District Court for the Northern District of Ohio, Eastern Division. The plaintiff's complaint sought an injunction and other relief against defendant Drebus, the principal of Shaw High School in East Cleveland, Ohio, as well as against the superintendent and board of education for the schools of said city. The plaintiff also asked for declaratory relief and damages. (p. 595)

On March 11, 1969, Guzick and another student, Havens, appeared at the office of defendant Drebus, principal of the high school, bringing with them a supply of pamphlets which advocated attendance at the Chicago anti-war demonstration as was identified by the button. The boys were denied permission to distribute the pamphlets, and were also told to remove the buttons which both were then wearing. Guzick said that his lawyer, counsel for him in this litigation, told him that a United States Supreme Court decision entitled him to wear the button in school. Principal Drebus di-

rected that he remove it and desist from wearing it in the school. Being told by Guzick that he would not obey, the principal suspended him and advised that such suspension would continue until Guzick obeyed. The other young man complied, and returned to school. Guzick did not, and has made no effort to return to school. This lawsuit promptly followed on March 17. The complaint asked that the school authorities be required to allow Guzick to attend school wearing the button, that it be declared that Guzick had a constitutional right to do so, and that damages of $1,000 be assessed for each day of school missed by Guzick as a result of the principal's order. (p. 595)

The district judge denied the plaintiff's application for a preliminary injunction, and after a plenary evidentiary hearing, which was concluded on March 26, 1969, the complaint was dismissed. (p. 595)

Issues: Does a high school's rule prohibiting the wearing of any buttons or insignia constitute a denial of a student's First Amendment right to free speech? (p. 594)

Holding: The Court of Appeals for the Sixth Circuit held that where a high school rule prohibiting the wearing of any buttons or insignia was of long standing and had been universally applied, and the situation at the high school, which had undergone a change of racial composition from all white to 70% black, was incendiary, the enforcement of a rule against a student who wore a button soliciting participation in an anti-war demonstration did not deny the student the right of free speech. (p. 594)

Reasoning: The rule applied to appellant Guzick was of long standing—forbidding all wearing of buttons, badges, scarves, and other means whereby the wearers identify themselves as supporters of a cause or bearing messages unrelated to their education. Such things as support for the high school athletic teams or advertisement of a school play are not forbidden. The rule had its genesis in the days when fraternities were competing for the favor of the students and it has been uniformly enforced. The rule has continued as one of universal application and usefulness. While controversial buttons appeared from time to time, they were required to be removed as soon as the school authorities could get to them. (p. 596)

Reciting the history of the no button or symbol rule, and the fact that the current student population of Shaw High School is 70% black and 30% white, the district judge observed:

> The rule has acquired a particular importance in recent years. Students have attempted to wear buttons and badges expressing inflammatory messages, which, if permitted, and as the evidence indicates, would lead to substantial racial disorders at Shaw. Students have attempted to wear buttons with the following messages inscribed thereon. 'White is right'; 'Say it loud, Black and Proud'; 'Black Power.' Other buttons have depicted a mailed black fist, commonly taken to be the symbol of black power. (p. 596)
>
> There have been occasions when the wearing of such insignia has led to disruptions at Shaw and at Kirk Junior High. A fight resulted in the cafeteria when a white student wore a button which read 'Happy Easter, Dr. King.' (Dr. Martin Luther King was assassinated in the Easter season.) 305 F. Supp. at 476-477. (p. 596)

From the total evidence, including that of educators, school administrators, and others having special relevant qualifications, the district judge concluded that abrogation of the rule would inevitably result in collisions and disruptions which would seriously subvert Shaw High School as a place of education for its students, black and white. (pp. 596-597)

Contrasting with the admitted long standing and uniform enforcement of Shaw's no symbol rule, the majority opinion in Tinker was careful to point out:

> It is also relevant that the school authorities [in Tinker] did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol —black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. 89 S. Ct. at 738-739. (p. 597)

Further distinguishing Tinker from this case are their respective settings. No potential racial collisions were background to Tinker, whereas here the changing racial composition of Shaw High from all white to 70% black, made the no symbol rule of even greater good than had characterized its original adoption. In our view, school authorities should not be faulted for adhering to a relatively nonoppressive rule that will

indeed serve our ultimate goal of meaningful integration of our public schools.

In Tinker, the Court concluded that a regulation forbidding expressions opposing the Vietnam conflict anywhere on school property would violate the students' constitutional rights. (p. 597)

But in the case at bar, the district judge, upon a valid appraisal of the evidence, did find that "if all buttons are permitted or if any buttons are permitted, a serious discipline problem will result, racial tensions will be exacerbated, and the educational process will be significantly and substantially disrupted." 305 F. Supp. at 478. Again, in Tinker, the majority said:

> But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression.

Here, the district court, conscious of the commands of Tinker, said:

> Furthermore, there is in the present case much more than an 'undifferentiated fear or apprehension' of disturbances likely to result from the wearing of buttons at Shaw High School. The wearing of buttons and other emblems and insignia has occasioned substantial disruptive conduct in the past at Shaw High. It is likely to occasion such conduct if permitted henceforth. (p. 598)

Further distinction from Tinker is provided by the long standing and universal application of Shaw's rule. In Tinker, the majority said:

> The record shows that students in some of the schools wore buttons relating to national political campaigns and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. 89 S. Ct. at 739. (p. 598)

The district judge here points out that for school authorities to allow some buttons and not others would create an unbearable burden of selection and enforcement. He said:

> In addition, any rule which attempts to permit the wearing of some buttons, but not others, would be virtually impossible to administer. It

> would involve school officials in a continuous search of the halls for students wearing the prohibited type of buttons. It would occasion ad hoc and inconsistent application. It would make the determination of permissible versus impermissible buttons difficult, if not impossible. It would make it difficult for the school officials to give both the substance and appearance of fairness, and would deprive the school officials of their present position of neutrality. 305 F. Supp. at 477-478. (pp. 598-599)

This court has made its own examination of the record before it and is persuaded that the factual findings of the district judge are fully supported by the evidence and agrees with them. (p. 598)

In this court's view, the potentiality and the imminence of the admitted rebelliousness in the Shaw students support the wisdom of the no-symbol rule. Surely those charged with providing a place and atmosphere for educating young Americans should not have to fashion their disciplinary rules only after good order has been at least once demolished. (pp. 596-600)

Disposition: The decision of the District Court for the Northern District of Ohio was affirmed. (p. 601)

Citation: Hill v. Lewis, 323 F. Supp. 55 (E.D.N.C. 1971)

Facts: The plaintiffs, students of the 71st High School, Cumberland County, North Carolina, seek a preliminary injunction pursuant to 42 U.S.C. Section 1983, 28 U.S.C. Section 1343, and the First and Fourteenth Amendments to the Constitution of the United States, restraining the defendant, individually and as principal of 71st High School, from suspending the plaintiffs, or others similarly situated, for the exercise of their constitutional rights, specifically their right to wear black armbands as a form of symbolic speech in protest against the war in Vietnam. (p. 56)

71st High School is part of the Cumberland County school system. The school is located approximately four miles from the Fort Bragg Military Reservation and within eight miles of Pope Air Force Base. In October 1969, the high school had 1,653 students enrolled, 636 (38%) with a parent on active military duty and an additional 264 (16%) with a parent who is a federal employee. (p. 56)

On Monday, October 13, 1969, Debbie Redifer, a senior at 71st High School, went to the defendant's office and requested that he convene a student assembly on October 15, 1969, stating that she had engaged a

> speaker to address the students in opposition to the war in Vietnam. The defendant informed her that, in his opinion, an assembly for that purpose would not be in the best interest of a school where approximately 40% of the students' parents were actively serving in the military service. Debbie had expressed strong opposition to the Vietnam war and participated the previous Saturday in a protest march in Fayetteville. (p. 56)
>
> During the day, the defendant received telephone calls from parents informing him that a student bus driver had requested the passengers on her bus to wear black armbands on October 15th in support of the National Moratorium. The parents objected to the driver using her position to influence students on her bus. Debbie Redifer was identified as the bus driver, and the defendant informed her that some irate parents objected to this type of influence on the students. (pp. 56-57)
>
> The conferences with Debbie Redifer were the first indication that there might be some demonstrations on the campus on October 15, 1969. There was talk among the students that there might be one group wearing black armbands and another wearing red, white, and blue armbands—"a group of protestors against the protestors"—and a third group wearing black gloves. Some of the teachers and students believed there might be a confrontation between the groups that would disrupt the school. (p. 57)
>
> On October 15, between twenty-five and fifty students came to school with armbands. Some of the armbands were black, others were red, white, and blue, still others were white with a red peace symbol. Also, some students wore black gloves or black scarves. Armbands were distributed to other students after they entered the school building. Upon a request by a teacher or other school official to remove an armband, the student usually complied. There were isolated examples of refusals to comply, and frequently the students were disrespectful and belligerent to teachers and other school officials. (p. 57)
>
> Throughout the day students wearing armbands were given the option of removing armbands or going to the principal's office. In most cases, the armband was removed and the student admitted to class. One student was parading through the halls with an American flag. Some students indicated respect for the flag, others disrespect. (p. 57)

Issues: Based on the facts presented, does prohibiting the wearing of any armbands at a high school unconstitu-

tionally impinge upon the students' First Amendment exercise of symbolic speech? (p. 56)

Holding: The District Court for the Eastern District of North Carolina, Fayetteville Division, ruled that prohibiting the wearing of any armbands at a high school was warranted and did not impinge upon symbolic speech where more than one third of the students were children of military personnel; some students were war protesters; armbands, including both black armbands and red, white, and blue armbands, were used to symbolize diverse factions with respect to war and nonwar-related issues. A tense situation had developed. At least 25 to 50 students with antagonistic views were involved, and there had been advanced advertisement of demonstration, active group participation, marching in the hallways, recruitment of other children to join several groups, chanting, belligerent and disrespectful attitudes toward teachers, incidents of flag disrespect, and threats of violence. (p. 55)

Reasoning: The disposition of the case depends upon an interpretation of Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733. If the present case is governed by Tinker, the plaintiffs must prevail. But if the principles enunciated in Tinker are not applicable, then the injunction will not be issued. This court holds Tinker distinguishable from the case at bar. (p. 57)

The Court held in Tinker that a regulation prohibiting the wearing of armbands to school and providing for the suspension of any student refusing to remove the armband was an unconstitutional denial of a student's right of expression of opinion, without the demonstration by school officials of any facts which might reasonably have led them to forecast substantial disruption of or material interference with, school activities, and without any showing that disturbances or disorders in fact occurred. Tinker makes certain premises absolutely clear. First, "the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment." (at 736) Second, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." (at 737) Third, the burden of proof is on the school officials to demonstrate any facts which might reasonably have led them to forecast substantial disruption of or material interference with school activities. And fourth:

> 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. at 740 (pp. 57-58)

The Court in Tinker found that the wearing of armbands was entirely divorced from any actually or potentially disruptive conduct by those participating in it, under the circumstances of that case. (at 736) The present case is factually distinguishable. Tinker did not involve aggressive, disruptive action or group demonstrations. Tinker did not concern speech or action that intrudes upon the work of the school or the rights of other students. In Tinker the fear of disruption did not motivate the prohibition of armbands. The regulation was directed against "the principle of the demonstration" itself. (at 738) The record in Tinker failed to disclose evidence that school officials had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. In Tinker the prohibition was directed at the wearing of black armbands. Tinker involved a small number of participants, and students were dismissed for the sole reason they wore the proscribed armbands. (p. 58)

In the case at bar, there were several groups of protesters. At least three different viewpoints were represented by these groups. At least twenty-five to fifty students were involved, with antagonistic views. The evidence here shows advance advertisement of the demonstration, active group participation, marching in the hallways, recruitment of other students to join the several groups, chanting, belligerent, and disrespectful attitude towards teachers, incidents of flag disrespect, and threats of violence. (p. 58)

In this case, the order prohibiting the wearing of armbands extended to all armbands and not to a particular symbol, and was motivated by reasonable apprehension of disruption and violence. The record here discloses substantial evidence which reasonably led to the forecast of substantial disruption and material interference with school activities and infringement upon the rights of other students. Indeed, despite the precautions taken, the potential of disruption and violence was still present on October 15. (p. 58)

There was more than undifferentiated fear or apprehension of disturbance. The 71st High School demography is relevant. More than a third of the students were the children of military personnel, and it was reasonable to assume that many of them supported the national war effort as the result of personal family inter-

ests. Others were war protesters. The wearing of armbands to symbolize the divergent factions in such a school under the tense situation that had developed would have further polarized the groups. (p. 58)

On October 15 the disruption occurred. There was confusion, disorder, and demonstrations in the halls. At least one class was disrupted to the extent that law enforcement officials were called. The situation has been described as "explosive" and "volatile," with the fear of fights and disorder. The student mood was termed as "very tense" with some students "clearly hostile." Several witnesses stated their belief that violence had been averted by the action of the defendant and other school officials. (p. 58)

The plaintiffs seek an order enjoining the defendant from suspending or otherwise taking disciplinary action against the plaintiffs and other students similarly situated for the peaceful exercise of their First Amendment rights as evidenced by the wearing of black armbands, or from otherwise interfering with the free exercise of said rights. The evidence fails to show that the plaintiffs or others similarly situated have been suspended or otherwise disciplined for wearing armbands. Tinker makes it clear that First Amendment rights are available to teachers and students. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (at 736) Tinker makes it clear that no suspension or disciplinary action can be upheld for the peaceful expression of opinion. From the present record before the court, no such violation has yet occurred. There is no hint that such a violation is imminent. (p. 59)

Disposition: The district court ordered that the plaintiffs' request for a preliminary injunction be denied. (p. 59)

Citation: Melton v. Young, 465 F.2d 1332 (6th Cir. 1972)

Facts: Brainerd is a public high school in the city of Chattanooga, Tennessee. Until 1966 Brainerd was operated as an all white school which had adopted as its nickname the word "Rebel" and used the Confederate flag as the school flag along with the song Dixie as its pep song. The school has been attended by both white and black students since 1966; by 1969 the student consisted of 170 black and 1224 white students. (p. 1333)

The record indicates that with the advent of the 1969 school year, the student body became racially polarized as a result of continuing controversy over the

use of the Confederate flag and the song Dixie at various school functions. It also appears that on October 8, 1969, demonstrations took place at the school which disrupted classes and that on the evening of the same day a motorcade drove through various parts of the city waving Confederate flags. (p. 1333)

In May 1970, the Brainerd school administration and P.T.A. appointed a committee of citizens to study the difficulties of the past year and recommend remedial action for the ensuing year. Among the conclusions of the committee were the nickname "Rebel," the song Dixie, and the Confederate flag were precipitating causes of tension and disorder within the school. As a corrective measure, the committee recommended that the use of the Confederate flag as a school symbol and the use of the song Dixie as the school pep song be discontinued but that the nickname "Rebel" be retained. These recommendations were adopted as official policy by the school board at its meeting on July 8, 1970. (p. 1333)

The appellant, after both he and his parents were informed of the new rules, wore a jacket to school with an emblem depicting a Confederate flag on one sleeve. He was asked to remove the emblem or cease wearing the jacket while in school by the principal but declined to do so. After he was allowed to return to class, several complaints from both faculty and students caused the principal to call the appellant to his office and request him to remove the jacket, which request was again refused. The principal then indicated that it was his judgment that the emblem was "provocative" and in violation of the school code, and thereupon he directed that appellant either remove the jacket or leave the school. The appellant chose to absent himself from the campus. (p. 1334)

The following day, the appellant presented himself at the school with the same jacket and emblem and upon being sent to the principal's office and being requested to remove the jacket stated that he was merely demonstrating pride in his Confederate heritage by wearing of the flag and that he had no other motive. The appellant was then told to leave school and not return until he was willing to stop displaying the Confederate emblem while in school. (p. 1334)

The district court issued an opinion finding, inter alia, that the portion of the school regulation forbidding students from wearing "provocative symbols" upon their clothing was unconstitutionally "vague, broad, and imprecise" in derogation of the precepts of both the First and Fourteenth Amendments to the United States Constitution. Although the plaintiff-appellant

was suspended pursuant to a regulation that was subsequently determined to be unconstitutional, the district court apparently felt that the suspension was, nevertheless, valid for the reason that the suspension would have been a legitimate exercise of the school officials' inherent authority to curtail disruption of the educational process even in the absence of a regulation. (p. 1334)

Issues: The First Amendment issue at hand is whether the suspension of a public high school student for refusing to cease wearing, while at school, a shoulder patch of the Confederate flag infringes on the student's right to symbolic speech. (p. 1332)

Holding: The Court of Appeals for the Sixth Circuit held that the student's suspension was not violative of his First or Fourteenth Amendment rights, where there was substantial disorder at the high school throughout the school year, where much of the controversy during the previous year had centered around use of the Confederate flag as the school's symbol, and where school officials had every right to anticipate that a tense racial situation continued to exist. (p. 1332)

Reasoning: This is a troubling case; on the one hand this court is faced with the exercise of the fundamental constitutional right to freedom of speech, and on the other with the oft conflicting, but equally important, need to maintain decorum in our public schools so that the learning process may be carried out in an orderly manner. It is abundantly clear that this court will not uphold arbitrary or capricious restrictions on the exercise of such jealously guarded and vitally important constitutional tenets. However, it is contended here that the circumstances at the time of the appellant's suspension were such that the district court could properly find that

> [t]he principal had every right to anticipate that a tense, racial situation continued to exist at Brainerd High School as of the school [sic] in September of 1970 and that repetition of the previous year's disorders might reoccur if student use of the Confederate symbol was permitted to resume. (p. 1334)

It is this court's view, after an independent examination of the record, that the conclusions of the district court are fully supported by the evidence. In the leading case of Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, the Supreme Court stated, inter alia, that student conduct which "materially disrupts class work or involves substantial disorder or invasion of the rights of others" is

not afforded the cloak of protection provided by the First Amendment. (p. 1335)

It is, therefore, our conclusion that under all of the circumstances herein presented that the appellant's suspension was not violative of his First and Fourteenth Amendment rights and that the judgment below was proper. (p. 1335)

Disposition: The decision of the District Court for the Eastern District of Tennessee was affirmed. (p. 1335)

Use of School Facilities

Citation: Hunt v. Board of Education of County of Kanawha, 321 F. Supp. 1263 (S.D.W.Va. 1971)

Facts: This action was instituted by six students of Herbert Hoover High School in Kanawha County seeking to enjoin and restrain the defendants from prohibiting the plaintiffs to meet voluntarily on the premises of the school for the purpose of engaging in group prayer and for a declaratory judgment that these acts of the defendants violate the rights of the plaintiffs under the First and Fourteenth Amendments to the Constitution of the United States. The plaintiffs also moved for a preliminary injunction to enjoin the defendants from interference with the said activities of the plaintiffs. (p. 1263)

During or prior to the year 1956, the board of education prepared and adopted a Manual of Administration, copies of which manual were delivered to all supervisory and administrative personnel of the school system for their guidance in following the approved policies and procedures for the administration of the public schools in Kanawha County. (p. 1264)

Included in the manual are the following sections which were duly approved and adopted by the board and have been at all times pertinent to this litigation in full force and effect. (p. 1264)

Section 11.212—"Requests for the use of school buildings for religious purposes shall not be granted. However, baccalaureate services may be held provided the major purpose of such baccalaureate service is teaching and stressing moral and ethical values and is not religious." (p. 1264)

Section 2.117—"School Conduct and Discipline"

> "No student shall be in a school building without the supervision of a teacher." (p. 1264)

On or before September 19, 1970, the plaintiffs began to meet on the premises of Herbert Hoover High School prior to the beginning of the school day for the purpose of offering group prayers. These meetings were initiated without the knowledge or permission of the faculty and the principal of the high school, and were not sponsored or supervised by any member of the faculty of the school. On or before October 1, 1970, the principal of Herbert Hoover High School was apprised of the activities of the students and thereupon advised the plaintiffs that these prayer sessions were in violation of the policy of the board of education and were prohibited. The principal stated to the students that such sessions were in violation of the "Supreme Court decisions." As a result of this action on the part of the principal, the plaintiffs have been denied access to any of the classrooms or other premises of the high school for the purpose of conducting their prayer sessions. The prayer sessions were conducted by the group without regard to religious denomination and were open to members of all religious faiths. (pp. 1264-1265)

Issues: Does the school board's act of prohibiting public high school students from meeting voluntarily on school premises for the purpose of engaging in public prayer deny the students their First Amendment right of freedom of speech, freedom of assembly, or free exercise of their religious beliefs? (p. 1263)

Holding: The District Court for the Southern District of West Virginia, Charleston Division, ruled that the school board's prohibiting use of school premises for any religious purposes did not deny to public school students, seeking to enjoin the school board and others from prohibiting students meeting voluntarily on school premises to engage in public prayer, their federal constitutional rights of freedom of speech, freedom of assembly, or free exercise of their religious beliefs. (p. 1263)

Reasoning: The present case presents only two questions: first, whether the board of education had the authority to prohibit the use of school facilities for any religious purpose, and second, whether such prohibition is constitutionally permissible. It is this court's conclusion that both of these questions must be answered in the affirmative. (p. 1265)

It is well settled in West Virginia that a county board of education is a corporation created by the legislature and, as such, has only such powers as are

expressly conferred upon it by statute or that fairly arise by necessary implication to execute such express statutory powers. The only statute relative to the use of school property for purposes other than those of a basic educational nature is Section 19, Article 5, Chapter 18 of the Code of West Virginia, 1931, as amended. (p. 1265)

A reading of this statute clearly indicates that the legislature did not see fit to grant specific authority to boards of education to permit the use of school facilities for religious meetings. (p. 1265)

The present statutory section, which was first incorporated into the general law of this state by the Acts of the Legislature in 1919, deleted the specific authority for religious activities and extended to the boards of education only the authority to permit the use of school property for meetings or activities of a secular nature. It is clear that the board, in the exercise of its administrative discretion, has the right to prohibit the use of its school facilities for all religious activities. (p. 1265)

Having concluded that the action of the board of education in proscribing the use of the school building for religious purposes comported with the statutory law of the State of West Virginia, this court is further of the opinion that this proscription does not deny to the plaintiffs their federal constitutional rights of freedom of speech, freedom of assembly, or the free exercise of their religious beliefs. This power of school authorities to prohibit the use of a schoolhouse for religious worship is well recognized. (p. 1266)

It should be noted that the regulation of the board of education denies to anyone, regardless of sect, the use of public school property for religious purposes. There is no invidious discrimination in the regulation, and it relates only to the use of school facilities and not to the religious affiliations of the users. (p. 1266)

Disposition: The district court granted the defendant school board's motions for summary judgment and dismissal. The plaintiff students' complaint and request for a preliminary injunction were dismissed. (p. 1267)

Citation: Brandon v. Board of Education of Guilderland, 487 F. Supp. 1219 (N.D.N.Y. 1980)

Facts: The plaintiffs are the organizers of a group called "Students for Voluntary Prayer." In September of 1978, plaintiffs Lauren Rogers and William Smith, acting on

behalf of the other plaintiffs and "Students for Voluntary Prayer" sought permission from defendant principal, Charles Ciaccio, to use a room in the Guilderland High School for the purpose of conducting a communal prayer meeting each day before classes. According to the plaintiffs, the request was made entirely on their own initiative. The proposed meetings were to be held without any official school assistance, supervision, aid, or participation and with volunteer adult supervision. The plaintiffs contend that attendance at the meetings would be voluntary and that the sessions would be completely separate, distinct, and independent from all other school functions. (p. 1222)

Defendant Ciaccio denied the request by letter dated September 23, 1978. Defendant Alland, superintendent of the school district, responding to the same request, informed plaintiff Smith, by letter dated November 15, 1978, that the school attorney had advised him that it would be impermissible for the school to grant the request. The board of education, at a meeting held on December 19, 1978, voted to deny permission as well. (pp. 1222-1223)

Plaintiffs Conway, Rogers, and Smith renewed the request at meetings of the defendant board of education held on February 27, 1979, and March 6, 1979. At the March 6th meeting, the board collectively approved a resolution reaffirming its December 18, 1978, action denying the plaintiffs the use of a school room for prayer meetings. The present action was commenced as a result of the defendants' refusal to grant the plaintiffs' request. (p. 1223)

Issues: The free speech issue in this case focuses on the question of prior restraint. In particular, does the refusal of school officials to allow students, as members of a voluntary prayer group, to use a room in the school to conduct a communal prayer meeting prior to the beginning of school each day constitute an unconstitutional prior restraint on the students' freedom of speech? (p. 1221)

Holding: The decision of the District Court for the Northern District of New York ruled on several issues, including students' right to free speech. The court held that the refusal of school officials to allow students, as members of a group called "Students for Voluntary Prayer," to use a room in the school for a communal prayer meeting immediately prior to the beginning of school each day was mandated by the Establishment Clause, was not an arbitrary or unwarranted act of discrimination, and was not violative of the students' rights to the free exercise of religion, free

dom of speech and association, and equal protection of the law. (p. 1219)

Reasoning: In seeking summary judgment, the plaintiffs ask the court for a declaration that the defendants' refusal to allow student prayer groups to meet voluntarily on public school property before the commencement of classes constitutes a violation of the students' constitutional rights under the First and Fourteenth Amendments, including freedom of speech. (p. 1223)

The plaintiffs contend that even if holding prayer meetings on public school premises would result in a violation of the Establishment Clause, the refusal by the defendants to allow them to do so is in violation of their First Amendment rights to the free exercise of religion and the guarantee of the right of freedom of speech and freedom of association. (p. 1230)

The plaintiffs' argument that the defendants' actions serve as a prior restraint on their freedom of speech must fail. There is no question that within certain limits, students retain their fundamental constitutional rights while attending public school. See Tinker v. Des Moines School District, 89 S. Ct. 733. It is also true that there is a strong presumption against the validity of any prior restraint on speech. (p. 1232)

However, neither the fact that students retain their constitutional rights in school nor the general ban on prior restraint of speech dictates that the requirements of the Establishment Clause be disregarded. In addressing the issue of prior restraint, situations involving "religious activity" which are subject to the restriction imposed by the Establishment Clause must be looked at differently from those involving "secular liberties" where there is no such restriction, and restraint is seldom allowed. See Abington School District V. Schempp, 83 S. Ct. at 1569, in which the Court notes the distinction between the two types of speech, and recognizes the different treatment which must be accorded each as a result of the Establishment Clause. This court recognizes the fact that First Amendment rights are not absolute, and this is but another instance where the right to freedom of speech must be tempered by the boundaries established by the Establishment Clause. (p. 1232)

Disposition: The district court granted summary judgment in favor of the defendant school board and dismissed the plaintiff students' complaint in its entirety. (p. 1233)

Citation: Clergy and Laity Concerned v. Chicago Board of Education, 586 F. Supp. 1408 (N.D.Ill. 1984)

Facts: Antiwar activists brought suit under Section 1983 to have declared unconstitutional a practice of the board of education allowing military recruiters access to its schools while denying the same privilege to activists. (p. 1408)

The plaintiffs are the Clergy and Laity Concerned, an organization opposed to war that has developed programs, presentations, and literature regarding legal alternatives to the draft and military service. The defendants are the Board of Education of the City of Chicago and General Superintendent of Schools, Dr. Ruth B. Love. (p. 1409)

Based on the record as of January 20, 1984, the court determined that there was no issue of material fact and granted summary judgment in favor of the plaintiffs. It is this judgment that the defendants now seek to vacate. (pp. 1409-1410)

During the period alleged in the complaint, the defendants have maintained a policy that allows representatives of the armed forces access to the Chicago public high schools; military recruiters can disseminate literature, post advertisements on school grounds and in school papers, conduct workshops, counsel students as to careers in the armed services, and administer vocational aptitude tests. Father Skotnicki, during the same period, repeatedly contacted employees of the Chicago Board of Education to request permission on behalf of himself and the Clergy and Laity Concerned for access to the public high schools for the purpose of providing students with information and counseling regarding draft registration, military service, conscientious objection, and legal alternatives to the draft, specifically through distribution of literature and personal contact with students. The defendants have consistently denied the plaintiffs, and any other groups with similar views, access to the schools. (p. 1411)

Issues: Does the board of education meet its burden of showing compelling justification for denying antiwar activists access to its schools, while allowing the same privilege to military recruiters? (p. 1409)

Holding: The District Court for the Northern District of Illinois, Eastern Division, held that the defendant school board failed to show excusable neglect or meritorious defense. (p. 1408)

Reasoning: Plainly, the defendants' policy denies plaintiffs access to the schools while at the same time allows military recruiters the opportunity to enter school premises. It is clear that the school board is discriminating against the plaintiffs based on the content of the message they want to convey to students. The defendants voluntarily allow access to the schools to one group, yet, at the same time, deny access to another group which seeks to disseminate opposing information. Such a policy has the effect of favoring a particular viewpoint on careers in the military service. (p. 1411)

Once it opens a forum for the expression of views, under dual mandate of the First Amendment and the Equal Protection Clause, the defendants, as agents of state government cannot pick and choose which views they feel should be expressed in the forum. In our system of government, "students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate." See Tinker v. Des Moines School District, 89 S. Ct. 73, 740. When a restriction has the effect of favoring the expression of a particular point of view, the First Amendment is plainly offended, and such a restriction is subject to strict scrutiny. See First National Bank v Bellotti, 98 S. Ct. 1407, 1420-1421. (p. 1411)

Also, the court does not consider it significant that one of the plaintiffs is a priest. It is the nature of the plaintiffs' message that is in issue and, as the defendants admit, their message is secular, not religious. A clergyman can express his views on a secular subject without making his presence in the schools religious in nature. Accordingly, there is a complete lack of any probative evidence in the defendants' submissions which raises any genuine issues of fact over the religious nature of plaintiffs' message. (p. 1412)

Moreover, a policy of allowing religious groups access to a public forum equal to that allowed secular groups would not violate the Establishment Clause. In Widmar v. Vincent, 102 S. Ct. 269, the Supreme Court held that a university's policy of excluding religious groups from facilities it had opened to other groups violated the fundamental principle that a state regulation of speech be content neutral. The Court concluded that, although the university's interest in complying with its constitutional obligations under the Establishment Clause could be characterized as compelling, an "equal access" policy is not compatible with that clause. Likewise, even if the defendants had shown that the plaintiffs' messages were religious, a policy of equal access would not be violative of the Establishment Clause. The First Amendment demands neu-

trality of treatment between religious and non-religious groups. (p. 1412)

The defendants next contend that in allowing military recruiters access to the schools, they have not created an open forum. Relying on the Supreme Court's decision in Perry Education Association v. Perry Local Educator's Association, 103 S. Ct. 948, the defendants argue that public schools belong to a category of property where access is subject to strict control. Contrary to the defendants' assertions, Perry did not hold that a public school system belonged to the category of property in which it is permissible to deny access based on the viewpoint of the speaker. Rather, the court held that "the school mail facilities at issue here fall within this third category." (103 S. Ct. at 955) All Perry establishes is that a school board may constitutionally restrict access to certain facilities within a school system, but it does not establish that a school board can completely deny access to the whole school system to a group that wants to express views differing from those held by a group that has been allowed access. (p. 1413)

Even though schools are not traditional open forums where viewpoint discrimination is per se unconstitutional, many cases have held that the states' obligation of viewpoint neutrality applies to discriminatory access restriction imposed in public schools. For example, in Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, the Court struck down a restriction on students wearing armbands in protest of the Vietnam war, in part because the school board did not prohibit the wearing of any other symbols by the students. Thus, although schools are not traditional public forums, courts have consistently struck down access restrictions when such restrictions are based, in part, on the viewpoints of the speakers' messages. In the instant case, the defendants are restricting access to the plaintiffs based on the viewpoint of their message; the defendants have not met their burden of showing a compelling justification for excluding the plaintiffs from the forum. (pp. 1412-1413)

The plaintiffs seek access to the schools for the limited purpose of providing information on legal alternatives to the draft and military service; they are not seeking to disseminate any information about the moral and social evils of war. Further, the plaintiffs are subject to all time, place, and manner restrictions that the defendants have placed on military recruiters in each high school. Thus, for example, if a particular high school only allows the military representatives to sit in the counselors' office and dis-

tribute literature, the plaintiffs' access is limited to the same place and manner in that particular high school. (p. 1414)

Disposition: The defendants' motion to vacate the order granting summary judgment in favor of the plaintiffs was denied. The parties were invited to propose a draft judgment order, consistent with the views expressed in this decision, for consideration and entry by the court. (p. 1414)

Citation: Bender v. Williamsport Area School District, 741 F.2d 538 (3rd Cir. 1984)

Facts: Plaintiffs-Appellees Lisa Bender et al., are or were students at Williamsport Area High School. It was their desire to form a student organization (Petros) within the high school, which would be devoted to prayer and other religious activities, and which would meet during the regularly scheduled student activity period. The school officials, fearing violation of the Establishment Clause of the First Amendment, denied the students permission to meet. (p. 541)

The students brought this suit for declaratory and injunctive relief under Title 42 U.S.C. Section 1983, alleging violation of their constitutional rights of free speech and free exercise of religion. After considering the affidavits, stipulations, and depositions of the parties, the district court granted summary judgment in favor of the school district and against the students on the free exercise claim. Relying, however, on Widmar v. Vincent, 102 S. Ct. 269, the district court agreed with the students that their free speech rights had been abridged, and that, under these circumstances, the Establishment Clause did not provide a compelling state interest to justify that abridgement. The court, therefore, granted summary judgment in favor of the students and against the school district on the free speech claim. See Bender v. Williamsport Area School District, 563 F. Supp. 697 (M.D.Pa. 1983). (p. 541)

Issues: Three questions related to the First Amendment are addressed by the court: (1) Is speech less protected under the First Amendment because it is religious in nature? (2) Where the school board defines its activity period in broad terms so that virtually any program which can be said to benefit the development of students is permissible, do the activities of a religious prayer group formed by students fall within "limited forum," thereby providing students with a valid First Amendment interest to engage in their proposed activity? (3) Is the interest in protecting free speech within the context of the activity period out-

weighed by Establishment Clause concerns? (pp. 539-540)

Holding: The Court of Appeals for the Third Circuit ruled that: (1) student members of the religious club had free speech rights guaranteed by the First Amendment; (2) the school district had created a limited forum with First Amendment interest; and (3) the students' First Amendment free speech rights were outweighed by Establishment Clause considerations. (p. 539)

Reasoning: In determining the nature of the free speech protections which exist within the school, this court, of course, takes note of the general axiom that students do not shed their rights to freedom of speech or expression at the schoolhouse gate. E.g., Tinker V. Des Moines Independent Community School District, 89 S. Ct. 733, 736. Nor is speech any less protected because it is religious in nature. See Heffron v. International Society for Krishna Consciousness, 101 S. Ct. 2559, 2563. (p. 545)

On the other hand, the mere fact that speech is involved and the Free Speech Clause of the First Amendment is invoked does not require the government to open the use of its facilities as a public forum to any one desiring to use them. See Perry Educational Association v. Perry Local Educators Association, 103 S. Ct. 948, 954. (p. 545)

It is in the context of distinguishing between a public forum, and a limited or limited open forum, that this court examines Widmar v. Vincent, 102 S. Ct. 269, the principal case upon which the students and the district court rely. In Widmar, students at the University of Missouri sought permission, as did the students in Williamsport, to use school facilities for religious activities. They formed a group known as "Cornerstone," and for a time were allowed to hold meetings on school premises. The university withdrew that permission, however, citing school regulations against use of its facilities "for purposes of religious worship or religious teaching." (p. 546)

In a suit brought by members of Cornerstone, the Supreme Court held that, by opening its facilities for general use by campus groups, the university had created a forum for its students, and thus it could not make content-based discriminations against particular groups absent a compelling state interest.

Here UMKC [the University] had discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and

association protected by the First Amendment. In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Because elementary and secondary schools, unlike universities, are not the academic battleground for clashes among contending lines of thought, particularly since the level of student maturity rarely reaches the more advanced level of those attending college, it is unlikely that school authorities would seek to create a truly open forum in a high school environment for unregulated dialogue and inquiry. Because of the inherent nature of a secondary school, any forum created has purposes which are narrower, and uses more exclusive than a forum such as in Widmar or one open generally to all forms of communication by the public. In determining the type of forum, if any, created by secondary school authorities such as the Williamsport Area School District, therefore, the court must take into account, among other things, the level of maturity of the students and the nature of the academic program involved. (pp. 546-548)

Nevertheless, nothing precludes the existence of a forum in a high school setting. The best indication of the accommodation afforded in this case to the students comes from the school district principal's own description of the activity period, in which he states that "any student activity or club which is considered to contribute to the intellectual, physical, or social development of the students" would likely be approved. The roster of clubs which exist or have existed at Williamsport reveals a wide range of pursuits and interests, which do not indicate adherence to any curricular plan or educational scheme, beyond this general criterion. Indeed, as the district court noted and as the school authorities themselves stated, no organization proposed by students has ever been denied permission to meet during the activity period. The record, therefore, reveals that the activity period at Williamsport Area High School provides a forum for self-expression, by which students exercise their own discretion in deciding which organization, if any, to support. Indeed, unlike the compulsory instructional classes, which are created and designed by the school authorities, the very existence of such organizations depends entirely upon voluntary student participation and interest. (pp. 548-549)

This court, therefore, must determine whether the activities of Petros fall within the parameters of the

limited forum as it exists at Williamsport. It is clear to the court that religious discussion, religious study, and even prayer, fall within the articulated qualification that student organizations promote the intellectual and social welfare of students. The Constitution, of course, in no way requires that, because establishment of religion is forbidden, religious activity must be deemed unintellectual or irrelevant to a student's social growth. Because the scope of the activity period has been framed in terms so broad that virtually any program which can be said to benefit the development of the students is permissible, this court is able to conclude without further discussion that the activities of Petros fall within the bounds of a "limited forum" as it exists at Williamsport Area High School. The student members of Petros, therefore, have a valid First Amendment interest to engage in their proposed activity. (pp. 549-550)

Having found that a limited open forum was created within the high school, such that the students' free speech rights were implicated, the court must now determine whether the school may constitutionally impose restrictions on those rights. (p. 550)

It first should be noted that the restriction which the school board would seek to place on Petros is content-based, since it is undisputed that the students were denied permission to organize Petros solely because their activity was religiously oriented. Thus, any restriction which was placed on Petros cannot be justified as a "time, place, or manner" limitation, which must be content neutral. Moreover, because the restriction imposed by the school district in denying permission for Petros to meet is content-based, Williamsport ("the State") must demonstrate that it is narrowly drawn to meet a compelling state interest. E.g., Widmar, 102 S. Ct. at 274. The sole justification advanced by Williamsport for denying Petros permission to organize is that such permission might violate the Establishment Clause. As noted in Widmar, "the interest of [the school] in complying with its constitutional obligations may be characterized as compelling." Id. 102 S. Ct. at 275. This court examines the situation presented in Williamsport to determine if, in fact, an Establishment Clause violation would be made out if Petros were allowed to meet. (p. 550)

The court's analysis has advanced to that aspect of this case which is, in many ways, the most troubling. This court has already concluded that the students of Petros enjoy a free speech right to engage in religious activity. The court now holds that allowing such

religious activity would violate the mandate of the Establishment Clause. This court is thus faced with a constitutional conflict of the highest order. Moreover, in deciding Widmar, the Supreme Court explicitly declined to "reach the questions that would arise if state accommodation of free exercise and free speech should, in a particular instance, conflict with the prohibitions of the Establishment Clause." (102 S. Ct. at 276 n. 13) The court is therefore left with no definitive guidance from the Court as to the proper direction to take in this unique circumstance. (p. 557)

While it is true that the Establishment Clause might provide a compelling state interest to restrain speech, it does not do so in every case. The parameters of the Establishment Clause may bend somewhat in order to accommodate another fundamental interest—free speech, just as the Speech Clause must, depending on the circumstances, accommodate the objectives of the Establishment Clause. (p. 559)

This court therefore turns to consideration of the circumstances before it. The facts of this case concededly present a close question. In sum, however, this court concludes that the interest in protecting free speech within the context of the activity period as it exists at Williamsport Area High School is outweighed by the Establishment Clause concerns. (p. 559)

The court determines that, in balancing the respective constitutional interests which would be lost and gained if Petros were granted access to the activity period, as against those which would be lost and gained if it were not granted access, there is a greater vindication of the protections of the Constitution if the Establishment Clause prevailed in this instance, as the court holds that it does. To this extent, therefore, it can be said that the interest of Williamsport in complying with its constitutional obligations provides a compelling state interest. See Widmar, 102 S. Ct. at 275. Under other circumstances, of course, this same analysis could work to override the Establishment Clause, if a sufficiently compelling interest were shown. (p. 560)

This court's decision has no impact upon the rights of high school students to engage in speech protected by the First Amendment which does not involve the Establishment Clause dangers present here. This court only holds that the particular circumstances disclosed by this record and present at the Williamsport Area High School lead to the inexorable conclusion that the constitutional balance of interest tilts against permitting the Petros activity to be conducted within the school as a general activity program. (p. 561)

Disposition: The judgment of the District Court for the Middle District of Pennsylvania was reversed. (p. 561)

Citation: Jarman v. Williams, 753 F.2d 76 (8th Cir. 1985)

Facts: The question presented is whether the First Amendment compels the Vilonia School District No. 17 of Faulkner County, Arkansas, to rent a school gymnasium to a group of parents who wish to hold dances for high school students. The plaintiffs contend that dancing is a form of expression protected by the First Amendment, that a policy adopted by the school board in 1980 makes school property a public forum for the exercise of First Amendment rights, and that the school is therefore constitutionally obliged to rent its property to those who wish to hold dances. The district court held that the gymnasium had never become a public forum and denied relief. (pp. 76-77)

The plaintiffs are a group of parents of school children attending schools managed by the Vilonia School District No. 17 of Faulkner County, Arkansas. The school district sponsors one dance in the school gymnasium each year: the senior and junior prom. The plaintiffs wanted the school district to hold more dances for students. The school board denied requests to increase the number of school-sponsored dances. The plaintiffs then proposed to rent the gymnasium for purposes of holding other dances from time to time. Although the school board has a policy permitting rental of school facilities to civic organizations and school-related groups, and has allowed some groups to use the school facilities, it denied the plaintiffs' request. The plaintiffs believe that the school board's refusal was based upon pressure from religious sectors of the community which believe that dancing is immoral and should not be permitted in public schools. The plaintiffs brought suit alleging that the refusal to rent the gymnasium for the purpose of holding more dances violated their First Amendment rights and deprived them of the equal protection of the laws. (p. 77)

Issues: In this case two issues pertain to the First Amendment: (1) Is social dancing considered to be "speech" within the meaning of the First Amendment so as to be entitled to First Amendment protection? (2) If social dancing is considered to be "speech," is school property a public forum that allows this speech to be protected under the First Amendment? (p. 76)

Holding: The Court of Appeals for the Eighth Circuit held that: (1) social dancing advocated by parents was not "speech" within the meaning of the First Amendment, and (2) even if social dancing was speech, school property

had not become a public forum, and thus, the parents' First Amendment rights had not been violated. (p. 76)

Reasoning: The First Amendment provides, in pertinent part, that "Congress shall make no law abridging the freedom of speech." The Supreme Court has long ago extended this prohibition to the states and their political subdivisions, through the medium of the Due Process Clause of the Fourteenth Amendment. The theory of the plaintiffs' complaint is that social or recreational dancing is a form of expression coming within the term "speech" as that term is used in the First Amendment. (p. 77)

Obviously not every activity that a citizen wishes to engage in can be categorized as "speech" for First Amendment purposes. It is the plaintiffs' obligation to demonstrate that the First Amendment applies to the conduct in which they wish to engage. "To hold otherwise would be to create a rule that all conduct is presumptively expressive." See Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3069 n. 5. The First Amendment presupposes that "speech" has a privileged constitutional position, one not accorded to conduct generally. That is, when government seeks to prohibit or regulate "speech," it must meet a much higher standard than when it simply prohibits or regulates conduct in the exercise of the power to promote the public health, welfare, or morals. Certainly some forms of dancing are entitled to First Amendment protection. See, e.g., Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176, concerning dancing before audiences as a performance or an art form. The sort of dancing involved here is quite different. The plaintiffs simply want their children to have the opportunity to dance for social or recreational purposes, for their own edification, and not for the enjoyment of an audience. The dancing here is not claimed to involve any political or ideological expression. It is not intended to convey any kind of message, unless it be the message that the plaintiffs do not believe that dancing is wrong. In these circumstances, it is our view that conduct as opposed to speech is involved. (pp. 77-78)

When conduct conveys a message, that is, when it is expressive, it may be entitled to a measure of First Amendment protection. See International Brotherhood of Teamsters, Local 695 v. Vogt, Inc., 77 S. Ct. 1166, in which picketing, which is conduct designed to convey a certain message, was characterized as "speech plus" and accorded some First Amendment protection. (p. 78)

Although the Supreme Court has held that First Amendment rights are not absolute, and that they may in

appropriate cases be overridden by "compelling" state interests, still speech, as that term is used in the First Amendment, has a preferred position in our constitutional scheme. The courts must be alert both to preserve this preferred position, and to confine it to the area intended by the Framers of the Bill of Rights. If any sort of conduct that people wish to engage in is to be considered "speech" simply because those who engage in conduct are, in one sense, necessarily expressing their approval of it, the line between "speech" protected by the First Amendment and conduct not so protected will be destroyed. This court declines to adopt such a view. In short, this court holds that the sort of dancing that the plaintiffs advocate in this case is not "speech" under the First Amendment, and, therefore, that the First Amendment has not been violated by the refusal of the school board to allow its property to be used for this sort of dancing. (p. 78)

Even if the sort of dancing involved in this case were "speech" within the meaning of the First Amendment, the plaintiffs could still not succeed unless they establish that school property has become a public forum, in which the school board is constitutionally obliged to permit any form of protected expression. The district court found, as a fact, that the school property had not become a public forum. (p. 79)

This court thinks this phase of the case is governed by the Supreme Court's holding in Perry Education Association v. Perry Local Educators' Association, 103 S. Ct. 948, 956. There, the Court held that selective access granted to groups such as the YMCA, the Cub Scouts, and other civic and church organizations did not convert the Perry School District's mail system into a public forum. This court has here the same sort of selective opening of school property, and, like the Supreme Court in Perry, the court holds that the school board's willingness to allow the gymnasium to be used for karate, gymnastics, piano lessons, and the like, did not convert it into a public forum, so as to obligate the school board to allow the gymnasium to be used for any other purpose protected by the First Amendment. (p. 79)

Disposition: The holding of the District Court for the Eastern District of Arkansas was affirmed. (p. 79)

Citation: Bell v. Little Axe Independent School District No. 70 of Cleveland County, 766 F.2d 1391 (10th Cir. 1985)

Facts: Joann Bell and Lucille McCord each have several children who have attended Little Axe School. During

> the 1980-1981 school year, their children told them of certain religious meetings held before class every Thursday morning. Testimony in the record indicates that other students asked the Bell and McCord children why they had not chosen to attend the meetings, asserting that they therefore must not believe in God. Consequently, Bell and McCord notified defendant Holleyman, then school superintendent of the district, of their concern. Upon investigation, he found that several teachers were supervising and participating in religiously oriented meetings involving students and nonstudents on Thursdays between 8:00 and 8:25 a.m. He ordered the meetings suspended until the school board could consider the matter. (p. 1396)
>
> The meetings had been started by several students and a faculty sponsor so "that youth could be influenced in a positive way to seek God and good in their own lives and in others." The meetings were advertised by posters in the halls and announcements in school publications. Between five and forty students, including elementary-age school children, attended the meetings that began shortly after school buses arrived. Speakers sometimes appeared at the invitation of a student, but usually at the behest of a teacher or a person unrelated to the school. The speakers included a minister, local athletes, and others speaking about how God and Christianity had benefited the speaker in his or her daily life. The program also included prayers, songs, and "testimony" of students and other individuals concerning the benefits of knowing Jesus Christ. (p. 1397)
>
> The school board first considered the issue at a board meeting in April 1981 before an agitated crowd. On a 4-1 vote, the board decided to permit the meetings to continue until such time as the meetings were declared unlawful. The meetings resumed, and the plaintiffs filed this action.
>
> In November 1981, the board adopted an equal access policy purporting to regulate the student use of school facilities. Although board members generally asserted that they adopted the policy to ensure freedom of speech and religion for the students and to clarify past unwritten policy, at least one member favored the policy, in part, so that the meetings would be allowed to continue. At the meetings conducted pursuant to this policy, teachers were designated as monitors rather than sponsors or supervisors and were not permitted to participate. The school, moreover, disclaimed sponsorship of the group. A student committee was formed to solicit speakers, but the format remained unchanged. (pp. 1397-1398)

Shortly thereafter, the plaintiffs amended their complaint to challenge the new policy and to seek damages for the alleged unconstitutional acts of the district. The meetings continued until October 1982, when the district agreed to suspend the meetings and implementation of the policy pending resolution of the merits at trial. (p. 1398)

Issues: Several issues arise in this appeal that are related to the First Amendment: (1) Is the equal access policy promulgated by the school district unconstitutional insofar as the district or the school construed the policy to permit concerted religious activity on school grounds during the school day? (2) Do students and teachers enjoy First Amendment rights of religious worship and discussion? (3) If so, do these rights require the government to open use of its facilities as a public forum to anyone desiring to use them? (4) May the state create a forum and limit that forum to certain groups for a particular subject matter? (5) Are the parents in this case entitled to compensatory damages for violation of their First Amendment rights, without proof of consequential harm? (pp. 1392-1393)

Holding: The Court of Appeals for the Tenth Circuit determined that: (1) the equal access policy promulgated by the school district was unconstitutional insofar as the district or the school construed the policy to permit concerted religious activity on school grounds during the school day; (2) students and teachers possess First Amendment rights of religious worship and discussion; (3) the First Amendment rights of religious worship and discussion do not require the government to open the use of its facilities as a public forum to anyone desiring to use them; (4) the state may create a forum, even if not required to do so, and limit that forum to certain groups for particular subject matter; however, once that action is taken, a compelling state interest must be shown to justify a content-based exclusion; and (5) the parents were entitled to an award of compensatory damages for violation of their First Amendment rights, without proof of consequential harm. (pp. 1392-1393)

Reasoning: In defense of the meetings and the policy, the district asserts the students' complementary First Amendment rights of freedom of speech and religion. Although the First Amendment clearly protects religious worship and discussion, Widmar v. Vincent, 102 S. Ct. 269; Bender v. Williamsport Area School District, 741 F.2d 538, 545 (3d Cir. 1984), cert. granted, 105 S. Ct. 1167, and both students and teachers enjoy these rights, see Widmar, 102 S. Ct. at 273 n. 5; Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 736; Bender, 741 F.2d

at 545, these rights do not "require the government to open the use of its facilities as a public forum to anyone desiring to use them," id.; see Perry Education Association v. Perry Local Educators Association, 103 S. Ct. 948, 955. However, the state may create a forum, even if not initially required to do so, see Widmar, 102 S. Ct. at 273, and limit that forum to certain groups or a particular subject matter, Perry, 103 S. Ct. at 955 n. 7. Once that action is taken, a compelling state interest must be shown to justify a content-based exclusion. See Widmar, 102 S. Ct. at 274. (pp. 1400-1401)

Accordingly, this court must analyze the First Amendment rights of the Little Axe students "in light of the special characteristics of the school environment," id. 102 S. Ct. at 273 n. 5 (quoting Tinker, 89 S. Ct. at 736), so that the court may determine whether the Little Axe School has created a limited open forum and, if so, whether the Establishment Clause justifies restriction of the students' free speech rights. See Bender, 741 F.2d at 544. (p. 1401)

The Supreme Court identified a university campus as a limited forum because of its policy of accommodating meetings of student organizations. See Widmar, 102 S. Ct. at 273. Similarly, the Third Circuit recognized a high school as a limited forum by virtue of its comparable policy. See Bender, 741 F.2d at 547-549. In each case, a student organization raised a free speech challenge to an administrative decision prohibiting their meetings because of the religious content. The Third Circuit in Bender, however, recognized that a high school differs from the university campus considered in Widmar. First, the court noted, the educational mission of a high school is more circumscribed, consisting of a structured program designed "[to inculcate] fundamental values necessary to the maintenance of a democratic political system." See Bender, 741 F.2d at 548 (quoting Board of Education v. Pico, 102 S. Ct. 2799, 2806). Thus, it was unlikely that school authorities would create a "truly open forum" of "unregulated dialogue." Id. Second, the court recognized that the level of maturity of high school students is notably lower than that of university students. Id. Despite these considerations, the court observed that "nothing precludes the existence of a forum in a high school setting," id., and concluded that the high school involved was in fact a limited forum. (p. 1401)

The reservations expressed in Bender apply with even greater force to an elementary school, where the curriculum is far more circumscribed. More importantly, most school children are unable to appreciate or ini-

tiate a wide diversity of viewpoints, as demonstrated by the relatively few student organizations that actually meet at Little Axe School, such as Girl Scouts, Boy Scouts, and 4-H Clubs. (p. 1401)

Nevertheless, this court is reluctant to hold that an elementary school administration may never create a limited forum for the benefit of its students. The policy governing Little Axe School purports in paragraph 2 to guarantee all students and employees "freedom of religion, speech, the press, association, petition and equal protection," rights which the policy provides may not be restricted "except as essential in the performance of the school's educational purposes." The policy, therefore, does not compromise the primary educational purpose of the school. See Widmar, 102 S. Ct. at 273 n. 5; cf. Bender, 741 F.2d at 549. Accordingly, this court concludes that by adopting the equal access policy, the Little Axe Independent School District created a limited forum for the benefit of its students and employees. The court must now determine whether the Establishment Clause is a sufficiently compelling interest to warrant the injunction against the religious meetings at issue. (pp. 1401-1402)

This court concludes that the school district's action violates the Establishment Clause. In addition, this court believes that in a public school that includes elementary-age school children, a violation of the Establishment Clause to this degree offers a sufficiently compelling interest to justify a content-based distinction in the limited forum created in this case. (p. 1407)

Disposition: The appeals court affirmed the judgment of the District Court for the Western District of Oklahoma enjoining the religiously oriented meetings or any concerted religious activity held on the school grounds during school hours. The appeals court reversed the denial of compensatory and punitive damages. On remand, the district court was instructed to consider an award of compensatory damages judged reasonable in light of the nature and extent of the particular invasion of the parents' rights under the First Amendment. The district court was also instructed to consider whether the actions of the individual defendants manifested a reckless or callous indifference for those rights. (p. 1413)

Citation: Student Coalition for Peace v. Lower Merion School District Board of School Directors, 633 F. Supp. 1040 (E.D.Pa. 1986)

Facts: Presently before this court is plaintiff Student Coalition for Peace's (SCP) motion for a permanent in-

junction. SCP is a nonschool-sponsored student organization of the Lower Merion High School (LMHS). SCP seeks to conduct a public antinuclear exposition on certain parcels of the LMHS's property. The Lower Merion School District (LMSD) and other defendants have refused to grant permission to the SCP to use any parcel. (p. 1041)

Issues: Under the Equal Access Act, may a school board prohibit use of a high school gym by a nonschool-sponsored student organization which seeks to conduct a public antinuclear exposition, where the school has previously granted permission to use the gym for a volleyball marathon, thereby creating a limited open forum? (p. 1040)

Holding: The District Court for the Eastern District of Pennsylvania determined that under the Equal Access Act, the school district could not prohibit use of the high school gym by a nonschool-sponsored student organization. (p. 1040)

Reasoning: The defendants contend that the Equal Access Act codified constitutional principles of the First Amendment as to limited public forums. A forum may be considered a limited public forum where access is limited to a certain group or limited to the content of the speech (of course, as long as it is viewpoint neutral). It is the defendants' position that the LMSD, by its expression in its rules and regulations, forbids political speech of any kind, no matter what the viewpoint. (pp. 1042-1043

The defendants have argued that the fact that a charitable or athletic event takes place on certain parcels does not require a political event to be allowed on these same parcels. The plaintiff has taken a contrary position. The plaintiff contends that the Equal Access Act expands First Amendment rights to free speech. (p. 1043)

At the first blush, it appears that Congress was attempting to expand the application of the Supreme Court's decision in Widmar v. Vincent, 102 S. Ct. 269, rather than expand the concept of a limited public forum when it drafted the Equal Access Act. However, after further analysis, this court finds Congress sought also to prohibit the denial of noncurricular-related student groups' meetings on the basis of subject matters, namely as to religious, political, philosophical, or other content of the speech. Thus, the court finds that Congress did, by enacting the Equal Access Act, afford students the right to use school property beyond the constitutional guarantees in the First Amendment. (p. 1043)

Disposition: The court enjoined the LMSD from denying use of the gym to the SCP, stating, however, that this ruling did not prohibit the LMSD from protecting its property by reasonable regulations. (p. 1043)

Citation: Garnett v. Renton School District No. 403, 874 F.2d 608 (9th Cir. 1989)

Facts: Richard Garnett and other Lindbergh High School students sought a district court order requiring the Renton School District to allow their student religious group to meet in a high school classroom prior to the start of the school day. The students appeal the district court's orders denying their motion for a preliminary injunction and entering judgment for the school district on the merits. The students claim: 1) the First Amendment requires that the school district permit their group to meet; and 2) the Equal Access Act requires that the school district permit their group's meetings. (p. 609)

Lindbergh High School is a public secondary school in the Renton School District. The district makes classrooms available during noninstructional time for use by students participating in approved "co-curricular" activities. The district's board of directors and superintendent determine whether to approve an activity based on District Policy 6470. Among the criteria to be used for approving co-curricular activities is the stipulation that the purposes and/or objectives shall be an extension of a specific program or course offering. Policy 6470 also states that the district "does not offer a limited open forum." (p. 609)

Garnett and others asked Lindbergh's principal and the school district for permission to use a Lindbergh classroom for weekday morning meetings of their nondenominational Christian student group. The group wished to discuss religious and moral issues, read the Bible, and pray. The principal and the district denied the group's requests because the club was not curriculum-related and because allowing the proposed meetings would violate the Establishment Clause. (pp. 609-610)

Issues: In addition to an Establishment Clause issue, there are four First Amendment issues related to students' speech, forum analysis, and the Equal Access Act. The questions these issues raise are: (1) Does a school district's refusal to allow a student religious group to meet on campus prior to the school day violate the students' right to free speech? (2) Is the high school a First Amendment limited public forum? (3) If a school district has not created a public forum, may it limit student expression? (4) If a public high school is not a limited First Amendment public forum, does

its refusal to allow a student religious group to meet on campus violate the Equal Access Act? (p. 608)

Holding: The Court of Appeals for the Ninth Circuit ruled as follows: (1) A school district's refusal to allow a student religious group to meet on campus prior to the school day did not violate the students' right to free speech. (2) The high school was not a First Amendment limited public forum. (3) Because the school district had not created a limited public forum, it could limit student expression in any reasonable way. (4) Because the high school was not a First Amendment limited public forum, the Equal Access Act did not require that it make a classroom available to a student religious group who wished to meet prior to the beginning of the school day. Also, the appeals court held that allowing students to use a classroom prior to the school day for a religious meeting would violate the Establishment Clause. (p. 608)

Reasoning: The Renton School District's refusal to allow a student religious group to meet on campus does not violate the Free Speech Clause of the First Amendment. (p. 612)

Lindbergh High School is not a First Amendment limited public forum. In Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, 568, the Supreme Court held:

> school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," or by some segment of the public, such as student organizations. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Cornelius v. NAACP Legal Defense & Educational Funds, Inc., 105 S. Ct. 3439, 3449. (p. 612)

The Renton School District has not by either policy or practice opened its classrooms for indiscriminate use. District Policy 6470 explicitly states that "[t]he Renton School District does not offer a limited open forum." The district's policy is to allow use of its facilities by student groups only after those groups are approved according to narrowly circumscribed guidelines. The district's practice does not vary from its policy. Student groups are allowed to meet in high school classrooms only after express district approval. The school district has not intentionally opened its classrooms for public discourse by students and student groups. (pp. 612-613)

Because the district has not created a public forum, it may limit student expression in any reasonable way. Clubs which are an extension of the courses and programs of the district are permitted to meet. Clubs, such as the religious group in this case, which have nothing to do with the school district's educational mission, are not granted district approval. (p. 613)

The district's exclusion of religious groups from its co-curricular program is not only reasonable, but also constitutionally required. The district must exclude organized religious speech because use of public school facilities for religious purposes violates the Establishment Clause "[W]hen the explicit Establishment Clause proscription against prayer in the public schools is considered, the protections of political and religious speech are inapposite." Collins, 644 F.2d at 763 (quoting Brandon, 635 F.2d at 980). (p. 613)

Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, is also inapplicable. The Hazelwood court explained:

> 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. (p. 613)

Hazelwood, 108 S. Ct. at 569. Lindbergh has not prohibited students from discussing religion at school. Rather, the school district has refused to grant a group the use of its classrooms and other sources. Tinker is also inapplicable because the Establishment Clause concerns present in this case were not present in Tinker. (p. 613)

Allowing a student religious group to hold meetings in a public secondary school classroom at a time closely associated with the school day would violate the Establishment Clause. The school district's refusal to approve a student religious group as a district activity is, therefore, not only reasonable, but required. Because Lindbergh High School does not have a "limited open forum" as defined by the Equal Access Act, the Act's requirements do not apply. (p. 614)

Disposition: The decision of the District Court for the Western District of Washington was affirmed. (p. 614)

Citation: Doe v. Human, 725 F. Supp. 1503 (W.D.Ark. 1989)

Facts: The parents of an affected child brought action challenging Bible classes provided by public schools during regular school hours and in school building for voluntary attendance by elementary schoolchildren as unconstitutionally establishing religion and sought injunctive relief. (p. 1503)

In an addendum to their brief filed on September 12, 1989, the defendants raise certain arguments not raised in their original brief. (p. 1508)

Issues: Primarily a case involving the legal concepts of advancement and establishment of religion and equal access, freedom of speech is a secondary issue incorporated in this case. Specifically, is the claim that total exclusion of the Bible from public schools violates freedom of speech and religion relevant to determining whether a Bible instruction program should be enjoined? A collateral free speech issue is whether injunctive relief against Bible classes being offered in public schools violates a volunteer teacher's right to freedom of speech. (p. 1504)

Holding: The District Court for the Western Division of Arkansas, Fayetteville Division, decided that a claim that total exclusion of the Bible from public schools violated freedom of speech and religion was irrelevant to determining whether a Bible instruction program should be enjoined, where injunctive relief would not require total exclusion of the Bible, but merely enjoin a specific program. The court also decided that injunctive relief against Bible classes in public elementary schools did not violate a volunteer teacher's freedom of speech. The volunteer teacher had no right to teach a religious course during hours on public school grounds. (p. 1504)

Reasoning: The defendants argue that the total exclusion of the Bible from public schools would violate freedom of speech and religion, as well as the right of Gravette parents to educate their children. Indeed, it is well settled that Bible study, "when presented objectively as part of a secular program of education, may be effected consistently with the First Amendment." See School District of Abington Twp., Pennsylvania v. Schempp, 83 S. Ct. 1560, 1573. Entry of summary judgment in this case, however, would not require total exclusion of the Bible, but would merely enjoin a specific program. Thus, the defendants' argument is beside the point. (p. 1508)

The defendants also argue that entry of an injunction in this case would violate volunteer teacher Elsie Smith's right to freedom of speech. Mrs. Smith certainly has the right to discuss religion, but she has

no right to teach a religious course during school hours on public school grounds. (p. 1508)

Disposition: The court granted the plaintiffs partial summary judgment and made its preliminary injunction against the defendants permanent. (p. 1508)

Citation: Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989)

Facts: The Atlanta Peace Alliance (APA) challenged the policy of the Atlanta School Board regarding access of military and nonmilitary groups to the Atlanta schools. The APA brought suit contending that the school board's refusal to grant the APA access to programs known as Career Day and Youth Motivation Day and to place information on bulletin boards and in guidance counselors' offices violated the APA members' First Amendment rights of free speech. The district court held that the denial of access to bulletin boards, guidance counselors, and Career Day was unconstitutional. The board has only appealed the district court's determination that several of the regulations concerning Career and Motivation Day are unconstitutional. (p. 1315) Two regulations of contention address "present affiliation" and "appropriate information." The regulation concerning present affiliation requires presenters to have present affiliations with the career fields they are discussing. The regulation involving appropriate information stipulates that participants present appropriate information, which means the information must be helpful to students in explaining career options, but cannot be critical of the opportunities presented by other organizations. (p. 1317)

Issues: Of primary importance in this case are two regulations promulgated by the Atlanta School Board to govern Career Day in its public schools. The first issue questions whether the regulation requiring participants to have present affiliation or authority with their career field is an undue restriction on the First Amendment's guaranty of free speech. (p. 1314) The second issue, which deals with "appropriate information," questions whether a ban on information which is critical of the careers of the presenters unconstitutionally prohibits protected speech. (p. 1317)

Holding: The Court of Appeals for the Eleventh Circuit ruled that: 1) the present affiliation regulation was unduly restrictive, and 2) to the extent that a speaker discourages students from entering a specific career by providing students with valid and informative disadvantages of that career, such speech was appropriate and allowable. (p. 1314)

Reasoning: The Supreme Court has explained that the type of restrictions which may be placed on First Amendment activities depends in large part on "the nature of the relevant forum." See Cornelius v. NAACP Legal Defense Fund, 105 S. Ct. 3439. In a traditional public forum and a "created" public forum, the government may enforce content-based restrictions only if necessary to serve a compelling state interest and narrowly tailored to serve that interest. The government may also enforce content-neutral, i.e., time, place, and manner regulations, which are narrowly tailored to serve a significant interest but still leave open ample, alternative means of communications. See Perry Education Association v. Perry Local Education Association, 103 S. Ct. 948. In a nonpublic forum, however, the government enjoys considerably more power over the use of its property: it may impose content-based restrictions which are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." See Cornelius, 105 S. Ct. at 3448 (quoting Perry, 103 S. Ct. at 955). (p. 1318)

A school serves an important function in our society: it serves as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment." See Brown v. Board of Education, 483, 493, 74 S. Ct. 686, 691. Because of the special role of schools in our society, the Supreme Court has allowed school officials to regulate speech based on content where such a regulation would not be upheld in a nonschool setting. See Hazelwood School District v. Kuhlmeier, 108 S. Ct. at 570; Bethel School District v. Fraser, 106 S. Ct. 3159, 3164. In addition, school officials may structure curricular programs to "assure that participants learn whatever lessons the activity is designed to teach." See Hazelwood, 108 S. Ct. at 570. The Supreme Court in Hazelwood reaffirmed that "the education of the Nation's Youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." (108 S. Ct. at 571) Thus, a court must defer to reasonable educational decisions made by educators. However, when a particular decision implicating the First Amendment "has no valid educational purpose the First Amendment is so 'directly and sharply implicate[d]' as to require judicial intervention." See Hazelwood. (pp. 1319-1320)

Because Career Day is a nonpublic forum, any restrictions on access must be reasonable in light of the purposes of the forum. (p. 1320)

In this case, the plaintiffs were excluded from a forum established by the Atlanta School Board for the

purpose of encouraging members of the public to participate in Motivation and Career Days. The chief objective of Career Days was to inform students of the advantages and disadvantages of various job and career opportunities. (pp. 1325-1326)

After learning that the First Amendment's Free Speech Clause permitted the plaintiffs' involvement in the forum, the school board adopted regulations governing content of speech and eligibility of speakers. The district court correctly perceived that some of these regulations were designed to either directly or indirectly deny the plaintiffs' participation in the forum.

This court agrees with the district court that the "present affiliation" regulation is unduly restrictive. (p. 1326)

To the extent that a speaker is discouraging a student from entering a specific career by providing students with valid and informative disadvantages of that career, this is appropriate and allowable. To the extent a speaker discourages students from entering a specific career by denigrating that career because of its nature or purpose of the career, the administrator of the program can ban such speech. Stated another way, accurate information about a career that some might take as criticism of the career or as discouragement of students from entering that career is permissible. On the contrary, exhortative and denigrative presentations by speakers for the purpose of denouncing certain careers for the purpose which they serve may properly be banned. (p. 1326)

Disposition: The court of appeals affirmed the judgment of the District Court for the Northern District of Georgia with slight modifications. (p. 1326)

Citation: Board of Education of the Westside Community Schools v. Mergens, 110 S. Ct. 2356 (1990)

Facts: Westside High School, a public secondary school that receives federal financial assistance, permits its students to join, on a voluntary basis, a number of recognized groups and clubs, all of which meet after school hours on school premises. Citing the Establishment Clause and a school board policy requiring clubs to have a faculty sponsorship, petitioner school officials denied the request of respondent Mergens for permission to form a Christian club that would have the same privileges and meet on the same terms and conditions as other Westside student groups, except that it would have no faculty sponsor. After the board voted to uphold the denial, the respondents, current

and former Westside students, brought suit seeking declaratory and injunctive relief. They alleged that the refusal to permit the proposed club to meet at Westside violated the Equal Access Act, which prohibits public secondary schools that receive federal assistance and that maintain a "limited open forum" from denying "equal access" to students who wish to meet within the forum on the basis of the "religious, political, philosophical, or other content" of the speech at such meetings. In reversing the district court's entry of judgment for the petitioners, the Court of Appeals for the Eighth Circuit held that the Act applied to forbid discrimination against respondents' proposed club on the basis of its religious content, and that the Act did not violate the Establishment Clause. (p. 2359)

Issues: Although the Supreme Court based its ruling on the relationship between the Establishment Clause and the Equal Access Act, the Court did address an issue pertinent to student speech and the Equal Access Act. The specific issue is whether a public high school, by allowing even one noncurriculum-related student group to meet on school premises, triggers the Equal Access Act such that the school may not deny other clubs equal access to meet during noninstructional time on the basis of the content of their speech. (pp. 2356-2357)

Holding: The Supreme Court held that the Equal Access Act did not violate the Establishment Clause. The court also stated that even if a public secondary school allows only one noncurriculum-related student group to meet, obligations of the Equal Access Act are triggered, and the school may not deny other clubs equal access to meet on school premises during noninstructional time on the basis of the content of their speech. (p. 2356-2357)

Reasoning: The Equal Access Act provides, among other things, that a "limited open forum" exists whenever a covered school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises." Its equal access obligation is therefore triggered even if such a school allows only one "noncurriculum related" group to meet. (p. 2359)

Westside's denial of the respondents' request to form a religious group constitutes a denial of "equal access" to the school's limited open forum. Although the school apparently permits the respondents to meet informally after school, they seek equal access in the form of official recognition, which allows clubs to be part of the student activities program and carries

with it access to the school newspaper, bulletin boards, public address system, and annual Club Fair. Because denial of such recognition is based on the religious content of the meetings the respondents wish to conduct within the school's limited open forum, the school's denial violates the Act. (p. 2360)

The introduction of religious speech into the public schools reveals the tension between the Free Speech and Establishment Clauses, because the failure of a school to stand apart from religious speech can convey a message that the school endorses, rather than merely tolerates, that speech. Thus, the particular vigilance this Court has shown in monitoring compliance with the Establishment Clause in elementary and secondary schools, see, e.g., Edwards v. Aguillard, 107 S. Ct. 2573, 2577, must extend to monitoring the actual effects of an "equal access" policy. (p. 2361)

There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. The court thinks that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. Cf. Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, (no danger that high school students' symbolic speech implied school endorsement); West Virginia State Board of Education v. Barnette, 63 S. Ct 1178, (same). The proposition that schools do not endorse everything they fail to censor is not complicated. "[P]articularly in this age of massive media information the few years difference in age between high school and college students [does not] justif[y] departing from Widmar." See Bender v. Williamsport Area School District, 106 S. Ct. 1326, 1339. (p. 2372)

Indeed, the Court notes that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion. See S.Rep. No 98-357, p.8 (1984); id., at 35 ("[S]tudents below the college level are capable of distinguishing between state-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other"). Given the deference due "the duly enacted and carefully considered decision of a coequal and representative branch of our Government," the Court does not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations. (p. 2372)

Accordingly, the Court holds that the Equal Access Act does not on its face contravene the Establishment Clause. Because the Court holds that the petitioners have violated the Act, the Court does not decide the respondents' claims under the Free Speech and Free Exercise Clauses. (p. 2373)

Disposition: The Supreme Court affirmed the judgment of the Court of Appeals for the Eighth Circuit. (p. 2373)

Citation: Gregoire v. Centennial School District, 907 F.2d 1366 (3rd Cir. 1990)

Facts: In these cross appeals, this court is asked to resolve a direct conflict, of constitutional proportions, between a public school district and a religious organization, over the use of school facilities. The dispute comes to this court from a final order of the district court granting a permanent injunction which enjoined the Centennial School District from refusing to open the facilities of the William Tennent High School to groups wishing to engage in religious speech. Centennial appeals the grant of this permanent injunction, claiming that it is not constitutionally required to open its facilities and in fact, is mandated by the Establishment Clause to exclude at least certain types of religious speech. The beneficiary of the permanent injunction ("Student Venture") cross appeals on the ground that the district court stopped short; it contends that the district court erred when it did not include worship and distribution of religious literature within the mandate of the injunction. (pp. 1368-1369)

Issues: Three primary questions involving the First Amendment emerge from this appeal: (1) Has the school board allowed the high school auditorium to become a "designated open public forum" by intentionally opening the auditorium for indiscriminate use by the public for expressive activity? (2) Does use of the school's facilities by a religious group violate the First Amendment? (3) Is a religious organization, which is entitled to the use of school facilities on the grounds that the facilities are a designated public forum, entitled to conduct religious worship and distribute religious literature? (pp. 1367-1368)

Holding: The Court of Appeals for the Third Circuit held that: (1) the school board had created a designated public forum; (2) use of the school's facilities by a religious group would not violate the First Amendment; and (3) there was no basis for precluding religious worship or distribution of religious literature. (p. 1367)

Reasoning: There is no question that religious discussion and worship are forms of speech and association protected by the First Amendment. See Widmar v. Vincent, 102 S. Ct. 269. There is also no question that Centennial seeks to exclude Student Venture and other religious organizations from its facilities based on the content of their speech. (p. 1370)

This court recognizes at the outset that a school district is under no obligation to open its facilities to expressive activity by outsiders. "The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." See Perry Educational Association v. Perry Local Educators' Association, 103 S. Ct. 948, 955. It is when the government opens facilities not generally available to the public that legal questions relating to equal access arise. (p. 1370)

This established, the court turns its focus to the issue at the very center of the litigation: what are the legal characteristics of the forum created by the school district at William Tennent High School? Limitations which the government may lawfully place on classes of speech vary, depending upon whether the relevant forum is determined to be a traditional open forum, a public forum created by government designation or a non-public forum. (p. 1370)

The "traditional public forum" has been defined in terms of places such as streets or parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." See Hague v. CIO, 59 S. Ct. 954, 964. Regulation of speech in a traditional public forum must pass muster under a strict scrutiny analysis; the regulation must be narrowly drawn to serve a compelling state interest. See Carey v. Brown, 100 S. Ct. 286, 2290. (p. 1370)

A "designated open public forum" is created when public property is intentionally opened by the state for indiscriminate use by the public as a place for expressive activity. A state is not required to maintain the open character of the facility indefinitely. See Perry, 103 S. Ct. at 955. While the facility is open, however, content-based regulation of speech is subject to the same strict scrutiny analysis applied in the traditional public forum. (p. 1370)

The third forum category recognized in the First Amendment context is the "non-public forum." This forum exists when publicly owned facilities have been dedi-

cated to use for either communicative or noncommunicative purposes but have never been designated for indiscriminate expressive activity by the general public. See United States Postal Service v. Council of Greenburgh, 101 S. Ct. 2676. Content-based regulation in this category is examined under the "reasonable nexus" standard. "Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." See Cornelius v. NAACP Legal Defense & Educational Fund, 105 S. Ct. 3439, 3451. (pp. 1370-1371)

Neither party before the court argues that the William Tennent High School facilities constitute a traditional public forum. The parties join issue over whether Centennial has created a designated open forum, thus implicating strict scrutiny of its decision to exclude Student Venture, or whether it has, instead, maintained a closed forum in its high school facilities from which content-based exclusions may be made so long as there is some rational basis for the exclusion. Centennial argues that elementary and secondary schools occupy a unique status for purposes of the First Amendment and that courts have been reluctant to characterize either as an open forum. (p. 1371)

While the parameters of the public forum doctrine are, at the edges, imprecise, this court believes that the line of cases in which this doctrine has been developed and applied requires a finding that Centennial has created a designated open forum in the William Tennent High School facilities and that its content-based exclusion of Student Venture's expressive activities must be examined against the strict scrutiny standard. (p. 1371)

Centennial contends that, despite having granted access to many diverse groups, it did not intend to create an open forum; it created instead a closed forum with access properly restricted to those groups whose purpose is consistent with the educational function and mission of the school. Centennial takes the position that the First Amendment is not offended by reasonable content classifications rationally related to this mission. (p. 1374)

Throughout the course of this litigation, Centennial has refined and narrowed its position, arguing that despite the breadth of access granted, it has consistently evaluated each applicant against a definable standard relating to the function and mission of the school. Centennial's distilled position is that the

critical factor separating Centennial from other users is not religion per se. The exclusion is based, not on the religious nature of Student Venture's speech, but on the element of conversion and the attempt to influence students inherent in the Student Venture program. Centennial asserts that it is this conversion element that sets Student Venture's speech apart from the wide spectrum of other speech permitted at William Tennent High School; its message alone is directed to students and is said to have this conversion component. Expressive activity by other groups is limited to the members of those adult groups or classes and, therefore, has no tendency to influence high school students toward a particular point of view. Centennial argues that it grants access to most groups because most groups do not have a conversion message. Limiting access to those groups not engaging in conversion speech, Centennial contends, is especially important in the secondary school where a conversion message is likely to undermine the school's interest in neutrality and to have an undue influence on impressionable youth. (p. 1376)

When this court views the school's access policy and practice in terms of this now narrowly defined criterion of exclusion, the court notes that, consistent with its definition of the school's mission, Centennial has supported religious speech in a number of contexts. Religion may be the theme of dramatic or musical productions, so long as these productions are not sponsored by a nonprofit or charitable organization. Most critical to this court's evaluation of Centennial's purported reasons for excluding Student Venture is the act that Centennial has also created an open forum for religious discussion in its evening classes and in the afternoon student activity period to which outsiders may be invited. (p. 1376)

On the facts of this case, the court finds that the Centennial school district has created a designated open forum for speech such as that presented by Student Venture. The court arrives at this conclusion having examined each of the factors integral to public forum analysis as identified in Perry, Cornelius and Widmar. (p. 1378)

When Centennial originally sought a preliminary injunction seeking to bar Student Venture from use of its high school auditorium, it had in force a comprehensive facilities use policy which imposed a ban on the use of school facilities for religious purposes. Despite this limiting language in the policy, the district court found that Centennial had created a designated open forum. As the dissent points out, "as a result of its finding of indiscriminate permission to

use school facilities, the district court properly concluded that Centennial could not exclude Student Venture from using the auditorium in the absence of a compelling state interest." (p. 1378)

While this court does not take issue with the idea that speech which is appropriate and permissible in some public school contexts may be appropriately excluded from other contexts, this court does believe that Centennial's assumptions in opening its limited afternoon student forum and in permitting religious speech in other contexts bear on the court's analysis here. It is not the existence of religious discussion in some contexts per se which leads the court to its holding. It is, instead, that the assumptions underlying the tolerance of religious speech in other contexts, particularly in the afternoon student forum, undercut the rationale advanced by Centennial for excluding religious speech from the high school auditorium during non-school hours. (p. 1379)

In concluding that Centennial has not maintained a closed forum, this court emphasizes that the basis of its holding is narrow. Centennial must be consistent in granting facilities access: where it permits potentially divisive or conversion-oriented speech by outsiders to a student audience in school facilities in the afternoon and determines what this speech is consistent with the function and mission of the school system, it cannot, on maturity or "mission" grounds, exclude the same type of speech directed to the same audience from its facilities in the evening. Where it identifies student-directed conversion speech as its criterion for exclusion, it cannot reasonably allow some members of some groups to meet with each other and deny access to others whose speech does not implicate this conversion element. (p. 1379)

The cross-appeal by Student Venture requires that this court advance one step beyond where the district court stopped. In drawing a line between religious discussion and religious worship, concluding that discussion is within the parameters of the permanent injunction and worship without, this court believes that the district court erred. As the majority in Widmar makes clear, both religious discussion and worship constitute speech protected by the First Amendment. Both types of activity are permitted in the student open forum, and this court has been presented with no principled argument for excluding the same types of speech from school facilities in the evening. (p. 1382)

Finally, the court addresses Student Venture's contention that the district court erred in failing to consider Centennial's flat ban on distribution of reli-

gious literature. The argument advanced by Centennial in support of its ban on religious material in contexts outside the student open forum context hinges again on its argument that it maintains a closed forum and, in essence, may ban whatever it deems necessary for protection of impressionable children. This court recognizes the difficult role assigned to the school in achieving a balance between protecting its students and allowing them a measure of freedom necessary to intellectual development. While the court can envision circumstances in which the school might have a compelling interest in shielding its students from indecent or inflammatory speech, this court believes that, in the context of religious speech, Centennial's prior judgments concerning its students' maturity tip the balance away from the need for protection. This court has concluded that Centennial has created an open forum in the William Tennent High School facilities and therefore cannot uphold the flat ban on all distribution of religious material. (pp. 1382-1383)

Disposition: Having concluded that an open forum existed in the facilities of William Tennent High School, the appeals court affirmed the grant of permanent injunction by the District Court for the Eastern District of Pennsylvania, but remanded the case so that the district court could issue a revised injunction, drafted in conformity with this opinion, to include religious worship and distribution of religious literature. (p. 1383)

Citation: Youth Opportunities Unlimited v. Board of Public Education of the School District of Pittsburgh, Pennsylvania, 769 F. Supp. 1346 (W.D.Pa. 1991)

Facts: The plaintiffs seek damages and injunctive and declaratory relief for the alleged denial of their constitutional rights by the defendants. Specifically, the plaintiffs claim that the defendants have denied them their rights to freedom of expression, to freedom of association, and to the free exercise of religion, by revoking permits that had been issued to plaintiff Youth Opportunities Unlimited, Inc. (Y.O.U.) to conduct a summer program for economically disadvantaged children on public school property. (p. 1347)

On April 29, 1991, an application was filed by Y.O.U. for the use of various facilities at the Northview Heights Elementary School during the period June 24 through August 2, 1991. The application did not list religious activities as a purpose for the use of school property. (p. 1350)

On June 6, 1991, Y.O.U. filed an application for the use of various facilities at the Allegheny Middle

School during the period June 24 through August 2, 1991. This application also failed to list religious activities as a purpose for the use of school property. (p. 1350)

Henry L. Stephens, Jr., has been the principal of Allegheny Middle School for the past two years. In this position, he has the initial responsibility for approval of applications from outside organizations for permits to use the school's facilities. He has been instructed to adhere to board policy, as revised by the 1979 amendments, in reviewing applications for permits, including the policy embodied in Section 7(b) which prohibits permits for religious or sectarian purposes. (p. 1350)

On June 21, 1991, Mr. Stephens met with Y.O.U.'s executive director, Michael Bowling, and its program director, David Lipke, to discuss the availability of the auditorium, the gym, and the public address system at the Allegheny Middle School. The subject of the public address system led to a discussion of the content of Y.O.U.'s program. Mr. Stephens was informed that the program included morning prayers, the singing of religious hymns, and the reading of scripture materials. Mr. Stephens was concerned about these activities because he believed that they were contrary to the policy of the board for the enforcement of which he was responsible. (pp. 1350-1351)

On Monday, June 24, 1991, Y.O.U. began its summer program at both public schools without any religious activity. Thereafter, a meeting was held among counsel for the parties, and school district and Y.O.U. officials. They discussed resolution of the perceived violation of board policy against school use for religious or sectarian purposes. Y.O.U. was informed that its permit would be revoked if it continued to engage in prayer, the singing of religious hymns, and Bible reading. However, the school district officials agreed that, if Y.O.U. insisted on continuing to include religious activities in its summer program, it would be permitted to remain in the public school buildings until the end of the week to enable it to find another location for the program. On July 1, 1991, the plaintiffs filed the present action. (p. 1351)

Issues: Does a school board create a designated open public forum and violate the First Amendment's freedom of expression if it denies a religious organization use of its facilities after issuing thousands of permits each year to outside organizations to use various school facilities for expressive activity, and the board can point to no instance in which a permit was

denied to any organization for any purpose? (pp. 1346-1347)

Holding: The District Court for the Western District of Pennsylvania held that: (1) the board had created a designated open public forum in its public school facilities; and (2) the corporation demonstrated likelihood of success on the merits of its claim that revocation of its permits because of the religious content of the summer program violated the First Amendment. (pp. 1346-1347)

Reasoning: In its analysis of restrictions on First Amendment activity on public property, three categories of such property have been defined by the United States Supreme Court. In Perry Education Association v. Perry Local Educators' Association, 103 S. Ct. 948, the Supreme Court stated:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. (p. 1352)

A second category consists of public property which the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a state is not required to indefinitely retain the open character of the facility, so long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. (p. 1352)

> Public property which is not by tradition or designation a forum for public communication is governed by different standards. The court has recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place, and manner regulations, 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. (p. 1352)

> The proper forum classification in the present case must be based on what the board does in practice, and not what it says. As set forth in the court's findings, the board has issued permits many times in the past to Y.O.U., as well as to religious organizations, for a variety of purposes. In addition, the board has issued permits to several organizations for Christmas shows and concerts. Having opened its facilities to certain religious organizations, including Y.O.U. for a variety of religious purposes, the board cannot deny the use of such facilities to Y.O.U. due to the content of the speech in its summer program. (p. 1354)

> Based on the determination that the board has created a designated open public forum, the same standards as apply in a traditional public forum are applicable to the board's decisions to grant or deny permits. Specifically, the actions of the board in granting or denying permits are subject to a strict scrutiny test. The board may enforce time, place, and manner regulations on expression in its school facilities so long as those regulations are content-neutral and narrowly tailored to serve a compelling state interest. With respect to whether the board's regulations are content-neutral, it is undisputed that the board is seeking to revoke the permits issued to Y.O.U. based on the religious content of its summer program. This fact is established by the board's offer not to revoke Y.O.U.'s permits if it eliminates the opening prayers, religious hymns, and Bible readings from the summer program. Although the board denies that it allows some religious speech to the exclusion of other, the evidence does not support this assertion. Based on the testimony and exhibits offered by Y.O.U., it is clear that public school facilities have been utilized for performances of gospel music by a number of different groups, and that Christmas shows and concerts have been held in public school auditoriums by several outside organizations. Moreover, until 1991, Y.O.U.'s summer program has been sanctioned every year since the board's current policy was adopted in 1979. These facts compel the conclusion that the application of

the board's policy to Y.O.U.'s summer program is not content-neutral. (p. 1355)

By giving access to the "large spectrum" of groups conducting a variety of activities, including Y.O.U. and its summer program, the defendants have, in the past, demonstrated neutrality toward speech, including religious speech. The refusal to permit Y.O.U. to conduct its summer program because of its religious content can be viewed as giving rise to an inference of hostility to such content. (p. 1356)

Disposition: The religious youth organization was entitled to a preliminary injunction directing the defendants to restore the revoked school use permits. The school board was enjoined from revoking such permits before they expired according to their terms. (p. 1357)

Citation: Lamb's Chapel v. Center Moriches Union Free School District, 113 S. Ct. 2141 (1993)

Facts: The petitioners (Church) are Lamb's Chapel, an evangelical church in the community of Center Moriches, and its pastor John Steigerwald. Twice the Church applied to the district for permission to use school facilities to show a six-part film series containing lectures by Doctor James Dobson. A brochure provided on request of the district identified Dr. Dobson as a licensed psychologist, former associate clinical professor of pediatrics at the University of Southern California, best-selling author, and radio commentator. The brochure stated that the film series would discuss Dr. Dobson's views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage. The district denied the first application, saying that "[t]his film does appear to be church related and therefore your request must be refused." The second application for permission to use school premises for showing the film, which described it as a "family oriented movie—from the Christian perspective," was denied using identical language. (pp. 2144-2145)

The Church brought suit in district court, challenging the denial as a violation of the Freedom of Speech and Assembly Clauses, the Free Exercise Clause, and the Establishment Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. As to each cause of action, the Church alleged that the actions were undertaken under color of state law, in violation of Title 42 U.S.C. Section 1983. The district court granted summary judgment for respondents, rejecting all of the Church's claims. The district court stated that once a limited public forum

is opened to a particular type of speech, selectively denying access to other activities of the same genre is forbidden. Noting that the school district had not opened its facilities to organizations similar to Lamb's Chapel for religious purposes, the district court held that the denial in this case was viewpoint neutral and, hence, not a violation of the Freedom of Speech Clause. (p. 2145)

The Court of Appeals for the Second Circuit affirmed the judgment of the district court "in all respects." It held that the school property, when not in use for school purposes, was neither a traditional nor a designated public forum; rather, it was a limited public forum open only for designated purposes, a classification that "allows it to remain non-public except as to specified uses." The court observed that exclusions in such a forum need only be reasonable and viewpoint neutral and ruled that denying access to the Church for the purpose of showing its film did not violate this standard. The Supreme Court granted the petition for certiorari, which in principal part challenged the holding as contrary to the Free Speech Clause of the First Amendment. (pp. 2145-2146)

Issues: The primary First Amendment issue in this case concerns speech and religion. In specific, does a school district violate the Free Speech Clause by denying a church access to school premises to exhibit a film series on family and child-rearing issues solely because the film deals with the subject from a religious standpoint? (p. 2141)

Holding: The United States Supreme Court ruled that the school district violated the Free Speech Clause of the First Amendment by denying the Church access to school premises solely because its film dealt with the subject of family issues from a religious standpoint. The court also ruled that allowing the church access to school premises would not have been an establishment of religion. (p. 2141)

Reasoning: There is no question that the school district, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated. See Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 105 S. Ct. 3439, 3448 and Perry Educational Association v. Perry Local Educators' Association, 103 S. Ct. 948. It is also common ground that the school district need not have permitted after-hours use of its property. The school district, however, did open its property for two of the ten uses. The Church argued that because under Rule 10 of the rules issued by the school district, school property could be used for "social, civic, and

recreational" purposes, the district had opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public fora such as parks and sidewalks. Hence, its view was that subject-matter or speaker exclusions on school district property were required to be justified by a compelling state interest and to be narrowly drawn to achieve that end. See Perry, 103 S. Ct. at 955 and Cornelius, 105 S. Ct. at 3448. The argument has considerable force, for the school district's property is heavily used by a wide variety of private organizations, including some that presented a "close question" as to whether the district had in fact already opened its property for religious uses. (p. 2146)

With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, the Court has said that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." See Cornelius, 105 S. Ct. at 3451, citing Perry Education Association, 103 S. Ct. at 957. (p. 2147)

The film involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the film dealt with the subject from a religious standpoint. The principle that has emerged from Supreme Court cases "is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." See City Council of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118, 2128. That principle applies in the circumstances of this case. (pp. 2147-2148)

Disposition: The judgment of the Court of Appeals for the Second Circuit was reversed by the United States Supreme Court. (p. 2149)

Citation: Good News/Good Sports Club v. School District of the City of Ladue, 28 F.3d 1501 (8th Cir. 1994)

Facts: The Good News/Good Sports Club (the Club) and individuals affiliated with the Club appeal the district court's judgment denying their challenge to the use-of-premises policy (Amended Use Policy) of the School District of the City of Ladue, Missouri (School District) that closes the school district's facilities between 3 p.m. and 6 p.m. on school days to all community groups except for the Scouts and athletic groups. The Amended Use Policy also contains a proviso that

prohibits the Scouts from engaging in any religious speech from 3 p.m. to 6 p.m. (p. 1502)

The Club is a community-based, nonaffiliated group that seeks to foster the moral development of junior high school students from the perspective of Christian religious values. Club advertisements state that the Club is not sponsored by the School District. Parent volunteers run the Club meetings. The Club is open to junior high school students regardless of their race, creed, denomination, or sex. The Club does require, however, parental consent before a student may attend a meeting. The Club is religious, but nondenominational. (p. 1502)

In February 1992, several residents of the School District attended a school board meeting and complained about the religious content of the Club's meetings. The school board asked its attorney to evaluate the present use policy (1986 Use Policy) in response to the complaints against the Club. In late March, the school board passed a resolution allowing the Club to continue meeting for the remainder of the year. In July, the school board adopted the Amended Use Policy that closed the School District to all community groups, except the Scouts and athletic groups, between 3 p.m. and 6 p.m. on school days. (p. 1503)

The exemption for the Scouts was based on the School District's "long-standing tradition of cooperation with scout programs." The Amended Use Policy excluded the Club from meeting at its regularly scheduled time, but allowed the Club access to school facilities after 6 p.m. on school days, and after 8 a.m. on weekends. The Club filed suit in district court, seeking injunctive and declaratory relief based on its First Amendment rights. (p. 1503)

After a bench trial, the district court returned a judgment in favor of the School District. The district court found that the School District's facilities constituted a non-public forum between 3 p.m. and 6 p.m. on school days. The district court also concluded that the long-standing relationship between the Scouts and the School District was a reasonable basis upon which to allow the Scouts to meet between 3 p.m. and 6 p.m. on school days and that the school board's concern over the possibility of an Establishment Clause violation was a reasonable consideration for excluding the Club under the Amended Use Policy. Finally, the district court determined that the Amended Use Policy did not discriminate on the basis of viewpoint. (p. 1503)

Issues: The First Amendment issue at hand is whether denying a religious club access to school district prop-

erty immediately after school, while a secular club is not limited in access, constitutes impermissible viewpoint discrimination in violation of the Free Speech Clause. (p. 1502)

Holding: The Court of Appeals for the Eighth Circuit ruled that the use-of-premises policy which denied a religious club access to the school district's policy, while a secular club likewise concerned with the moral development of young people was not so limited in access, impermissibly discriminated against the religious club based on its viewpoint in violation of the First Amendment's Free Speech Clause. (p. 1501)

Reasoning: The Club raises numerous grounds for reversal; this court needs consider only one: whether the Amended Use Policy results in impermissible viewpoint discrimination as described in Lamb's Chapel v. Center Moriches Union Free School District, 113 S. Ct. 2141. This court holds that the Amended Use Policy results in viewpoint discrimination against the Club that does not serve a compelling governmental interest, and therefore, the court reverses. (p. 1503)

The School District argues that the district court properly held that its reason for adoption of the Amended Use Policy was reasonable and did not constitute viewpoint discrimination. The School District also argues that if the Amended Use Policy results in viewpoint discrimination, that discrimination serves the compelling governmental interest of not violating the Establishment Clause. (p. 1503)

"Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." See Cornelius, 105 S. Ct. at 3451 (citing Perry, 103 S. Ct. at 957); see also Lamb's Chapel, 113 S. Ct. at 2147. This court turns to whether the Amended Use Policy results in viewpoint discrimination. (p. 1505)

First, the subject matter for which the Club sought access to the School District facilities already was included in the forum as evidenced by the Scouts' speech. See Cornelius, 105 S. Ct. at 3451 ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.") The "ideals of Scouting," which Scout meetings seek to support, involve exactly the same category of speech for which the Club seeks access: moral and character development. (pp. 1505-1506)

Further, the Amended Use Policy defines the scope of permissible speech from 3 p.m. to 6 p.m. by reference to the speech which may occur during the Scout meetings. The Scouts may engage, with the School District's blessing, in any speech relating to moral character and youth development. Because both the Club and the Scouts discuss issues relating to moral character and youth development, the subject matter for which the Club seeks access already is included under the Amended Use Policy. (p. 1506)

Second, the Club has demonstrated that it has a viewpoint, i.e., a religious viewpoint, regarding moral character and youth development. In Lamb's Chapel, the Supreme Court held that denial of access to a religious group to show films regarding child-rearing and family values from a religious perspective constituted impermissible viewpoint discrimination. The Lamb's Chapel court held that the religious group had demonstrated its particular viewpoint because its proposed First Amendment expression, on otherwise includible subject matter, had a religious perspective. (p. 1506)

Further, the Lamb's Chapel court refused to cabin religious speech into a separate excludible speech category; rather, the Court adopted a more expansive view, recognizing that a religious perspective can constitute a separate viewpoint on a wide variety of seemingly secular subject matter. The Club has demonstrated, and the district court found, that the Club has a religious viewpoint on moral issues and youth development. (pp. 1506-1507)

The Club need not establish that the School District opposed the Club's viewpoint; rather, the Club need only demonstrate that the Amended Use Policy allowed the Scouts to express their viewpoint on moral and character development but prohibited the Club's religious viewpoint. In Lamb's Chapel, the Supreme Court determined that the school access policy constituted impermissible viewpoint discrimination without any determination that the school officials opposed or disagreed with the religious perspective proposed. The relevant inquiry was whether the Lamb's Chapel group was excluded because of its religious viewpoint, irrespective of whether the school district opposed that viewpoint. (p. 1507)

Even if this court were to reject this finding as clearly erroneous, which the court does not, the School District's viewpoint discrimination appears on the face of the Amended Use Policy. Specifically, the Amended Use Policy allows the Scouts access to the facilities so long as "such meetings shall be limited exclusively to the scout program and shall not include

any speech or activity involving religion or religious beliefs." Thus, like the utilization policy in Lamb's Chapel, the Amended Use Policy restricts access to the facilities based on religious viewpoint. (p. 1507)

Thus, this court concludes that the Amended Use Policy results in viewpoint discrimination because it denies the Club access based on the Club's religious perspective on otherwise includible subject matter. (p. 1507)

Disposition: The Court of Appeals for the Eighth Circuit reversed the judgment of the District Court for the Eastern District of Missouri, and remanded the case to the district court for a determination of a remedy consistent with this opinion. (p. 1511)

Citation: Hsu v. Roslyn Union Free School District No. 3, 85 F.3d 839 (2nd Cir. 1996)

Facts: Under the Equal Access Act, Title 20 U.S.C. Sections 4071-4074, public school students who wish to pray and study the Bible together after school enjoy the same right to meet in school classrooms as other extracurricular groups. The school can avoid the requirements of the Equal Access Act (the "Act") by prohibiting all "noncurriculum related" student groups or by declining federal funding. In this case, a public high school subject to the Act negotiated to impasse with a small group of students who wanted to form an after-school Bible Club. Agreement was reached on every aspect of the Club's status and operation, but one. The students insisted on a club charter provision that only Christians could be club officers; the school refused recognition on the sole ground that this condition violated the school policy prohibiting all student groups from discriminating on the basis of (among other things) religion. The students sued, and moved for a preliminary injunction that would force the school to recognize the club. The United States District Court for the Eastern District of New York denied the motion. The students appealed. (pp. 847-848)

Issues: In this case, there are two issues relevant to expression and speech. The first issue is whether the requirement in a religious club's constitution that the activities coordinator and the secretary of the club be professed Christians constitutes a religious test for membership or attendance that is supportable under the Equal Access Act. The second issue is whether the decision to allow only Christians to be president, vice-president, or music coordinator is within the meaning of the Equal Access Act. (p. 840)

Holding: The Court of Appeals for the Second Circuit held that: (1) the requirement in a religious club's con-

stitution that the activities coordinator and the secretary of the club be professed Christians constituted a religious test for membership or attendance insupportable under the Equal Access Act; and (2) the decision to allow only Christians to be president, vice-president, or music coordinator of the club was calculated to make certain types of speech possible and affected the religious content of speech at meetings within the meaning of the Equal Access Act. (p. 840) In sum, the appeals court concluded that the club's Christian officer requirement, as applied to some of the club's officers, was essential to the expressive content of the meetings and to the group's preservation of its purpose and identity, and was therefore protected by the Equal Access Act. (p. 848)

Reasoning: Did the School refuse to recognize the Hsus' club "on the basis of the religious content of the speech at [the Club's] meetings"? One might argue that there is no "speech" at issue here. After all, the school did not base its qualified recognition of the Club on what would be said at the Club meetings, but on what could be characterized as the Club's "act" of excluding non-Christians from leadership. The school has demonstrated that it would recognize the Walking on Water Club (or any other religious club) without regard to the content of the club's prayers or discussions, so long as no religious exclusions were made. (p. 856)

The court is therefore confronted with difficult issues about the meaning of the statutory term "speech." This court concludes that, in light of the Supreme Court's command that we construe the Equal Access Act broadly, the term "speech" includes the Walking on Water's Club leadership policy provision, to the extent that it is reasonably designed to assure that a certain type of religious speech will take place at the Club's meetings. This court takes guidance from the Supreme Court's decision in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338. In that case, the Court recognized that the message a group imparts sometimes depends upon its ability to exclude certain people, and that this exclusion may be protected by the First Amendment. The lesson this court draws from Hurley is that the principle of "speaker's autonomy" gives a speaker the right, in some circumstances, to prevent certain groups from contributing to the speaker's speech, if the groups' contribution would alter the speaker's message. (p. 856)

Hurley does not control this case, because (first) it concerns speech rights under the Constitution, not a federal statute, and (second) the Club's proposed exclusion differs somewhat from the exclusion at issue

in Hurley. Here, this court is not faced with the exclusion of a discrete group that will definitely communicate a specific message if included. Rather, a broad cross-section of people is excluded from leadership in the Club because they lack a personal characteristic or belief, without any showing that they would desire to communicate any particular message. (p. 856)

Despite these two differences, Hurley remains instructive. First, because the Act creates an analog to the First Amendment's default rule banning content-based speech discrimination, cases discussing the meaning of "speech" in First Amendment jurisprudence are also interpretive tools for understanding the Act. Second, the exclusions here and in Hurley are too similar to be meaningfully distinguished. As in Hurley, the Club's decision to exclude is based on its desire to preserve the content of its message. The Hsus claim that having Christian leaders necessarily shapes the content of the religious speech at their meetings, because the nature and quality of the speech at the meetings is dependent upon the religious commitment of the officers. The court can accept this claim to the extent that there is an integral connection between the exclusionary leadership policy and the "religious speech" at their meetings. However, as the court reviews the Club's constitution, the court sees that some of the activities are not unambiguously "religious." There is no reason to limit the range of activities that may be undertaken by an after-school religious club that discriminates, so long as the activities are integral to a sectarian religious experience. But to the extent that such a group engages in social and community activities that are not integral to a sectarian religious experience, it is in danger of becoming merely a religious affinity group practicing social exclusion. (pp. 856-857)

The constitution lists picnics and volunteer community service as Club activities, events which would obviously take place outside of the Club's meetings at the schoolhouse. This is not "religious speech" within the meaning of the Equal Access Act, if only because it will not occur at a "meeting." In addition, there is no reason to believe, based on the present record, that the planning of a picnic or a service project must be done by a Christian in order to make it meaningful for Christian students. In the Walking on Water Club, the planning of these nonschool activities is the only responsibility of the Activities Coordinator, who, according to the Hsus, must ensure that the activities do not "offend Christian sensibilities." But an agnostic with an understanding of "Christian sensibilities" might plan these activities as well as any other stu-

dent. Similarly, it is very difficult to understand why the "religious speech" at the Walking on Water Club meetings would be affected by having a non-Christian "Secretary," whose principal duties are "to accurately record the minutes of meetings and be involved in the Club's financial accounting and reporting." (p. 857)

The leadership provision is defensible, however, as to the President, Vice-President, and Music Coordinator of the Club, because their duties consist of leading Christian prayers and devotions and safeguarding the "spiritual content" of the meetings. Guaranteeing that these officers will be dedicated Christians assures that the Club's programs, in which any student is, of course, free to participate, will be imbued with certain qualities of commitment and spirituality. Thus, this court concludes that the decision to allow only Christians to be President, Vice-President, or Music Coordinator is calculated to make a certain type of speech possible, and will affect the "religious content of the speech at [the] meetings," within the meaning of the Equal Access Act. (p. 858)

This court, therefore, rejects the district's argument that the Hsus could abandon the leadership provision of the Club's constitution without suffering any tangible harm. Under the Equal Access Act, the Hsus may try to preserve the content of the religious speech at their meetings by discriminating in a way that ensures that the Club's leaders will be committed to both its cause and a particular type of expression. The school's recognition of the Club only on the condition that it abandon this effort, therefore, constitutes a failure to provide equal treatment, and denies the Walking on Water Club "equal access." In short, the Hsus are likely to succeed on their claim that Roslyn High violated Section 4071(a) of the Equal Access Act, to the extent that the Club's leadership provision applies to the President, Vice-President, and Music Coordinator of the Club. (p. 862)

By concluding that the school's nonrecognition denies the Hsus "equal access," this court is giving the term "equal access" the broad construction that the Supreme Court requires. See Mergens, 110 S. Ct. at 2366. This does not mean, however, that all efforts by a student club to exclude other students are protected by the statute, even if the exclusion is based on a club's desire to realize its expressive purpose. The Equal Access Act is not a set of federal handcuffs fitted to school principals. Schools must have rules to control their students, and rules will always have the effect of suppressing someone's idea for a club. Though the school's effort to apply its nondiscrimination rule is trumped by the Equal Access Act, the Act's mandate of

> equal access can be trumped by the school's responsibility for upholding the Constitution, for protecting the rights of other students, and for maintaining "appropriate discipline in the operation of the school." See Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 738. These are substantial limitations on the statute's intrusive power. (p. 862)
>
> This court's holding is narrow. The court does not hold that administrators must allow religious discrimination in the schools. Religious discrimination by student clubs will often be invidious and will rarely fall within this court's holding. However, when a sectarian religious club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must allow it to do so unless that club's specific form of discrimination would be invidious (and would thereby violate the equal protection rights of other students), or would otherwise disrupt or impair the school's educational mission. Courts must be extremely reluctant to overrule the judgment of local school administrators who are responsible for making these sensitive decisions. But in this case, the only judgment Roslyn High School has made is that every instance of religious discrimination by a student group is invidious and disrupts the school's mission. Invidious discrimination entails more context-specific judgments. This court holds only that, on this record, the Hsus are likely to succeed on that part of their Equal Access Act claim that relates to the Club's President, Vice-President, and Music Coordinator. (pp. 872-873)

Disposition: The decision of the District Court for the Eastern District of New York was affirmed in part, reversed in part, and remanded for the issuance of an injunction and additional proceedings, if necessary, consistent with this opinion. (p. 873)

CHAPTER 5

ANALYSES OF CASES AND PRINCIPLES

Introduction

The data for the principles presented in this chapter are derived from an analysis of the holdings and the reasonings outlined in the case briefs found in Chapter 4. Each case is analyzed within the context of the issue(s) adjudicated before the United States District Courts, the United States Courts of Appeals, or the United States Supreme Court. Cases which are illustrative of key legal precepts concerning public school students' rights of expression and speech are included in this chapter. The cases are classified by category based on the salient First Amendment issue(s) addressed by the federal courts. For the purpose of this study, there is a total of 19 different categories. The operational principles for practicing school administrators are stated at the end of the discussion for each category.

Censorship

The thrust of censorship cases regarding students' freedom of expression and speech focuses on removal of books or periodicals from school libraries. The federal courts have tended to rule against school officials in such cases unless a compelling state interest can be substanti-

ated to warrant the removal or unless the removal is related to a legitimate pedagogical concern.

In a 1976 case, Minarcini v. Strongsville City School District (1976), the Court of Appeals for the Sixth Circuit drew a line of distinction between curriculum control of textbook selection and removal of books from the school library simply because the school board found the books distasteful. The court upheld the right of school board officials to select textbooks, viewing this action as a discretionary function lodged with the board, whose members served as elected representatives of the people. However, the Minarcini court nullified the board's action of removing books from the school library stating:

> A library is a storehouse of knowledge. When created for a public school, it is an important privilege created for the benefit of the students in the school. The privilege is not subject to being withdrawn by succeeding school boards whose members might desire to "winnow" the library for books the content of which occasioned their displeasure or disapproval. (p. 581)

In brief, the action of the school board in removing books from the library violated the students' First Amendment rights of expression and speech by unconstitutionally denying them the opportunity to receive information and ideas.

Following the same path of legal reasoning, the District Court of Massachusetts, in Right to Read Defense Committee v. School Committee of the City of Chelsea (1978), considered a school to be "a readily accessible warehouse of ideas." (p. 710) The court asserted that the act of a school committee in removing an anthology of writings by adolescents from the high school library, because the com-

mittee considered the theme and language to be offensive, did not constitute a substantial state interest. Therefore, the court concluded that the committee's action was violative of the free expression and speech rights of both students and teachers.

On the other hand, in the 1980 case of Bicknell v. Vergennes Union High School Board of Directors (1980), the Court of Appeals for the Second Circuit upheld the school board's removal of two books from a public school library on the grounds that the board deemed the language contained in the books to be vulgar and indecent. The Bicknell court reasoned that no First Amendment violation occurs by removing books from a school library on the basis of vulgarity or indecency when there is no suggestion that the books were removed because of their ideas and when the board does not act out of political motivation. High school students, on school property, do not have a protected First Amendment right to material that, regardless of its literary merit, is fairly characterized as vulgar and indecent within the school context.

The seminal case regarding the issue of censorship in public schools was a United States Supreme Court case decided in 1982, Board of Education, Island Trees Union Free School District No.26 v. Pico (1982). Adhering to reasoning analogous to that of the courts in Minarcini and Right to Read Defense Committee, the Supreme Court held that local schools may not remove books from libraries of public schools merely because they dislike the ideas contained in

these books. The Court stated that the right to receive information and ideas was an inherent corollary to the rights of free speech and free press and was explicitly guaranteed by the Constitution. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers" (p. 2808). In sum, the justices declared,

> [W]e hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in these books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." (West Virginia Board of Education v. Barnette, 1943, 1187)

In a 1989 Eleventh Circuit case, Virgil v. School Board of Columbia County, Florida (1989), the federal court determined that school officials had greater control over removal of material when the material was curriculum-related. The court of appeals referred to the Supreme Court decision in Hazelwood School District v. Kuhlmeier (1988). Hazelwood established a relatively relaxed standard for regulation of student expression and speech. Regulation, according to the Hazelwood criterion, was constitutionally permissible if it was "reasonably related to legitimate pedagogical concerns" (pp. 570-571). This line of thought was applied by the court in Virgil. The Court of Appeals for the Eleventh Circuit held that the school board did not impinge students' rights to free expression and speech by removing a previously approved textbook from a high school

curriculum because of its vulgarity and sexual explicitness.

Principles

Operational principles pertinent to dealing with matters related to censorship include

1. School officials should not censor or remove materials from student access based merely on personal preferences or tastes.

2. Even when attempting to maintain community standards, federal courts are apt to rule against school officials on censorship of library material unless officials can prove that a compelling state interest is at stake.

3. In the area of curriculum, the federal courts tend to grant school officials greater discretionary control. The critical factor is establishing a nexus between an act of censorship and a legitimate pedagogical concern. If the censorship can be shown to be related to a legitimate pedagogical concern, it is likely that the court will rule in favor of school officials.

Corporal Punishment

Only one case in this study concerns the First Amendment rights of public school students as they relate to corporal punishment. Though primarily involved with issues regarding the Eighth and Fourteenth Amendments, Sims v. Board of Education School District No. 22 (1971) commented on the ancillary issue of corporal punishment and the First

Amendment. In particular, the District Court of New Mexico stated that a public school regulation allowing the use of corporal punishment was not so vague and overbroad as to have a chilling effect on the students' free exercise of expression and speech.

Principles

The major First Amendment principle derived from the Sims case is

1. School administrators have the authority to impose, in a reasonable manner, responsible and nondiscriminatory corporal punishment upon public school students without violating the students' constitutional rights, including the right of free expression and free speech.

Distribution of Religious Material

Based on the findings of this study, the distribution of religious material in the public school setting is a relatively recent legal controversy facing school administrators. Contained in the First Amendment issues raised in such litigation may be the dictates of the Equal Access Act, passed by the United States Congress in 1984. For example, in Thompson v. Waynesboro Area School District (1987), the District Court for the Middle District of Pennsylvania not only ruled on students' freedom of speech with respect to the distribution of religious material, but also addressed the secondary issue of the relationship between such distribution and the Equal Access Act.

The court specified three criteria to be reviewed in determining whether school authorities abridged the free speech rights of students. First, the court must decide whether the activity in question, that is, the distribution of religious material, constitutes speech protected by the First Amendment. Second, if it is speech and it is protected, the court must identify the nature of the forum in order to determine the extent of the school's ability to limit access to the forum. In particular, the court must decide whether school administrators have maintained a nonpublic forum or have, instead, established a public forum or a limited public forum. Finally, the court must determine whether the school's action satisfies the appropriate standard of a compelling state interest.

In Thompson, the district court differentiated between the students' First Amendment right of free speech and the meaning of the Equal Access Act. Referring to the 1943 Supreme Court decision in Martin v. Struthers (1943), the court held that the right of free speech clearly includes the right to distribute literature. As to the type of forum created by school officials, the court determined that, although officials had enforced a policy prohibiting individuals who were not students from distributing nonschool-sponsored literature on school grounds, the school had allowed students to engage in various noncurriculum-related activities during noninstructional time at the end of the school day. Accordingly, the district court found that school officials had created a limited public, or limited

open, forum and that permission to use the school's facilities was granted as a matter of course. However, the court concluded that the gathering of students in the halls to distribute religious material did not constitute a "meeting" for the purpose of equal access. Thus, the students could not find protection for their expressive activity in the Equal Access Act.

In reviewing the appropriate constitutional standard, the district court looked to Tinker (1969, p. 740) and Widmar (1981, p. 274). According to Tinker, a constitutionally valid reason for the regulation of speech exists if the forbidden speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." By the Widmar standard, if a school created a limited public forum, the school must satisfy the "compelling state interest" test and narrowly tailor its regulation to meet that end. Given these standards, the Thompson court found that the school district had denied the students' freedom of speech by restricting their distribution of religious material to an area outside the school. However, the court also held that the school district could impose content-neutral time, place, and manner restrictions on distribution of religious material inside the school.

The case of Berger v. Rensselaer Central School Corporation (1993) provides guidance for school administrators concerned about the distribution of religious material by outside organizations rather than by students. In this case, the court of appeals opined that the actions of

school authorities who were intimately involved with the distribution of Gideon Bibles in fora (i.e., classrooms) that were not open to competing ideas violated the Establishment Clause. In addition to ruling that school authorities violated the First Amendment's Establishment Clause, the court also stated that the Gideon organization did not possess free speech rights which would allow them to distribute religious material to public school students.

Johnston-Loehner v. O'Brien (1994), points to problems regarding prior restraint policies and the distribution of religious material. Contending that permitting public school students to distribute religious material would violate the Establishment Clause, school administrators attempted to justify their action of screening out material dealing with religious subjects. The district court plainly asserted that permitting student distribution of religious materials does not violate the Establishment Clause and that such a policy imposes a prior restraint on speech that amounts to an unconstitutional content-based restriction. Therefore, the policy neither served, nor was it narrowly drawn to serve, a compelling state interest.

The District Court for the Eastern District of Pennsylvania also referred to prior restraint policies in its ruling of Slotterback v. Interboro School District (1991). In finding the school district's policy to be an unconstitutional abridgement of students' First Amendment rights, the court noted that school officials were granted "unbridled discretion" to such an extent that it created a system

of prior restraint that could result in constitutionally intolerable censorship. Also, the court commented that any policy of prior restraint that does not specify the time frame within which school officials must decide whether the proposed speech will be allowed is impermissible.

Another area of concern for administrators regarding the distribution of religious material is addressed in Clark v. Dallas Independent School District (1992). In this case, the district court clearly stated that written expression is pure speech and that free speech includes the right to distribute written material peacefully. In addition, the court stated that a blanket prohibition of high school students' expression of religious views, and even a blanket prohibition of proselytizing on campus, were unconstitutional unless the students' actions caused a material and substantial disruption of the school's operation or interfered with the rights of other students. The mere fact that several students object to the distribution of religious material is not sufficient reason for school administrators to restrain distribution.

Principles

Operational principles related to the distribution of religious material in public schools include

1. Even if school administrators have created a limited public, or limited open, forum in their schools by allowing student groups to meet during noninstructional time, students do not find protection, under the Equal Ac-

cess Act, for the distribution of religious material in hallways.

2. School administrators may impose content-neutral time, place, and manner restrictions on the distribution of religious material inside the school.

3. Approving the distribution of religious material in school by outside, nonstudent organizations may expose administrators to legal action based on violation of the Establishment Clause.

4. Outside organizations do not possess free speech rights to distribute religious material to students on school grounds.

5. Administrators may prohibit the distribution of religious material by students in school by showing that the distribution would materially and substantially interfere with school operations or with the rights of other students.

6. School administrators may restrict the distribution of religious material on school grounds by showing that such restriction serves a compelling state interest and that the restriction is narrowly drawn to serve that state interest.

7. Administrators may not prohibit the distribution of religious material based solely on the objections of other students.

8. If school officials choose to implement a policy of prior restraint, it is imperative that the policy include reasonable time limits as to when officials will render a

decision about the proposed distribution of religious material.

9. School officials do not possess unbridled discretion in restricting the distribution of religious material.

Graduation Requirement of Community Service

School officials who wish to incorporate community service into the curriculum can find legal support from the Court of Appeals for the Third Circuit. In Steirer by Steirer v. Bethlehem Area School District (1993), the court held constitutional a school district's requirement that students engage in community service to be entitled to graduate from high school. The appellate court affirmed the decision of the district court, which granted the school district's motion for summary judgment, stating that the requirement for community service did not violate the First Amendment by compelling expression as to the value of altruism, nor did it constitute involuntary servitude prohibited by the Thirteenth Amendment. The court granted that a school-imposed requirement of community service could, in some contexts, implicate the First Amendment by requiring a student to provide community service to an organization whose message conflicted with the student's view. However, in this case, the school not only provided students with a wide variety of organizations from which to choose, but also allowed students to design their own experiential activities.

A crucial element in Steirer is the precept that "the boundaries of expressive conduct have been particularly cabined when the conduct is associated with school curricula" (p. 996). After noting this position, the court concluded that the act of performing community service, within the circumstances of Steirer, was not an expressive activity which directly implicated constitutional values. Indeed, the court commented that public schools have a long history and tradition of teaching values to their students, including those values connected with community responsibility.

Principles

Operational principles which school authorities may refer to when incorporating community service into their curriculum include

1. School authorities, as a rule, are afforded wider latitude by the courts in matters related to the curriculum.

2. If students are not required to adopt an organization's philosophy, are free to criticize the program, and are permitted to express their views on the value of community service, administrators are on strong legal footing regarding First Amendment challenges to a graduation requirement of community service.

3. The fact that value judgments may be implicit in the notion of community service should not deter school officials who are interested in a community service

requirement. The appellate court found that the value judgments implicit in community service are not materially different from those underlying more widely accepted programs, such as drug education, health education, and sex education.

Homosexuality

Within certain circumstances, homosexual students in public schools have been successful in claiming abridgement of their First Amendment rights of free expression and free speech. For instance, in the 1980 case of Fricke v. Lynch (1980), a male student who stated he was homosexual argued that the high school principal denied him his First Amendment right to freedom of expression by refusing to grant him permission to bring a male escort to the senior prom. The District Court of Rhode Island agreed. Several key standards related to the First Amendment were incorporated in the court's decision. Primary to the ruling in this case was the fact that the court agreed with the student's claim that the act of bringing a male escort to the prom made a political statement about equal rights and human rights. Consequently, the court viewed this act as having significant expressive content, thereby triggering First Amendment issues. The district court relied on Bonner v. Gay Student Organization (1974), to determine that this type of conduct was, in fact, a vehicle for transmitting a message and therefore, could be considered protected speech. Having made that determination, the court then looked to the Su-

preme Court cases of Tinker v. Des Moines Independent Community School District (1969) and United States v. O'Brien (1968) to review particular First Amendment standards.

Even though the court concurred that the principal had justifiable concerns of a possible disturbance and possible violent acts against the two homosexual students, the right of the students to free expression outweighed the right of the school to suppress such expression. Explicit in this ruling were several First Amendment principles that administrators should consider in addressing the rights of homosexual students in a public school setting. Namely, to justify the prohibition of particular expression, school officials must be able to show that their action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that may accompany an unpopular viewpoint. Even a legitimate interest in school discipline does not outweigh a student's right to express peacefully his views in an appropriate time, place, and manner. Ultimately, the First Amendment requires that meaningful security measures be taken by school administrators to protect, rather than to stifle, the free expression of students.

Principles

Operational principles for school administrators to consider when dealing with First Amendment issues concerning homosexual students are

1. Actions by homosexual students that involve expressive conduct could come under the umbrella of protected speech.

2. Although school administrators have the authority to regulate students' conduct to ensure safety, before curtailing expression and speech, administrators should employ the least restrictive alternative.

3. Administrators may not squelch student expression and speech (e.g., a homosexual couple attending a prom) simply because they disagree with the conduct.

4. Unless school administrators can reasonably forecast that the actions of homosexual students would materially and substantially interfere with school discipline, they may not prohibit the conduct of the students. Fear of disruption alone would be inadequate to suppress the conduct.

5. If other students react in a threatening or violent manner toward homosexual students, it is incumbent on administrators to protect the speakers rather than prohibit the speech. In brief, other students should not be granted a hecklers' veto by allowing them to determine, through prohibited and violent means, what speech will be heard.

Loitering

The only case in this study regarding student loitering, Wiemerslage v. Maine Township High School District 207 (1994), challenged an antiloitering regulation on free speech and free assembly grounds. The Court of Appeals for the

Seventh Circuit upheld the policy promulgated by school officials.

Principles

Operational principles to be considered if school administrators wish to implement an antiloitering regulation are

1. A regulation prohibiting loitering will pass constitutional muster if it is crafted in specific terms by defining the proscribed conduct.

2. Schools may restrict the rights of students to speech and assembly if students exercise these rights in a manner that involves substantial disorder, invades the rights of others, or endangers themselves or others. In the case regarding loitering, there was concern for student safety because of traffic in the area and because residents reported property damage as a result of students congregating in the area.

Nonschool Publications

In the arena of nonschool publications, the federal courts tend to limit the discretion of school officials who base their actions on a prior restraint policy. However, when officials act to prohibit obscene or vulgar material, discipline disobedient students, or thwart material which promotes disruptive behavior, the courts are more likely to uphold school authorities.

In Poxon v. Board of Education (1971), the District Court for the Eastern District of California found that a policy permitting prior restraint of nonschool publications published by students was unconstitutional in that it denied students their rights of free expression and free speech. School authorities prohibited distribution of a nonschool publication based on a policy requiring prior submission of publications for administrative approval. The court viewed this policy as one of prior restraint. Any policy of prior restraint places a heavy burden on school administrators to prove that the policy is constitutionally valid. In Poxon, the court declared that school administrators failed to demonstrate that a less restrictive alternative was unavailable.

Besides finding it difficult to uphold prior restraint, or prior approval, policies in the federal courts, school officials have had little success justifying blanket prohibition policies involving nonschool publications. The District Court of New Hampshire, in Vail v. Board of Education of Portsmouth School District (1973), nullified a regulation which summarily banned the distribution of all nonschool publications. In its finding, the court opined that the regulation did not reflect any reasonable, constitutional standard of the First Amendment, specifically noting that there was no mention that any proscribed distribution must materially and substantially interfere with school activities and discipline or with the rights of others. In a similar case, Peterson v. Board of Education of School

District No. 1 of Lincoln, Nebraska (1973), the district court ruled that despite the fact that a nonschool publication had nonstudents as some of its distributors and contributions were solicited from those receiving it, such actions did not warrant a ban on campus distribution, unless the distribution produced material and substantial interference with the school's work or discipline.

As with the distribution of religious material, federal courts have discounted restrictive policies concerning nonschool publications when those policies did not indicate the time constraints within which school administrators were required to decide if submitted publications could be distributed. Leibner v. Sharbaugh (1977) illustrates the point that, to pass federal court scrutiny, review policies regarding nonschool publications must specify time limits for administrative action as well as define relevant policy terms, such as "obscene" and "libelous." As for the distribution of nonschool publications off school grounds, the Court of Appeals for the Second Circuit asserted, in Thomas v. Board of Education, Granville Central School District (1979), that the First Amendment forbids school authorities from regulating material to which students are exposed after leaving school.

School officials, however, are not powerless in curtailing the distribution of nonschool publications. Students who distribute nonschool publications are subject to disciplinary action if they disregard established school regulations and refuse to comply with the requests of

school officials. For instance, in Sullivan v. Houston Independent School District (1973), the Court of Appeals for the Fifth Circuit declared valid a high school student's suspension for selling an underground newspaper near an entrance to the campus, even though his actions did not disrupt school activities. The Court ruled that the student's First Amendment right to freedom of expression and speech did not preclude school discipline where the student flagrantly disregarded school regulations and never attempted to comply with a prior submission rule. In Schwartz v. Schuker (1969), students went beyond advocating disorderly behavior to actually defying the direct orders of school administrators by bringing copies of a nonschool publication on campus and then refusing to surrender the publications to school authorities. Because of the students' defiant conduct, the District Court for the Eastern District of New York sided with the administrators, declaring that First Amendment rights are not absolute and are subject to constitutional restrictions for the protection of the social interest in government, order, and morality. Another circumstance in which federal courts are apt to uphold administrative action involves the use of profanity, vulgarity, and obscenity in nonschool publications. In 1969, the District Court for the Central District of California, in Baker v. Downey City Board of Education (1969), upheld the suspension of students who distributed, just outside the main campus, a nonschool publication. The critical factor in the decision was that the court deter-

mined the off-campus newspaper contained profanity and vulgarity. Pointing out that freedom of expression and speech is not synonymous with the right to say anything one pleases in any manner or place, the court ruled against the students' claim that their First Amendment rights had been violated.

Principles

Principles to be employed by school administrators when dealing with nonschool publications include

1. Prior restraint policies, that is, policies requiring review and approval of student publications prior to their distribution, are not unconstitutional per se.

2. Federal courts are likely to rule against administrative actions they view as prior restraint unless school officials can prove that such restraint was necessary to prevent disruption of the educational process or was initiated to protect the rights of others.

3. School officials are on firmer legal ground if they have established reasonable and proper policies concerning the distribution of nonschool publications on campus and if discipline is based on the students' disobedient conduct in failing to follow the stipulated policies.

4. Federal courts are less likely to side with administrators who seek to ban totally the distribution of nonschool publications which occurs off school grounds.

5. School officials cannot justify the suppression of nonschool publications merely because they dislike or disagree with the viewpoints expressed in the publications.

Offensive Speech, Threats, and Hazing

The landmark decision regarding offensive speech by students occurred in 1986 when the United States Supreme Court decided the case of Bethel School District No. 403 v. Fraser (1986). The paramount issue in Bethel centered on the student's right to expression and speech being weighed against the power of school administrators to ban the use of offensive, vulgar speech at a school-sponsored activity. In addressing the issue, the Supreme Court sought to balance the freedom of students to voice unpopular or controversial views in school with the school's countervailing interest in teaching students the boundaries of socially appropriate behavior. Within this context, the court distinguished the First Amendment's guarantee of wide freedoms provided adults in public discourse from those provided students in a public school environment. Ultimately, the court ruled that public school students, in matters of discourse, do not possess free speech rights equivalent to the rights offered adults. As a result, it is a highly appropriate function of public schools to prohibit the use of offensive and vulgar speech in public discourse and to inculcate students with values characteristic of socially appropriate behavior. Nothing in the Constitution prevents school administrators from insisting that certain modes of

student expression and speech are inappropriate and subject to sanctions. In fact, according to the Bethel standard, the determination of what manner of expression or speech is appropriate in the classroom or on the school's property rests with school authorities. The Court further commented that First Amendment jurisprudence recognizes the school's interest in protecting minor students from exposure to offensive and vulgar speech. In brief, it was perfectly appropriate for the school to disassociate itself from this kind of speech to make clear to students that conduct of that nature was totally inconsistent with the educational mission of the school.

In Poling v. Murphy (1989), the Court of Appeals for the Sixth Circuit used a line of reasoning analogous to that employed by the Supreme Court in Bethel. The appellate court reasoned that speech sponsored by the school was subject to greater control by school authorities than speech not so sponsored. Again making a distinction between "outside" speech and "in-school" speech, the court of appeals noted that limitations on speech that would be unconstitutional outside the schoolhouse would not necessarily be unconstitutional within it. Accordingly, school administrators did not abridge a student's First Amendment right to free expression and free speech by disqualifying from a student council election for making discourteous and rude remarks about the assistant principal during a speech at a school-sponsored assembly. The court affirmed that teaching students civility was a legitimate pedagogical concern con-

gruent with the school's mission. A significant district-court case which relied on Bethel was Heller v. Hodgin (1996). In Heller, the District Court for the Southern District of Indiana upheld disciplinary action against a student who merely repeated offensive speech that was originally directed to her by another student. Other than cases involving dress codes (i.e., t-shirts), Heller produced the first federal decision in which student speech was prohibited, where such speech did not rise to the Tinker standard of "substantial disruption" and did not fall within the Hazelwood criteria of school sponsorship and curriculum. The Heller case was decided exclusively on the Bethel standard of inculcating students with socially appropriate behavior.

In two cases which dealt with students directing offensive speech toward teachers off campus and after school hours, the federal courts reached different conclusions. The significant difference was whether the court perceived the expression or speech as being synonymous with "fighting words," that is, words that by their very utterance inflict injury or incite violence (Schimmel, 1993). In a 1976 case, Fenton v. Stear (1976), the District Court for the Western District of Pennsylvania determined that a high school student's use of fighting words—"he's a prick"—directed at a teacher in a public place was not a protected form of speech under the First Amendment. Hence, the disciplinary action imposed on the student by school administrators was upheld. Ten years later, in a similar case, Klein v. Smith

(1986), the District Court of Maine reached an opposite conclusion. The high school student in Klein was suspended for making a vulgar gesture to a teacher off school grounds and after school hours. Unlike the court in Fenton, the district court in this case concluded that the vulgar gesture did not constitute fighting words, which might have justified stripping communicative aspects of the gesture from protected status under the First Amendment. The court also viewed the relationship between the student's act of "giving the finger" to a teacher in a restaurant parking lot far removed from school premises and the orderly operation of the school as being too weak to warrant disciplinary action against the student. The district court, therefore, held that the suspension imposed by school administrators was violative of the student's right to free speech under the First Amendment.

However, the federal courts have not been ambivalent in supporting administrators who suspend or expel students for threatening school personnel on school grounds. In 1973, the District Court for the Northern District of Florida, Marianna Division, in Rhyne v. Childs (1973), upheld the expulsion of students who made menacing, threatening gestures toward school administrators while on school property. In a more recent case, Lovell v. Poway Unified School District (1996), the Court of Appeals for the Ninth Circuit affirmed the actions of school authorities who suspended a high school student for allegedly threatening to shoot a counselor because of frustration over a proposed schedule

change. The court stated that, in general, threats are not protected under the First Amendment, and, in particular, threats of physical violence in any form are not protected by the First Amendment for purposes of Section 1983 action under federal law. In assessing whether a statement is protected by the First Amendment or constitutes a true threat falling outside First Amendment protection, the appellate court stressed that the final outcome turns on whether a reasonable person should have foreseen that his or her words could be considered by the listener to be a serious expression of the intent to do harm or assault.

Only one case in this study, Seamons v. Snow (1996), addressed hazing and the First Amendment right of free speech. Among the constitutional issues faced by the court of appeals was whether a high school student was denied the benefit of participating on the football team because he informed his parents and school officials that he was the victim of a hazing incident in the locker room. The court reasoned that because the student's speech did not involve school-sponsored expressive activities, such as in Hazelwood School District v. Kuhlmeier (1988, p. 571), the ability of school authorities to restrict the student's speech required proof that such speech would "substantially interfere with the work of the school or impinge upon the rights of other students." See Tinker v. Des Moines Independent Community School District (1969, p. 738). Furthermore, the court declared that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to free-

dom of expression," see Tinker (p. 737), and the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" (Tinker, 1969, pp. 737-738) cannot justify the prohibition by school officials of a particular expression of opinion. Given these criteria and the facts of the case, the student's act of reporting the hazing incident was seen by the court as speech entitled to First Amendment protection, and there was no significant school interest in denying the student the right to report hazing by other students.

Principles

Specific operational principles affecting the approach school authorities should follow in matters regarding offensive speech, threats, and hazing by students are

1. Administrators have wide latitude in prohibiting offensive, vulgar speech by students when it occurs in the context of school-sponsored activities.

2. School officials possess the authority to ban the use of offensive, vulgar terms in public discourse within the school premises.

3. Offensive, vulgar speech directed at school personnel by students outside of school and after school hours may subject students to disciplinary action if such speech constitutes fighting words, or if school officials can show that such speech can adversely affect the orderly operation of the school.

4. In determining whether alleged threats fall outside First Amendment protection, school administrators should consider the alleged threats in light of the totality of circumstances, including surrounding events and the reaction of listeners.

5. Administrators may punish students who make threatening remarks to school personnel if a reasonable person could consider the threat to be a serious expression of the intent to harm or assault, or if a reasonable person should have foreseen that the threat could be interpreted as a serious expression by the listener.

6. School authorities may not deny a student benefits, including participation in extracurricular activities, or take punitive action against a student for exercising the free speech right of reporting unpleasant incidents such as hazing.

Performances, Films, and Speakers

Case law in the federal court system points to several critical questions for school administrators to answer when facing First Amendment issues involving performances, films, or speakers. For example, is a school performance the product of students and teachers involved in a curricular or extracurricular activity? What is the subject matter depicted in the performance or film? If school authorities decide that a particular performance, film, or speaker should be banned, is the reason for such action based on pedagogical concerns or on personal tastes and preferences?

May school administrators rely solely on an outside movie rating system to determine if a film is suitable for viewing by students?

In a 1981 case, Seyfried v. Walton (1981), the Court of Appeals for the Third Circuit held that a public school superintendent's decision to cancel a musical play because of its sexual theme did not infringe upon the students' First Amendment right of expression. The court concluded that the major factor in this case was the relationship of the play to the school's curriculum. Although participation in the play was voluntary, the production of the play itself was considered part of the curriculum in theater arts. Dramatic production may be considered "speech" for purposes of the First Amendment. The overriding issue, however, was that administrators responsible for directing a school's educational program must be allowed to make decisions regarding the daily operation of the school, unless the First Amendment rights of students are directly and sharply implicated. Because of this caveat, the scope of school officials' authority in halting the production of student performances is not unlimited. In Bowman v. Bethel-Tate Board of Education (1985), the District Court for the Southern District of Ohio, Western Division, decided that school authorities had abridged students' rights of free expression and free speech by canceling rehearsals of a play to be performed by third-grade students at a PTA meeting. Once the court determined that the production of the play was an extracurricular activity, the fact that school authorities

disagreed with ideas in the play and considered the play to be in derogation of the board's curriculum philosophy did not provide sufficient legal grounds to suppress the students' First Amendment rights.

In Pratt v. Independent School District No. 831, Forest Lake, Minnesota (1982), the Court of Appeals for the Eighth Circuit gave close examination to a school board's removal of films from the high school curriculum. Granting that the school board had the discretionary authority to determine curriculum, the appellate court, nevertheless, held that the board had acted unconstitutionally by failing to establish a substantial and reasonable state interest for interfering with the students' right to receive information. Most important was the fact that the board removed the films from the high school curriculum not because they contained scenes of violence or distorted the story, but because a majority of its members found the films' ideological and religious themes to be offensive.

When school officials base their actions not on personal feelings, but on the content of the performance as it relates to the well-being of students, federal courts are more likely to uphold the right of officials to ban production. Such were the circumstances in Bell v. U-32 Board of Education (1986). In Bell, the District Court of Vermont agreed that the school board acted within its authority to safeguard the well-being of students by refusing to sponsor a play depicting violence, child prostitution, drug abuse, rape, and murder.

In Borger v. Bisciglia (1995), school authorities successfully met a challenge by a student who alleged that the district's refusal to show Schindler's List, an award-winning historical film which was rated "R," violated his First Amendment rights. The district's refusal to show the film rested on a policy which prohibited the showing of films rated "R" by the movie industry rating system. Relying on the Hazelwood standard of legitimate pedagogical concern, the court opined that using the motion picture rating system as a filter to determine what films students could view was rationally related to a legitimate pedagogical goal that students not be subjected to movies with excessive violence, nudity, or "hard" language.

Performances of a religious nature can present school administrators with a myriad of constitutional questions, including those pertaining to a student's right of free speech. A Jewish student, in Bauchman by and through Bauchman v. West High School (1995), claimed that her music teacher's choice of explicitly Christian religious music and Christian religious sites for performance by the high school choir violated the First Amendment's Free Speech Clause, Establishment Clause, and Free Exercise Clause. A significant consideration in the decision rendered by the District Court of Utah was the option offered the student in regard to practices and performances, namely that she could be excused from the practice and performance of any songs she found offensive. The court stated that, under this circumstance, school officials were not acting to com-

pel speech and were, therefore, not abridging any of the student's First Amendment rights.

As mentioned in Chapter 4, First Amendment cases primarily related to adults in the public school setting are not part of this study (e.g., Silano v. Sag Harbor Union Free School District Board [1994], where a fellow school board member was censured by the board for a guest presentation he made to the tenth-grade students). Consequently, Wilson v. Chancellor (1976), is the only case in this study pertaining to the First Amendment and guest speakers in public schools. This litigation arose when the school board ordered a ban on all political speakers at its high school. The order was in response to a teacher's invitation to a Communist speaker to address his students. The students had already heard a member of the John Birch Society, a Democratic speaker, and a Republican speaker without reaction from the board. The District Court of Oregon ruled the order unconstitutional in several aspects. With respect to students' First Amendment rights, the court held that the board's order infringed upon the students' right to hear, that is, to receive information and ideas. The court further concluded that the order existed to silence absolutely the expression of an unpopular view, solely out of fear that someone would listen.

Principles

Operational principles practicing school administrators should keep in mind concerning performances, films,

and speakers include

1. With a broadening legal interpretation of curriculum after the Hazelwood decision, administrators are given greater leeway to ban performances, films, and speakers if these activities are incorporated in the school's curriculum.

2. The federal courts tend to support administrative content-based prohibition of performances, films, and speakers if school authorities predicate their action on legitimate pedagogical concerns.

3. If performances, films, and speakers are considered part of a voluntary, extracurricular program, school officials bear a heavy burden of proof in justifying restrictive policies or actions.

4. Basing restrictive policies or actions on personal beliefs, tastes, or preferences will not withstand First Amendment scrutiny.

5. Movie ratings provide a constitutionally acceptable standard on which to support a decision regarding the showing of films.

6. School administrators should offer students who object to participating in practices and performances of a religious nature the option of choosing not to participate. There should be no reduction in the student's grade if the choice is nonparticipation.

Pledge of Allegiance, National Anthem, Flag Salute

Federal courts have been consistent in their rulings about policies and regulations which mandate that students recite the Pledge of Allegiance, sing the National Anthem, or salute the flag. The courts have sent a clear message to school administrators that these policies and regulations deny students their rights as guaranteed by the First Amendment.

The line of federal cases dealing with this issue dates to 1943 when the Supreme Court, in West Virginia State Board of Education v. Barnette (1943), declared that a resolution of the West Virginia State Board of Education requiring all public school students to salute the flag and recite the Pledge of Allegiance denied students their right to free speech. In striking down the state's resolution, the Supreme Court noted that passive refusal to participate in the flag salute and pledge ceremony did not interfere with or deny the rights of others to do so, nor did this refusal present a clear and present danger to the state. The court further stated that "no official 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" (p. 1187). Applied to the public school environment, this statement implied that school officials could neither arbitrarily suppress expression and speech nor compel expression and speech.

Following the precedent set in Barnett, several lower court decisions have addressed the issue of requiring stu-

dents to recite the Pledge of Allegiance, sing the National Anthem, or salute the flag. For instance, in 1963, the District Court of Arizona, Prescott Division, in Sheldon v. Fannin (1963), echoed the Barnette ruling, affirming that "governmental authority may not directly coerce the unwilling expression of any belief" (p. 775). The District Court for the Southern District of Florida stipulated in the case of Banks v. Board of Public Instruction of Dade County (1970) that a regulation requiring students to recite the Pledge of Allegiance or stand quietly during the ceremony was in direct conflict with the free expression and free speech guarantee of the First Amendment. Similarly, in Goetz v. Ansell (1973), the Court of Appeals for the Second Circuit ruled constitutionally invalid a regulation requiring public school students who refused to salute the flag to either stand or leave the classroom. In particular, the court held that the regulation denied the student his right to freedom of expression by compelling him to stand or leave the classroom during the flag pledge ceremony.

School administrators may not compel participation in reciting the Pledge of Allegiance, singing the National Anthem, or saluting the flag, nor may they require a student who objects to these ceremonies to stand quietly or leave the classroom. However, according to the Court of Appeals for the Seventh Circuit in Sherman v. Community Consolidate District 21 (1992), administrators do not deny students their rights to free expression and free speech by

conducting such ceremonies if unwilling students are free to sit in the classroom and not participate.

Principles

School authorities should be cognizant of the following principles regarding the Pledge of Allegiance, the National Anthem, and saluting the flag:

1. Students cannot be compelled to recite the Pledge of Allegiance or the National Anthem, or to salute the flag.

2. Mandating that students who refuse to participate actively in such ceremonies stand quietly or leave the classroom is not a constitutionally viable option.

3. School administrators may allow school time for the Pledge of Allegiance, the National Anthem, or the flag salute provided that students who choose not to participate are permitted to sit quietly in their classrooms during these ceremonies.

Prayer in School

Federal litigation involving prayer in public schools often focuses on issues related to the First Amendment's Establishment Clause or Free Exercise Clause. Nonetheless, free speech claims by students can also be part of the litigation. For example, in the 1965 case of Stein v. Oshinsky (1965), the Court of Appeals for the Second Circuit ruled that the First Amendment rights of free exercise of religion and free speech do not mandate that school officials,

as agents of the state, permit student-initiated prayers in public schools. Specifically, the court asserted that First Amendment protections of free exercise of religion and free speech do not necessitate the state allowing individuals to engage in public prayer in state-owned facilities wherever and whenever they desire.

Incorporating phrases such as "nonsectarian, nonproselytizing student-initiated prayer" in a state statute does not shield school prayer from First Amendment scrutiny. Such was the language in an Alabama school-prayer statute declared unconstitutional by the District Court for the Middle District of Alabama, Northern Division, in Chandler v. James (1997). In particular, the court ruled that the statute infringed on students' free speech rights by the very fact that it limited students to nonsectarian, nonproselytizing prayer. The district court stated that public school students should be permitted to engage in sectarian, proselytizing religious speech unless the speech was disruptive for reasons other than content, such as being loud or the speaker being aggressive.

School prayer can also produce direct conflict between two First Amendment provisions, the Establishment Clause and the Free Speech Clause. In Collins v. Chandler Unified School District (1981), the Court of Appeals for the Ninth Circuit found that the principal's granting permission for student council members to recite prayers and Bible verses of their choosing at assemblies during school hours violated the Establishment Clause, even though the students'

right to free speech was implicated, and student attendance at the assemblies was voluntary.

In this study, the majority of federal cases concerning prayer in public schools centered on graduation ceremonies. The District Court for the Northern District of Iowa, Western Division, in Lundberg v. West Monona Community School District (1989), utilized public forum analysis to determine that a high school graduation ceremony was not a public, or open, forum. In viewing a graduation ceremony as a nonpublic forum, which is subject to the greatest amount of governmental restriction, the court opined that school officials had not violated the students' right to free speech by prohibiting prayer at the ceremony. Following an analogous line of reasoning in Harris v. Joint School District No. 241 (1994), the Court of Appeals for the Ninth Circuit ruled that a public high school graduation ceremony was not a public forum for the purpose of prayer and that students who desired to pray could exercise their right to religion and speech outside the ceremony.

A different legal viewpoint of public high school graduation ceremonies was put forth by the Court of Appeals for the Fifth Circuit in Ingebretsen v. Jackson Public School District (1996). The appellate court held that students' rights of free speech and free exercise of religion would not be threatened if school officials were enjoined from implementing a state statute permitting public school students to initiate nonsectarian, nonproselytizing prayer at various compulsory and noncompulsory school events. How-

ever, the court let stand as constitutional that section of the statute which allowed students to choose to solemnize their graduation ceremonies with a student-initiated, nonproselytizing, nonsectarian prayer given by a student.

Principles

While the primary First Amendment question of prayer in public schools usually focuses on the Establishment Clause, the following operational principles for school administrators concerning the relationship between students' right to free speech and school prayer can also be discerned from case law:

1. The free speech rights of students are not abridged if students are prevented from leading prayers in a public manner during regular school hours.

2. Students may pray in a silent or nondisruptive manner during school hours if such prayer is not initiated, organized, or led by a school authority.

3. Students, as individuals, are permitted to engage in sectarian, proselytizing prayer, or religious speech, if such conduct does not materially disrupt classwork, involve substantial disorder, or invade the rights of others.

4. The Establishment Clause has no bearing on private speech. It operates only on government or state-sponsored speech, and then it prohibits all religious speech, not only sectarian, proselytizing religious speech.

5. Because the Supreme Court has not ruled directly and specifically on prayer at school events occurring out-

side of normal school hours, such as graduation ceremonies and athletic contests, school administrators should become familiar with the federal court rulings particular to their circuit or district and base their actions on the legal guidelines stipulated by those courts.

Religious Expression

First Amendment issues pertaining to religious expression may arise when students hold strong religious convictions and wish to share or express those convictions in school. Such was the situation in the case of DeNooyer by DeNooyer v. Livonia Public Schools (1992), where a second-grade student was prohibited by school authorities from playing for her class during show and tell a videotape of herself singing a proselytizing religious song. The district court held that this religious expression was considered to be student-initiated speech occurring as part of the school's curriculum in the nonpublic, or closed, forum of the classroom. As such, restriction on the student's speech was constitutionally permissible and not violative of the student's right to freedom of expression and speech because the restrictive actions of school officials were related to legitimate pedagogical concerns. Also, school administrators reasonably wanted to avoid a situation where other parents and students would be offended by the religious content of the speech they were required to listen to, or would infer the school's endorsement of the religious expression presented during class.

The 1995 case of Settle v. Dickson County School Board (1995) also upheld the right of school authorities to limit students' religious expression where the expression involved a class assignment. The Court of Appeals for the Sixth Circuit ruled that a teacher could give a student the grade of zero on her research paper concerning the life of Jesus Christ without violating the student's freedom of speech rights, where the student failed to follow the teacher's specific instructions about the writing of the paper. The court contended that the teacher had wide discretion to regulate classroom speech, including, as in this case, speech involving personal religious expression.

The District Court for the Northern Division of Mississippi, Western Division, enjoined school administrators from allowing a student group to broadcast morning prayers over the intercom and permitting student-led prayers in individual classrooms during school hours. Although this case, Herdahl v. Pontotoc County School District (1995), was decided on the basis of the Establishment Clause, the district court also noted that religious expression which is contemporaneous with the beginning of the school day implies recognition of religious ideals as part of the school day and implicit school approval of the particular religious expression. The court determined that religious expression within this context was violative of the First Amendment.

Principles

These operational principles can provide guidance for school administrators faced with First Amendment issues related to religious expression:

1. School authorities have the right to exercise wide control over students' religious expression in the classroom setting.

2. School officials may prohibit students' religious expression if this expression is presented in a way that could reasonably be viewed as having the school's approval.

School Emblems

As a rule, the federal courts are hesitant to intervene in the daily operation of public schools. Such was the circumstance in a 1975 case, Augustus v. School Board of Escambia County, Florida (1975), where the Court of Appeals for the Fifth Circuit declared that the district court's injunction prohibiting the use of the name "Rebels" and the use of the Confederate Battle Flag as school emblems did not deny students their First Amendment rights to freedom of expression and speech. The pivotal factor in the court's reasoning was that the use of these symbols served as a source of racial irritation and had contributed to student violence and disruption of the school. However, the court of appeals asserted that the district court's order of a permanent injunction banning use of the symbols should be modified to allow school officials the opportunity to impose lesser restrictions which might suffice in resolving

conflict at the high school. An analogous case, Crosby by Crosby v. Holsinger (1988), was decided 13 years later by the Court of Appeals for the Fourth Circuit with a similar outcome. With respect to the First Amendment, the court concluded that a high school principal did not impinge on the students' rights of free expression and free speech by eliminating the use of the school's emblem, "Johnny Reb." The appellate court stated that a school emblem, or mascot, bears the stamp of approval of the school itself. Accordingly, it is constitutionally permissible for school administrators to disassociate the school from emblems because of legitimate educational concerns. In this case, the court saw as a legitimate concern in the fact that the use of Johnny Reb offended black students and limited their participation in school activities.

Principles

The key operational principles for school administrators to bear in mind when confronting issues related to the use of a school emblem, mascot, or symbol are

1. School administrators are free to eliminate the use of a particular emblem, mascot, or symbol if its use is a source of irritation to students, is offensive to members of the school's population, or is the proximate cause of disruption in the educational process.

School Publications

While numerous cases involving school publications have been reviewed in this study, the seminal case was litigated in 1988 when the United States Supreme Court determined the extent to which school administrators could exercise control over the content of a high school newspaper produced as part of the school's curriculum. In the precedent-setting decision of Hazelwood School District v. Kuhlmeier (1988), the court held that the First Amendment permits school authorities to exercise editorial control over the style and content of student speech in school-sponsored expressive activities if their control is reasonably related to legitimate pedagogical concerns. The court further opined that a school newspaper cannot be characterized as a forum for public expression unless school authorities have, by policy or by practice, allowed the newspaper to be used indiscriminately by the general public, or by some segment of the public. An essential element that precluded the court from viewing the school newspaper as an open public forum was the fact that school officials did not deviate from their policy that the newspaper's production was part of the school's curriculum and a regular classroom activity under the control of the journalism teacher. Officials gave no indication of an intent to open the newspaper to indiscriminate use by its student reporters and editors or by the student body in general.

The Supreme Court clearly distinguished the First Amendment issue in Hazelwood from that articulated in Tin-

ker (1969). In Tinker, the question was whether the First Amendment required a school to tolerate particular student speech, whereas, in Hazelwood, the question was whether the First Amendment required a school affirmatively to promote particular student speech. The court stated that administrators' authority over school-sponsored expressive activities, such as school newspapers, is expanded if the public might reasonably perceive the activity to bear the imprimatur of the school.

The authority of administrators over school publications, however, is reduced if the school administrators have created a limited public, or limited open, forum by allowing the school newspaper to be the vehicle for the discussion of any topic by students, or by allowing non-students to use the forum it created in the newspaper to advertise goods, services, or vocational opportunities to students. This reasoning provided the basis for the decision rendered by the Court of Appeals for the Ninth Circuit in San Diego Committee Against Registration and the Draft (CARD) v. Governing Board of Grossmont Union High School District (1986). The court found that the school board, through its policy and practice, had created a limited public forum and permitted both political and commercial speech in printing advertisements by military recruiters advocating military service. By so doing, school officials opened the use of the newspaper to at least one side of a debate over the controversial and political topic of military service. Consequently, the court held that school of-

ficials could not exclude CARD's advertisement, which presented an opposing viewpoint to the position taken in the previous ads by the military. Once officials created a limited public forum, their ability to impose subsequent constraints on the type of speech permitted in that forum was significantly reduced. Constitutionally, school officials could not become party to viewpoint-based discrimination by presenting one side of an issue but prohibiting the presentation of another side.

A recent 1997 case, Yeo v. Lexington (1997), lends support to the CARD decision. In Yeo, the Court of Appeals for the First Circuit held that the advertising pages of a public high school's newspaper and yearbook had been utilized as limited public fora and, therefore, could not be subject to viewpoint, or content-based, restriction. Once a limited public forum is created, the fact that a topic may be objectionable or controversial is irrelevant under the First Amendment analysis.

Another major point of First Amendment contention in the arena of school publications entails the authority of school administrators to implement prior review and approval policies, which may result in unconstitutional prior restraint on student expression and speech. The Court of Appeals for the Ninth Circuit, in Burch v. Baker (1988), relied on the Tinker (1969) standard to enjoin school administrators from enforcing their prior review and approval policy. In specific, the court held that to justify enforcement of the policy, administrators needed to prove

that the dissemination of the particular student expression and speech would materially and substantially interfere with the daily operation of the school. The fact that school administrators found the expression of opinion to be discomforting and unpleasant did not pass First Amendment scrutiny, nor did the administrators' undifferentiated fear that the expression would lead to disruption of school activities. In addition, the court held that merely showing that a publication was school-sponsored would not provide sufficient justification for a policy which produced an overly broad content-based prior restraint on student expression and speech.

In a decision implicitly affecting school publications, the District Court for the Southern District of Indiana, Indianapolis Division, made a distinction between a policy requiring only prior submission and review of written material and a policy which mandates prior submission, review, and administrative approval of written material before distribution is allowed. In Harless v. Darr (1996), the district court defined prior restraint as existing when a regulation gives public officials the power to deny use of a forum in advance of actual expression. In this case, the policy stipulated that students who wished to distribute more than 10 copies of written material on school grounds must notify the principal of intent to distribute at least 48 hours prior to distribution and provide a copy of the material to be reviewed by the superintendent. However, students were not obligated to await affirmative ac-

tion from the superintendent before distributing the material. Hence, the court reasoned that the policy did not impose unconstitutional prior restraint on student expression and speech.

Principles

Practicing school administrators should be cognizant of several essential principles which are relevant to school publications:

1. Administrators have the authority to exercise control over school publications if the cause of this action is related to legitimate pedagogical concerns.

2. School administrators retain a high degree of control over student publications when it can be shown that such publications are produced as part of the school's curriculum.

3. School-sponsored publications bear the imprimatur of the school. Hence, administrators have the right to disassociate the school from articles that are inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.

4. Although prior review and approval policies are not unconstitutional per se, the federal courts tend to place a heavy burden on school administrators to prove that these policies do not inflict unconstitutional prior restraint on student expression and speech.

5. Policies which merely call for a review of written material, but do not require administrative approval of the

material in advance of distribution, are much more likely to be within First Amendment boundaries.

6. Unless school officials have by policy or by practice indicated otherwise, school-sponsored publications, such as newspapers, cannot be characterized as open fora for public expression and controversial issues.

7. A regulation enacting prior restraint, to pass constitutional muster, must be tailored to a compelling state interest and written much more precisely than a regulation imposing postpublication sanctions.

8. If administrators permit the school newspaper to become a limited public forum by printing views promoting one side of a debatable issue, they cannot deny access to that forum to those who wish to express an opposing viewpoint.

9. If school officials, by policy or by practice, allow the advertising pages of school publications, such as newspapers and yearbooks, to become limited public fora, refusing to print objectionable or controversial ads constitutes viewpoint discrimination and violates the First Amendment's guarantees of free expression and free speech.

Sending Information Home Via Students

Buckel v. Prentice (1978) is the only case in this study that examines the relationship between the First Amendment and sending information home via students. The primary issue to be considered by school administrators in this matter is whether communication of this kind estab-

lishes a public forum that would enable others to utilize students as information carriers.

In Buckel, the Court of Appeals for the Sixth Circuit held that school authorities had not created a public forum for First Amendment purposes by permitting a wide variety of printed information to be sent home with students. The key fact in defense of the administrators' actions was that all of the information sent home concerned school events, home safety measures, and other material related to a logical and proper function of the school. This type of dissemination does not, of itself, create a public forum through which parents and other concerned citizens have a claim to equal access. Another significant feature in this case was that the plaintiffs were not offering a response to the content of material previously distributed by school officials. Rather, the plaintiffs themselves were seeking to create a public forum by demanding equal access to students as messengers.

Principles

Three important operational principles are derived from this case:

1. School administrators may utilize student messengers without establishing a public forum if the information sent home is directly related to school events and other activities that would reasonably be considered to be a logical function of the school.

2. Administrators may invite a public forum challenge by sending home information with students that is controversial in nature, thereby raising the question of equal access by those individuals who advocate an opposing point of view.

3. It is prudent for school administrators to refrain from sending information home via students unless the information is connected to a logical and proper function of the school.

Student Dress and Appearance

The most litigated First Amendment issue in this study, as indicated by the number of cases briefed, pertains to student dress and appearance. The vast majority of First Amendment cases in this category were argued from the mid-1960s to the mid-1970s when there was a general feeling of student unrest in many college and public school communities throughout the nation. Since that time, there has been a noticeable decline in the number of federal court cases regarding student dress and appearance. Because the Supreme Court has not ruled on the constitutionality of school policies related to this topic, no consensus or consistent line of reasoning has emerged from the district and appellate courts.

Nevertheless, several cases typify the issues raised by public school students claiming that their First Amendment rights had been denied because of the enforcement of certain dress and grooming regulations. In this study, lit-

igation contesting restrictions on the hairstyle of male students produced the greatest number of cases with respect to student dress and appearance.

Various district courts and courts of appeal have upheld the authority of school officials to enforce hairstyle regulations for male students. Federal cases in which the courts ruled in favor of the regulations include, among others, Brick v. Board of Education, School District No. 1, Denver, Colorado (1969), Crews v. Cloncs (1969), Davis v. Firment (1967), Freeman v. Flake (1971), and Hatch v. Goerke (1974). A composite review of these cases yields numerous reasons on which the courts based their decisions. To illustrate, in Davis, the court opined that the wearing of long hair by male students did not qualify as a symbolic expression, but was instead conduct which violated a school rule. Thus, the students were subject to disciplinary action. The Crews decision rested, in part, on the suppositions that the conduct of wearing long hair at school was rather far removed from pure speech, and a student's choice of grooming was not a fundamental right with which the state could not interfere. Moreover, the Crews court argued that the Federal Constitution permitted reasonable regulation on showing of classroom disruption. The courts in Brick, Freeman, and Hatch, while deciding to sustain hairstyle regulations, pointed out that questions in the realm of student dress and appearance should be adjudicated at the state level because these questions did not merit federal consideration. The most common course of legal think-

ing followed by those courts which upheld administrative sanctions against students who were in violation of dress codes was that their behavior resulted in a disruption of the learning environment and, consequently, was not entitled to First Amendment protection.

However, the federal courts did not unanimously support school administrators who enforce hairstyle regulations for male students. Decisions were also rendered upholding the right of male students to wear their hair as they choose. Favorable rulings for students who alleged that hairstyle regulations abridged the First Amendment rights of free expression and free speech can be found in cases such as Bishop v. Colaw (1971), Dawson v. Hillsborough County, Florida School Board (1971), Richards v. Thurston (1970), and Westley v. Rossi (1969). As with the courts that upheld hairstyle regulations, the federal courts that struck down these regulations as violative of students' First Amendment rights did so for a variety of reasons. For instance, the courts in Richards, Dawson, and Bishop noted that hairstyle was an issue of personal liberty through which students were constitutionally entitled to govern their appearance and express their identity. A primary justification for refuting hairstyle regulations was that such regulations were not necessary for the maintenance of an orderly and effective school environment. Thus, no compelling state interest existed to warrant overriding the students' right to individual expression.

Though the hairstyle of male students has been a focal point of legal conflict regarding student appearance, the federal courts have also decided First Amendment cases related to student dress. The Court of Appeals for the Fifth Circuit, in Burnside v. Byars (1966), held that preventing students from wearing freedom buttons impinged upon their rights of freedom of expression and speech because the wearing of the buttons was not disruptive and did not interfere with the daily operation of the school. In Wallace v. Ford (1972), the District Court for the Western District of Arkansas, Western Division, upheld certain provisions of a school's dress code and invalidated others. Rules prohibiting students from wearing clothing considered distracting and counter to the school's educational mission, such as short skirts and tight pants, were determined to be within the school's constitutional authority. But prohibition against more modest forms of dress, such as jump suits and tie-dyed clothing, was viewed by the court as being an unconstitutional infringement on the students' right to govern their personal appearance.

In regard to wearing or displaying the Confederate flag, the federal courts have upheld the right of school administrators to prohibit such conduct. For example, in Denno v. School Board of Volusia County (1997), the District Court for the Middle District of Florida, Orlando Division, held that a student's suspension was a legitimate exercise of the administrators' inherent authority to cur-

tail disruption elicited by wearing the Confederate flag and did not deny the student his right to free speech.

The kind of message displayed on students' clothing may also be subject to school regulation. In Pyle by and through Pyle v. South Hadley School Committee (1994), the District Court of Massachusetts held that school administrators may adopt a dress code banning vulgar expression and speech even if such dress poses no risk of substantial disruption. In addition to being able to control messages of vulgar content, administrators may also regulate the form of the message without impinging on students' free speech rights. The District Court for the Eastern District of Virginia, Norfolk Division, in Broussard by Lord v. School Board of the City of Norfolk (1992), upheld the suspension of a student for refusing to change a shirt with the message "Drugs Suck!"

With the rising influence of gangs in public schools, the federal courts have been faced with First Amendment challenges to dress codes restricting gang-related attire. Three cases in this study pertain to dress codes which forbid the wearing of specific jewelry or clothing because of its association with gang attire. These cases are Bivens by Green v. Albuquerque Public Schools (1995), Jeglin v. San Jacinto Unified School District (1993), and Olesen v. Board of Education of School District No. 228 (1987). In all three cases, the federal district courts sustained the right of school officials to impose dress code restrictions in efforts to curb gang-related attire and activity in the

schools. The only exception to the courts' support was in Jeglin, where school authorities were enjoined from enforcing specific dress restrictions affecting elementary and middle school students, but the court approved the restrictions in the high school setting.

However, the federal courts may strike down dress code regulations pertaining to gang symbols if those regulations lack specificity. Such was the situation in Stephenson v. Davenport Community School District (1997). In Stephenson, the appellate court held that a school district's regulation prohibiting "gang symbols" was void for vagueness because the regulation failed to define the term "gang."

Principles

Operational principles school administrators should be aware of related to student dress and appearance include

1. A key element in formulating constitutionally sound dress and grooming regulations is correlating the regulations with the orderly operation of the school or with the health and safety of students.

2. School administrators may ban attire that contains vulgar expression or messages that are contrary to the educational mission of the school.

3. School administrators may ban the wearing or displaying of symbols, such as the Confederate flag, which are the source of material and substantial disruption or are racially controversial.

4. School administrators may prohibit the wearing of certain jewelry or clothing which is associated with gang-related attire.

5. Dress codes should define the term "gang" in concrete, specific language to provide students with fair warning about the type of conduct that is prohibited.

6. Absent a showing of disruption of the educational process, health and safety concerns, or gang-related activities, students have a right to determine their personal appearance.

7. Although student dress and appearance codes were frequently litigated in the past, the Supreme Court has not ruled on this issue. Therefore, school administrators should become familiar with the case law which is relevant to their federal judicial district and circuit.

Student Protests

Student protests have been identified historically with college and university students rather than with students attending public secondary schools. However, the idea of protest has filtered down to secondary school students, thereby raising freedom of expression and speech issues that public school administrators must contend with when confronted with student demonstrators.

Based on the findings of this study, the federal courts generally view orderly student protest activities as methods of expression and speech that fall within the parameters of the First Amendment. On the other hand, the

courts also examine each case on its own unique set of circumstances and attempt to balance the students' First Amendment rights of expression and speech with the compelling state interest of maintaining an orderly and effective educational system. To illustrate, in the case of Press v. Pasadena Independent School District (1971), the District Court for the Southern District of Texas, Houston Division, ruled that a walkout demonstration by eighth-grade students did not warrant First Amendment protection of expression and speech because the protest violated a school rule, occurred on school property, and at a time students should have been in class. Taking an opposite line of reasoning based on the particular facts in Boyd v. Board of Directors of McGehee School District (1985), the district court determined that football players who protested the action of their coach by staging a walkout during a pep rally did so without causing any substantial disruption of the work of the school and without intrusion on the discipline of the school. Thus, the court held that the protest came under the umbrella of constitutionally protected expression and speech.

Federal courts, at times, have acknowledged that student protests were deserving of First Amendment safeguards while also supporting the action of school administrators in responding to the protests. In Einhorn v. Maus (1969), the District Court for the Eastern District of Pennsylvania not only decided that students engaged in an orderly demonstration of distributing literature or wearing armbands at

a graduation ceremony deserved First Amendment protection, but the court also upheld the response of school administrators, who placed factual notations in the students' school records documenting their involvement in the demonstration so that this information could be communicated to institutions of higher learning. The District Court for the Southern Division of Indiana, Evansville Division, in Dodd v. Rambis (1981), held that the actions of students distributing leaflets in the school's halls advocating a student walkout fell within First Amendment protection. Therefore, the suspension of students involved in this activity constituted an infringement of their right to freedom of expression. The court, nonetheless, reasoned that the actions of these students, when viewed in the totality of circumstances, caused school administrators to reasonably forecast material interference with school activities. The suspensions were deemed appropriate and were upheld under the wide discretion afforded school officials in making such decisions.

The Court of Appeals for the Ninth Circuit, in the 1973 case of Karp v. Becken (1973), made a distinction between curtailment of student protests and punishment of students involved in the protests. The court determined that the suspension of a public high school student for bringing onto campus and attempting to distribute protest signs was not based on a statute or an existing school rule and violated the student's freedom of speech. However, the court also ruled that school administrators were justified

in limiting the student's exercise of free speech by ordering the student to surrender the signs. It is important to note that the court stated that the student could have been legitimately suspended for disobeying an existing, reasonable school rule, such as going to the school parking lot during school hours to secure signs from his automobile.

Principles

School administrators should consider the following principles when resolving First Amendment issues related to student protests:

1. Orderly student protests which do not materially and substantially interfere with the daily operation of the school have been viewed by the federal courts as a constitutionally permissible exercise of free expression and free speech.

2. Administrators may restrict student protests that disrupt the work or discipline of the school.

3. If there is a reasonable forecast of disruption because of planned student protests, officials may act to prevent the disruption.

4. School administrators are on firm legal ground if they can deal with student protests on the basis of statutes or existing, reasonable school rules that do not implicate First Amendment rights.

5. Punishment of student protesters places a heavier burden of proof on school administrators than does the mere limiting of their protests.

Symbolic Speech

The preeminent case in this study involved the issue of symbolic speech. It was in addressing the question of students' right to wear black armbands in school as a symbolic protest against the war in Vietnam that the United States Supreme Court, for the first time, explicitly validated the legal paradigm that America's public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (Tinker, 1969). According to the Supreme Court, prohibition of the passive expression of opinion, unaccompanied by disorder, violated First Amendment guarantees of expression and speech.

This landmark case, Tinker v. Des Moines Independent Community School District (1969), was decided in 1969. It established several cardinal precepts that have guided lower-level federal courts in deciding the scope of students' rights of free expression and free speech. In addition, the Tinker decision has provided the standard for determining the degree of authority school officials possess in maintaining an orderly, purposeful educational environment. One of the more frequently cited standards from Tinker is that of substantial disruption. In particular, the court declared the expressive activities by public school students that can be construed as speech are constitutionally immunized unless they materially interfere with classwork or create substantial disorder in the school. The court also asserted that student expression and speech that

infringes on the rights of others is not afforded First Amendment defense. Finding symbolic speech akin to pure speech, the Supreme Court was careful not to equate the regulation of symbolic speech with regulations pertaining to the length of skirts, type of clothing, hairstyle, deportment, or even group demonstrations. Two other oft-quoted criteria derived from Tinker refer to the concept that school authorities may not prohibit student expression and speech because of undifferentiated fear or apprehension of a disturbance, or because of a desire to avoid the discomfort and unpleasantness that accompany controversial viewpoints. However, Tinker does suggest that school administrators may restrict expression and speech if they can reasonably forecast that the activity will create substantial disruption or material interference with the work of the school.

It is worthy of mention that, in this study, both district and appellate courts, in applying the Tinker standards, have upheld the actions of school officials in curbing the symbolic speech activities of students when these activities led to disturbances or to reasonable anticipation that discipline within the school would be at risk. Several federal court cases illustrate this point. In Hernandez v. School District Number One, Denver, Colorado (1970), the District Court of Colorado determined that the suspensions of high school students wearing black berets were not violative of the students' freedom of expression because the students had engaged in disruptive behavior. In

Guzick v. Drebus (1970), a high school policy preventing the wearing of any buttons or insignia was challenged on free speech grounds by a student who wore a button to school which solicited participation in an anti-Vietnam war demonstration. The Court of Appeals for the Sixth Circuit found no abridgement of the student's free speech rights in enforcement of the policy based on the specific situation at the high school, where school administrators could reasonably forecast a serious discipline problem and increased racial tension if students were permitted to wear buttons. Analogous to the reasoning in Guzick was the reasoning in Melton v. Young (1972), which also involved the Court of Appeals for the Sixth Circuit. In this case, the court held that the suspension of a high school student for his unwillingness to stop wearing a Confederate flag patch did not impinge on his right to symbolic speech. Because there had been substantial disorder at the high school throughout the school year centered on the use of the Confederate flag as a school symbol and because school administrators could reasonably anticipate continued racial tension, the administrators properly exercised their discretionary power in suspending the student.

Principles

The salient principles for school administrators to follow in situations related to the symbolic speech of students are

1. The Tinker standard of substantial disruption remains viable in today's federal courts and should be given utmost consideration before students' symbolic speech is prohibited.

2. School authorities should feel free to limit or ban symbolic speech if that speech results in material interference with or substantial disruption of the functioning of the school, or if such speech collides with the rights of others.

3. Administrators do not have to wait for an actual disturbance to occur. If it can be reasonably forecast that the symbolic speech will result in disruption of the school program, administrators may act beforehand to prohibit the students' speech without violating the First Amendment.

4. Students who continue to be involved in symbolic expressive activity after the activity has disrupted the work and order of the school may be subject to disciplinary action because of their conduct.

5. Students who continue to be involved in symbolic expressive activity after school officials have established a reasonable forecast of substantial disruption may be subject to disciplinary action because of their conduct.

6. School authorities may not restrict symbolic speech or discipline students for such speech based on an unsubstantiated fear of disruption.

7. Students' right to symbolic speech may not be limited nor may students be punished for merely expressing an

unpopular or controversial point of view with which school officials do not wish to contend.

Use of School Facilities

Federal litigation regarding the use of school facilities has focused on two primary sources of First Amendment debate: (a) viewpoint, or content-based, discrimination and (b) equal access to public school facilities. In resolving disputes of this nature, the federal courts have often employed the process of forum analysis as specified in the Supreme Court case of Perry Education Association v. Perry Local Educators' Association (1988). Also, the Equal Access Act, signed into law by the president in 1984, has furnished the courts with legislative guidance in questions pertinent to the use of public school facilities.

Two Supreme Court decisions have served as precedents for federal district and appellate courts in formulating the legal reasoning concerned with the use of facilities in a public school setting. These Supreme Court decisions were rendered in Board of Education of Westside Community Schools v. Mergens (1990) and Lamb's Chapel v. Center Moriches Union Free School District (1993).

In Mergens, the court addressed, among other issues, the First Amendment question of whether a public high school introduces the Equal Access Act by permitting even one noncurriculum-related (i.e., extracurricular) student group to meet on school property. By allowing even one such meeting on school property, school administrators create a

limited public, or limited open, forum and may not deny other student groups access to school facilities based on the content of their speech. Adhering to the principles stipulated in the Equal Access Act, the Mergens decision mandated that, if one noncurriculum-related student group is allowed to meet on school premises during noninstructional time, administrators must afford equal access to school facilities for student religious groups, and such access does not violate the Establishment Clause. Furthermore, the court noted that the Equal Access forbids discrimination against student groups on the basis of political, philosophical, or other speech as well as religious speech. Approximately three years after Mergens, the Supreme Court decided a second case involving the use of school facilities for religious purposes. This case, Lamb's Chapel v. Center Moriches Union Free School District (1993), was argued primarily on the issues of freedom of speech and viewpoint discrimination.

Lamb's Chapel, an evangelical church, brought suit against the school district of Center Moriches when the district denied the church use of school facilities to show a religiously oriented film series on family values and child-rearing. Both the district and appellate courts had resolved that school officials had established their facilities as limited public fora by permitting their use for a wide variety of communicative activities. However, because the district had not allowed the use of its school facilities for religious purposes, the lower courts asserted that

denial of the church's request was viewpoint neutral and, hence, there was no violation of the First Amendment's Free Speech Clause. In reversing the decisions of the district and appellate courts, the Supreme Court affirmed that the church was prohibited from using school facilities solely because its film series presented material from a religious viewpoint. Holding that the First Amendment forbids government to regulate speech in ways that favor some viewpoints or ideas at the expense of others, the Court ruled that the school district had engaged in viewpoint discrimination. Consequently, the district had violated the Free Speech Clause by denying the church access to school facilities on the grounds that its film series advocated a religious approach to family values and child-rearing. In addition, the court declared that there would be no establishment of religion in this case because the film's showing was not during school hours, not sponsored by any school, and not open to the public.

Principles

When making decisions about requests for the use of school facilities, several relevant operational principles would be useful to administrators:

1. In public schools which receive any sort of federal funding; create, by policy or by practice, a limited public forum; and allow noncurriculum-related (i.e., extracurricular) student groups to meet on school premises outside of regular school hours, equal access to school facilities

must be granted to students who wish to form a religious group.

2. Besides student religious groups, given the aforementioned criteria, the Equal Access Act stipulates that school administrators may not deny access to school facilities to any extracurricular student group based on the viewpoint, or content, of their speech.

3. Within the dictates of the Equal Access Act, if administrators permit one extracurricular student group to have access to the school newspaper, the bulletin boards, the public address system, and the like, all extracurricular student groups must be afforded the same opportunity.

4. If school authorities permit only curriculum-related student groups to use school facilities, questions of equal access, free speech, and viewpoint discrimination are moot because a limited public forum has not been created.

5. A student group is considered curriculum-related if the group is concerned with subject matter that is taught, or will soon be taught, in a regularly offered course; if the subject matter of the group relates to the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.

6. If a limited public forum has been established, school officials may choose to discontinue the forum by denying all extracurricular student groups access to school facilities.

Conclusions

A review of the federal court cases selected for this study points to several conclusions relevant to the research questions posed in Chapter 1.

First and foremost, the United States federal courts have interpreted cases concerning First Amendment freedom of expression and speech for public school students in a variety of ways. Indeed, the district court in Dodd v. Rambis (1981) commented that cases implicating the First Amendment rights of public school students tend to be fact sensitive, making it problematic to predict whether a specific type of conduct falls within First Amendment protection. Thus, it is difficult to discern one fundamental, profound legal precept from which to derive operational principles. The findings of this study indicate that three paramount standards have emerged from Supreme Court litigation regarding student expression and speech.

The first critical standard, set forth in Tinker v. Des Moines Independent Community School District (1969), is that of substantial disruption. In applying this standard, school administrators may limit or ban student expression and speech that results in, or can be reasonably forecast to result in, a substantial disruption of the school's activities. However, administrators may not curtail expression and speech merely because they personally disagree with the content of that expression or speech. Nor may they deny students the right to freedom of expression because they have an undifferentiated apprehension that a distur-

bance, or a substantial disruption of the school's operation, will occur if the expression is permitted.

The second significant legal standard concerning student expression and speech in public schools is derived from Bethel School District No. 403 v. Fraser (1986). This standard is less demanding than Tinker in permitting administrative control over student speech. Specifically, the Supreme Court affirmed that the inculcation of appropriate societal values and behavior was a proper and necessary function of schools. Accordingly, the determination of what manner of speech is appropriate for a classroom, or for a student assembly, correctly rests with school authorities.

The third, and final, influential standard affecting the relationship between the authority of school administrators and the First Amendment rights of students is found in Hazelwood School District v. Kuhlmeier (1988). Reiterating a concept first articulated in Tinker, namely that the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, the Hazelwood Court declared that a school need not tolerate student speech that is anathema to its basic educational mission. With the Hazelwood ruling, the Supreme Court granted school administrators editorial control over the style and content of student speech in school-sponsored expressive activities if the administrators' actions were reasonably related to legitimate pedagogical concerns. The Hazelwood criteria enable school authorities to restrict students' expressive activity prior

to substantial disruption, or even prior to a reasonable forecast of a disturbance, if the restrictive action focuses on a school-sponsored activity and is congruent with the school's educational mission.

Besides the Supreme Court's decisions in Bethel, Hazelwood, and Tinker, the relationship between viewpoint, or content-based, discrimination and the use of public school facilities is an important concept in the interpretation of public school cases involving student expression and speech. Since the passage of the Equal Access Act in 1984, the central interpretation of the federal courts regarding viewpoint discrimination and the use of school facilities has been consistent. The courts have held that public schools which receive federal dollars and have established themselves as limited public, or limited open, fora may not deny noncurriculum-related (i.e., extracurricular) student groups access to school facilities based on their viewpoint or the content of their speech. The judgment of school authorities as to the merit of that speech is constitutionally irrelevant. In sum, whether school officials agree or disagree with a group's message is a moot point. Once a limited public forum has been created by granting even one extracurricular student group access to school facilities, all other such groups may demand equal access.

It seems likely that litigation in the federal judicial system will continue as school administrators seek to impose what they perceive to be reasonable limits on stu-

dent expression and speech and as students test the limits set by administrators. According to the findings of this study, constitutional conflicts as to issues such as student dress and appearance, the Pledge of Allegiance, symbolic speech, and student protests have waned in recent years. However, there appear to be other impending flash points for First Amendment challenges. As religious and political groups demand that their voices be heard in America's public schools, selection of reading materials (Salomone, 1994), access to school facilities, distribution of nonschool publications, the content of school publications, and controversy over school prayer and religious expression may well provide the major issues for First Amendment litigation in the future.

A broad spectrum of operational principles was gleaned from a review of the 151 cases in this study. The more frequently litigated categories were student dress and appearance (26 cases), nonschool publications (16 cases), use of school facilities (16 cases), and school publications (11 cases). Several categories contained only one case. These categories included corporal punishment, graduation requirement of community service, homosexuality, loitering, and sending information home via students. The categories in which a Supreme Court decision had been rendered were censorship, offensive speech, Pledge of Allegiance, school publications, symbolic speech, and use of school facilities, which included two related Supreme Court decisions.

There was a total of 88 operational principles derived from this study. These principles were discerned from the holdings and reasons put forth by the United States District Courts, the United States Courts of Appeal, and the United States Supreme Court. Within the 19 categories of federal litigation in this study, the operational principles addressed a myriad of issues related to students' First Amendment rights to freedom of expression and freedom of speech in America's public schools. The specific operational principles produced from this study and enumerated in the text of Chapter 5 afford public school administrators concrete guidelines relevant to problems arising from constitutional tension between students' exercise of their First Amendment rights and the state interest of administrators in maintaining an orderly and effective school program. In addition to providing a basis for resolving constitutional conflicts in a viable, legal manner, these operational principles can be utilized in a proactive fashion by providing the framework for developing constitutionally sound administrative policies and practices that could preempt the need for litigation.

CHAPTER 6

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS FOR FURTHER STUDY

Introduction

The purpose of this study was to analyze selected federal court cases which encompassed First Amendment issues related to public school students' rights of free expression and free speech. The cases utilized in this study were adjudicated in the United States District Courts, the United States Courts of Appeals, and the United States Supreme Court. The case brief method of research served as the means of analysis in this study. From this research, specific operational principles were derived to provide guidelines for practicing school administrators on the subject of students' freedom of expression and freedom of speech in the public school setting.

This chapter contains a summary of the findings. A review of the literature provides the foundation for the study's conclusions, which are presented from a thematic perspective. Recommendations for further study are also incorporated in this chapter.

Summary

Six research questions, cited in Chapter 1, were answered in this study: How have courts at the United States

district level and above interpreted cases concerning First Amendment freedom of expression and speech for students in public schools? What is the nature of the issues encompassed by these First Amendment cases? How did the issues regarding freedom of expression and speech for public school students arise? If these issues have been resolved, how have they been resolved? What issues are likely to be the focal points of future litigation for public school administrators? What operational principles can be discerned from the analyses of the selected cases reported in this study?

Interpretation of Cases

As evident from the breadth of operational principles derived from the cases in this study, the federal courts issued a diversity of opinions pertaining to freedom of expression and freedom of speech for public school students. Consequently, it was difficult to ascertain a single underlying interpretation of how the various federal courts have ruled in the myriad of First Amendment cases involving student expression and speech. The fundamental message of the courts' various interpretations of such cases was that each case was fact sensitive and was viewed in terms of its own unique set of facts. However, within a particular set of facts, federal courts have provided guidance through the interaction of principles articulated in Bethel (1986), Hazelwood (1988), and Tinker (1969), public forum doctrine, and Equal Access Act analysis.

Nature of Issues

The nature of the issues encompassed by the selected cases was identified by categorizing each case according to the relevant First Amendment issue being litigated. There were 19 categories which indicated the nature of the First Amendment issues involved in this study. These categories included (a) censorship; (b) corporal punishment; (c) distribution of religious material; (d) graduation requirement of community service; (e) homosexuality; (f) loitering; (g) nonschool publications; (h) offensive speech, threats, and hazing; (i) performances, films, and speakers; (j) pledge of allegiance, national anthem, and flag salute; (k) prayer in school; (l) religious expression; (m) school emblems; (n) school publications; (o) sending information home via students; (p) student dress and appearance; (q) student protests; (r) symbolic speech; and (s) use of school facilities.

How Issues Arose

Issues regarding freedom of expression and speech for public students arose out of the inherent tension between the First Amendment rights of students to express themselves and the right of the state to maintain an orderly, effective educational system. Legal conflict occurred when these two competing interests collided. This collision of opposing forces—the expressive rights of students versus the authority of school administrators—gave rise to the

salient legal issues which were ultimately adjudicated in the federal court system.

Resolution of Issues

While the federal judiciary did not establish one overriding legal construct to provide a model for resolving First Amendment disputes in public schools, the Supreme Court enunciated three essential standards to be utilized in these disputes. The first standard was that of substantial disruption and was derived from the Supreme Court's ruling in Tinker v. Des Moines Independent Community School District (1969). This decision granted school administrators the authority to limit or ban student expression and speech that caused, or could be reasonably forecast to cause, a substantial disruption of the school's operation. A second standard was found in the case of Bethel School District No. 403 v. Fraser (1986). In Bethel, the Supreme Court asserted that the inculcation of socially appropriate behavior was a legitimate and proper function of schools. Thus, school officials gained the right to determine what constituted acceptable speech in a school setting. A third standard was stipulated by the Supreme Court when it rendered its decision in Hazelwood School District v. Kuhlmeier (1988). The Hazelwood ruling gave school administrators the ability to exercise editorial control over the style and content of student speech in school-sponsored expressive activities provided the administrators' actions were reasonably related to legitimate pedagogical concerns.

In reviewing these three seminal Supreme Court cases, it was evident that the broad concept of students' First Amendment rights to expression and speech endorsed in Tinker had been narrowed by the Court's more recent decisions in Bethel and Hazelwood.

In addition to defining the scope of students' First Amendment rights through standards stipulated by the Supreme Court in Bethel, Hazelwood, and Tinker, federal courts have also utilized public forum doctrine and Equal Access analysis to resolve issues regarding freedom of expression and speech for public school students. Hence, in any given fact-sensitive context, the potential for extensive interaction exists among the five forms of analysis furnished by Bethel, Hazelwood, and Tinker, the public forum doctrine, and the Equal Access Act. It is through this interaction that many of the major First Amendment issues in this study have been most comprehensively addressed by the courts.

Focal Points of Future Litigation

Given the fact that there is no one legal paradigm to guide the courts or school officials in resolving First Amendment conflicts, litigation in this area will continue. Considering the current political and social climate, it appears that future litigation may increase in several arenas. An increased number of First Amendment challenges to the authority of school administrators may emerge from issues related to the selection of reading materials, access

to school facilities, distribution of nonschool publications, content of religious material, school prayer, and religious expression.

Operational Principles

As noted, this nation's federal courts have interpreted First Amendment freedom of expression and speech cases for public school students from a variety of legal perspectives. Each court's reasoning, when not based on an established precedent, was derived from a legal analysis of the facts particular to the individual case. The findings of the United States District Courts, Courts of Appeal, and Supreme Court provided the rationale for the operational principles gleaned from this study. The operational principles were categorized according to the 19 major First Amendment issues identified in Chapter 4. The 19 categories and their corresponding principles were as follows:

Censorship. School officials should not censor or remove materials from student access based merely on personal preferences or tastes.. Even when attempting to maintain community standards, federal courts are apt to rule against school officials on censorship of library material unless officials can prove that a compelling state interest is at stake. In the area of curriculum, the federal courts tend to grant school officials greater discretionary control. The critical factor is establishing a nexus between an act of censorship and a legitimate pedagogical concern. If the

censorship can be shown to be related to a legitimate pedagogical concern, it is likely that the court will rule in favor of school officials.

Corporal punishment. School administrators have the authority to impose, in a reasonable manner, responsible and nondiscriminatory corporal punishment upon public school students without violating the students' constitutional rights, including the rights of free expression and speech.

Distribution of religious material. Even if school administrators have created a limited public, or limited open, forum in their schools by allowing student groups to meet during noninstructional time, students do not find protection, under the Equal Access Act, for the distribution of religious material in hallways. School administrators may impose content-neutral time, place, and manner restrictions on the distribution of religious material inside the school. Approving the distribution of religious material in school by outside, nonstudent organizations may expose administrators to legal action based on violation of the Establishment Clause. Organizations do not possess free speech rights to distribute religious material to students on school grounds. Administrators may prohibit the distribution of religious material by students in school by showing that the distribution would materially and substantially interfere with school operations or with the rights

of other students. School administrators may restrict the distribution of religious material on school grounds by showing that such restriction serves a compelling state interest and that the restriction is narrowly drawn to serve that state interest. Administrators may not prohibit the distribution of religious material based solely on the objections of other students. If school officials choose to implement a policy of prior restraint, it is imperative that the policy include reasonable time limits as to when officials will render a decision about the proposed distribution of religious material. School officials do not possess unbridled discretion in restricting the distribution of religious material.

Graduation requirement of community service. School authorities, as a rule, are afforded wider latitude by the courts in matters related to the curriculum. If students are not required to adopt an organization's philosophy, are free to criticize the program, and are permitted to express their views on the value of community service, administrators are on strong legal footing regarding First Amendment challenges to a graduation requirement of community service. The fact that value judgments may be implicit in the notion of community service should not deter school officials who are interested in a community service requirement. The appellate court found that the value judgments implicit in community service are not materially different

from those underlying more widely accepted programs, such as drug education, health education, and sex education.

Homosexuality. Actions by homosexual students that involve expressive conduct could come under the umbrella of protected speech. Although school administrators have the authority to regulate students' conduct to ensure safety, before curtailing expression and speech, administrators should employ the least restrictive alternative. Administrators may not squelch student expression and speech (e.g., a homosexual couple attending a prom) simply because they disagree with the conduct. Unless school administrators can reasonably forecast that the actions of homosexual students would materially and substantially interfere with school discipline, they may not prohibit the conduct of the students. Fear of disruption alone would be inadequate to suppress the conduct. If other students react in a threatening or violent manner toward homosexual students, it is incumbent on administrators to protect the speakers rather than prohibit the speech. In brief, other students should not be granted a hecklers' veto by allowing them to determine, through prohibited and violent means, what speech will be heard.

Loitering. A regulation prohibiting regulation will pass constitutional muster if it is crafted in specific terms by defining the proscribed conduct. Schools may restrict the rights of students to speech and assembly if

students exercise these rights in a manner that involves substantial disorder, invades the rights of others, or endangers themselves or others. In the case regarding loitering, there was concern for student safety because of traffic in the area and because residents reported property damage as a result of students congregating in the area.

Nonschool publications. Prior restraint policies, that is, policies requiring review and approval of student publications prior to their distribution, are not unconstitutional per se. Federal courts are likely to rule against administrative actions they view as prior restraint unless school officials can prove that such restraint was necessary to prevent disruption of the educational process or was initiated to protect the rights of others. School officials are on firmer legal ground if they have established reasonable and proper policies concerning the distribution of nonschool publications on campus, and discipline is based on the students' disobedient conduct in failing to follow the stipulated policies. Federal courts are less likely to side with administrators who seek to ban totally the distribution of nonschool publications which occurs off school grounds. School officials cannot justify the suppression of nonschool publications merely because they dislike or disagree with the viewpoints expressed in the publications.

Offensive speech, threats, and hazing. Administrators have wide latitude in prohibiting offensive, vulgar speech by students when it occurs in the context of school-sponsored activities. School officials possess the authority to ban the use of offensive, vulgar terms in public discourse within the school premises. Offensive, vulgar speech directed at school personnel by students outside of school and after school hours may subject students to disciplinary action if such speech constitutes fighting words, or if school officials can show that such speech can adversely affect the orderly operation of the school. In determining whether alleged threats fall outside First Amendment protection, school administrators should consider the alleged threats in light of the totality of circumstances, including surrounding events and the reaction of listeners. Administrators may punish students who make threatening remarks to school personnel if a reasonable person could consider the threat to be a serious expression of the intent to harm or assault, or if a reasonable person should have foreseen that the threat could be interpreted as a serious expression by the listener. School authorities may not deny a student benefits, including participation in extracurricular activities, or take punitive action against a student for exercising the free speech right of reporting unpleasant incidents such as hazing.

Performances, films, and speakers. With a broadening legal interpretation of curriculum after the Hazelwood de-

cision, administrators are given greater leeway to ban performances, films, and speakers if these activities are incorporated in the school's curriculum. The federal courts tend to support administrative content-based prohibition of performances, films, and speakers if school authorities predicate their action on legitimate pedagogical concerns. If performances, films, and speakers are considered part of a voluntary, extracurricular program, school officials bear a heavy burden of proof in justifying restrictive policies or actions. Basing restrictive policies or actions on personal beliefs, tastes, or preferences will not withstand First Amendment scrutiny. Movie ratings provide a constitutionally acceptable standard on which to support a decision regarding the showing of films. School administrators should offer students who object to participating in practices and performances of a religious nature the option of choosing not to participate. There should be no reduction in the student's grade if the choice is nonparticipation.

Pledge of allegiance, national anthem, and flag salute. Students cannot be compelled to recite the Pledge of Allegiance or the National Anthem or to salute the flag. Mandating that students who refuse to participate actively in such ceremonies stand quietly or leave the classroom is not a constitutionally viable option. School administrators may allow school time for the Pledge of Allegiance, the National Anthem, or the flag salute provided that students

who choose not to participate are permitted to sit quietly in their classrooms during these ceremonies.

Prayer in school. The free speech rights of students are not abridged if students are prevented from leading prayers in a public manner during regular school hours. Students may pray in a silent or nondisruptive manner during school hours if such prayer is not initiated, organized, or led by a school authority. Students, as individuals, are permitted to engage in sectarian, proselytizing prayer, or religious speech, if such conduct does not materially disrupt classwork, involve substantial disorder, or invade the rights of others. The Establishment Clause has no bearing on private speech. It operates only on government or state-sponsored speech, and then it prohibits all religious speech, not only sectarian, proselytizing religious speech. Because the Supreme Court has not ruled directly and specifically on prayer at school events occurring outside of normal school hours, such as graduation ceremonies and athletic contests, school administrators should become familiar with the federal court rulings particular to their circuit or district, and base their actions on the legal guidelines stipulated by those courts.

Religious expression. School authorities have the right to exercise wide control over students' religious expression in the classroom setting. School officials may prohibit students' religious expression if this expression

is presented in a way that could reasonably be viewed as having the school's approval.

School emblems. School administrators are free to eliminate the use of a particular emblem, mascot, or symbol if its use is a source of irritation to students, is offensive to members of the school's population, or is the proximate cause of disruption in the educational process.

School publications. Administrators have the authority to exercise control over school publications if the cause of this action is related to legitimate pedagogical concerns. School administrators retain a high degree of control over student publications when it can be shown that such publications are produced as part of the school's curriculum. School-sponsored publications bear the imprimatur of the school. Hence, administrators have the right to disassociate the school from articles that are inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school. Although prior review and approval policies are not unconstitutional per se, the federal courts tend to place a heavy burden on school administrators to prove that these policies do not inflict unconstitutional prior restraint on student expression and speech. Policies which merely call for a review of written material, but do not require administrative approval of the material in advance of distribution, are much more likely to be within First Amendment

boundaries. Unless school officials have by policy or by practice indicated otherwise, school-sponsored publications, such as newspapers, cannot be characterized as open fora for public expression and controversial issues. A regulation enacting prior restraint, to pass constitutional muster, must be tailored to a compelling state interest and written much more precisely than a regulation imposing post-publication sanctions. If administrators permit the school newspaper to become a limited public forum by printing views promoting one side of a debatable issue, they cannot deny access to that forum to those who wish to express an opposing viewpoint. If school officials, by policy or by practice, allow the advertising pages of school publications, such as newspapers and yearbooks, to become limited public fora, refusing to print objectionable or controversial ads constitutes viewpoint discrimination and violates the First Amendment's guarantees of free expression and free speech.

Sending information home via students. School administrators may utilize student messengers without establishing a public forum if the information sent home is directly related to school events and other activities that would reasonably be considered to be a logical function of the school. Administrators may invite a public forum challenge by sending home information with students that is controversial in nature, thereby raising the question of equal access by those individuals who advocate an opposing point

of view. It is prudent for school administrators to refrain from sending information home via students unless the information is connected to a logical and proper function of the school.

Student dress and appearance. A key element in formulating constitutionally sound dress and grooming regulations is correlating the regulations with the orderly operation of the school or with the health and safety of students. School administrators may ban attire that contains vulgar expression or messages that are contrary to the educational mission of the school. School administrators may ban the wearing or displaying of symbols, such as the Confederate flag, which are the source of material and substantial disruption or are racially controversial. School administrators may prohibit the wearing of certain jewelry or clothing which is associated with gang-related attire. Dress codes should define the term "gang" in concrete, specific language to provide students with fair warning about the type of conduct that is prohibited. Absent a showing of disruption of the educational process, health and safety concerns, or gang-related activities, students have a right to determine their personal appearance. Although student dress and appearance codes were frequently litigated in the past, the Supreme Court has not ruled on this issue. Therefore, school administrators should become familiar with the case law which is relevant to their federal judicial district and circuit.

Student protests. Orderly student protests which do not materially and substantially interfere with the daily operation of the school have been viewed by the federal courts as a constitutionally permissible exercise of free expression and free speech. Administrators may restrict student protests that disrupt the work or discipline of the school. If there is a reasonable forecast of disruption because of planned student protests, officials may act to prevent the disruption. School administrators are on firm legal ground if they can deal with student protests on the basis of statutes or existing, reasonable school rules that do not implicate First Amendment rights. Punishment of student protesters places a heavier burden of proof on school administrators than does the mere limiting of their protests.

Symbolic speech. The Tinker standard of substantial disruption remains viable in today's federal courts and should be given utmost consideration before students' symbolic speech is prohibited. School authorities should feel free to limit or ban symbolic speech if that speech results in material interference with or substantial disruption of the functioning of the school, or if such speech collides with the rights of others. Administrators do not have to wait for an actual disturbance to occur. If it can be reasonably forecast that the symbolic speech will result in disruption of the school program, administrators may act beforehand to prohibit the students' speech without violat-

ing the First Amendment. Students who continue to be involved in symbolic expressive activity after the activity has disrupted the work and order of the school may be subject to disciplinary action because of their conduct. Students who continue to be involved in symbolic expressive activity after school officials have established a reasonable forecast of substantial disruption may be subject to disciplinary action because of their conduct. School authorities may not restrict symbolic speech or discipline students for such speech based on an unsubstantiated fear of disruption. Students' right to symbolic speech may not be limited nor may students be punished for merely expressing an unpopular or controversial point of view with which school officials do not wish to contend.

Use of school facilities. In public schools which receive any sort of federal funding; create, by policy or by practice, a limited public forum; and allow noncurriculum-related (i.e., extracurricular) student groups to meet on school premises outside of regular school hours, equal access to school facilities must be granted to students who wish to form a religious group. Besides student religious groups, given the aforementioned criteria, the Equal Access Act stipulates that school administrators may not deny access to school facilities to any extracurricular student group based on the viewpoint, or content, of their speech. Within the dictates of the Equal Access Act, if administrators permit one extracurricular student group to have ac-

cess to the school newspaper, the bulletin boards, the public address system, and the like, all extracurricular student groups must be afforded the same opportunity. If school authorities permit only curriculum-related student groups to use school facilities, questions of equal access, free speech, and viewpoint discrimination are moot because a limited public forum has not been created. A student group is considered curriculum-related if the group is concerned with subject matter that is taught, or will soon be taught, in a regularly offered course; if the subject matter of the group relates to the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. If a limited public forum has been established, school officials may choose to discontinue the forum by denying all extracurricular student groups access to school facilities.

Conclusions

Throughout much of the history of public education, the doctrine of in loco parentis applied to students in America's public schools. That is, school authorities stood in place of parents while the students were at school and, consequently, had as much right to control the expression, speech, and conduct of students as did the parents. In 1969, however, this de facto operational principle was dramatically altered by the Supreme Court's decision in Tinker v. Des Moines Independent Community School District (1969).

For the first time, the highest court in the nation's judicial system recognized that public school students possess constitutional rights to expression and speech.

The Supreme Court had previously recognized, in Keyishian v. Board of Regents (1967), that a primary function of schools was to serve as a marketplace of ideas, and thus, the robust exchange of ideas was a special concern of the First Amendment. The First Amendment rights, including freedom of speech, are made applicable to the states through the Fourteenth Amendment. Accordingly, the government, which includes public school officials, must have a compelling state interest to justify restricting protected expression and speech. A corollary of this legal precept is the right of an individual to remain silent when faced with an unconstitutional government demand for expression, such as mandatory participation in the Pledge of Allegiance and salute to the American flag, as was the circumstance in West Virginia State Board of Education v. Barnette (1943). More recently, in Parate v. Isibor (1989), the Court of Appeals for the Sixth Circuit stated that the difference between compelled speech and compelled silence was without constitutional significance (McCarty & Cambron-McCabe, 1992).

It is significant to mention, however, that the federal courts, while sensitive to the censoring of ideas or the curtailment of expression and speech, have long supported the concept that school officials may regulate students' expression and speech for the purpose of maintaining

an orderly learning environment. Indeed, the Supreme Court has recognized that First Amendment rights, in general, are not absolute and that students' First Amendment rights, in particular, are not coextensive with the rights of adults (Bethel School District No. 403 v. Fraser, 1986; Strahan & Turner, 1987). Hence, students' free expression and free speech rights may be reasonably limited by policies which take into account the special circumstances of the school environment (Tinker v. Des Moines Independent Community School District, 1969; McCarty & Cambron-McCabe, 1992).

An important element in the analysis of the findings of this study is to understand the threshold at which student conduct is deemed to be expression. According to the district court in Bivens by Green v. Albuquerque Public Schools (1995), only where conduct is intended to convey a particularized message or idea and where the message is understood by those who observe the conduct is such conduct considered expression for First Amendment purposes. But a determination that certain conduct communicates an idea, in and of itself, does not ensure First Amendment protection. The tension between the expressive rights of students and the state interest of administrators in operating a non-disruptive educational process lies in the fact that the Supreme Court has not provided a definition of what conduct classifies as "speech" for purposes of the First Amendment (van Geel, 1987).

Despite the inherent ambiguity in cases balancing students' First Amendment rights against a compelling state

interest to preserve discipline in its schools, the federal courts have determined that certain forms of student expression and speech fall outside of the First Amendment's protective boundaries (van Geel, 1987; McCarthy & Cambron-McCabe, 1992). For example, the courts are not tolerant of student protests which disrupt the daily activities of the school, finding that students engaged in this type of expressive activity are subject to disciplinary action by school administrators (Dodd v. Rambis, 1981). Similarly, federal judges are not likely to overrule a forecast of substantial disruption by administrators who face speech activity, such as the wearing of provocative buttons or emblems, in racially, ethnically, or politically tense schools (Denno v. School Board of Volusia County, 1997; van Geel, 1987).

Student expression and speech that may be considered defamatory is not afforded First Amendment protection. Defamatory expression "includes spoken (slander) and written (libel) statements that are false, expose another to public shame or ridicule, and are communicated to someone other than the person defamed" (McCarty & Cambron-McCabe, 1992, p. 110). The federal courts usually uphold the authority of school administrators in prohibiting the distribution of publications containing libelous material and in imposing penalties for disseminating such material (Frasca v. Andrews, 1979). On the other hand, the courts have been reluctant to support school administrators when regulations are vague and overly broad so as to give administrators

unfettered discretion to ban distribution of publications that they consider potentially libelous (Leibner v. Sharbaugh, 1977; McCarty & Cambron-McCabe, 1992).

Offensive speech, be it verbal or displayed on clothing (e.g., t-shirts), which is viewed by federal courts as vulgar or obscene, generally has been denied the traditional First Amendment safeguard given to political speech (Pyle by and through Pyle v. South Hadley School Committee, 1994).

The same holds true for fighting words, that is, words that by their very utterance inflict injury or incite violence (Fenton v. Stear, 1976; McCarty & Cambron-McCabe, 1992; Schimmel, 1993). While the courts have not provided an exact definition of obscenity, the Supreme Court has, on several occasions, recognized the government's authority to adjust the definition of what is obscene for minors to include a broader range of materials than what is judged to be obscene for adults. The rationale for this adjustment is that the state's power to regulate students' behavior extends beyond its authority to control adult conduct (Bethel School District No. 403 v. Fraser, 1986; van Geel, 1987; McCarty & Cambron-McCabe, 1992).

In contrast to expression and speech which is offensive or inflammatory, student expression and speech pertaining to social, political, economic, or ideological issues have been granted more stringent protection under traditional First Amendment doctrine (Tinker v. Des Moines Independent Community School District, 1969). After the

Supreme Court's 1969 ruling in Tinker, the federal courts tended to adopt an expansive interpretation of constitutional protection for students' rights to free expression and free speech in public schools (Scoville v. Board of Education of Joilet Township High School District 204, 1970; McCarty & Cambron-McCabe, 1992). However, with its 1986 decision in Bethel School District No. 403 v. Fraser, 1986), followed two years later by the Hazelwood School District v. Kuhlmeier, (1988) decision, the Supreme Court made a significant distinction regarding the extent of First Amendment protection afforded the expressive activities of public school students. Specifically, the court distinguished personal expression of ideological views that merely occurs at school and does not appear to be attributable to the school from student expression that may be seen as representing the school. Personal expression (Tinker-type speech) carries strong constitutional safeguards, while student expression which may be construed as bearing the school's imprimatur may be limited by administrators to ensure that it corresponds to the school's educational mission (Hazelwood-type speech). After adopting a broad interpretation of what comprises school-sponsored expression and speech (Tinker), the Supreme Court has constricted the circumstances under which public school students can prevail in free speech claims (Bethel; Hazelwood).

Further analysis of this study's findings reveals that the courts' assessment of the type of forum in which students' expression and speech occur is pivotal in determin-

ing the degree to which expressive activities can be curtailed. The federal courts have identified three type of fora: (a) the traditional public forum, (b) the nonpublic forum, and (c) the limited public forum.

Public fora are places, such as streets and parks, where individuals historically have been allowed to speak freely with little or no governmental restriction. Nonpublic fora are those places or circumstances where there is no tradition of unlimited expression and speech. Nonpublic fora have been created and maintained for specific purposes. Consequently, the courts have permitted authorities to regulate expression and speech in these settings provided the regulation is reasonable and not a form of viewpoint, or content-based, discrimination. As noted, nonpublic fora are public places which have been established for specific purposes. Because classrooms have been established for the specific purposes of teaching and learning, they are in the category of nonpublic fora. As a result, the courts allow school authorities wide regulatory latitude in these fora (DeNooyer by DeNooyer v. Livonia Public Schools, 1992; McCarthy & Cambron-McCabe, 1992; Ahlers et al., 1996).

It is possible for a nonpublic forum to be transformed to a limited public forum by policy or by practice. For example, the school's campus or classrooms where student activities are held after school hours are often seen by the federal courts as limited public fora entitled to treatment similar to public fora. It is important to keep

in mind, however, that even if a limited public forum has been created by a public entity, such as a public school, school officials are not obligated to maintain the open forum indefinitely or without restrictions. A limited public forum may be restricted to a certain class of speakers (e.g., students) or to particular kinds of expression (e.g., noncommercial speech) as long as the restrictions are viewpoint neutral (Lamb's Chapel v. Center Moriches Union Free School District, 1993; McCarthy & Cambron-McCabe, 1992; Ahlers et al., 1996).

The Supreme Court decisions in Bethel School District No. 403 v. Fraser (1986) and Hazelwood v. Kuhlmeier (1988) are illustrative of how forum analysis affects federal court rulings on student expression and speech. In Bethel, the Court opined that a school assembly did not constitute a traditional public forum for student expression and speech. It classified the school assembly as a nonpublic forum. Thus, administrators had the authority to decide the kind of expression and speech that was in sync with the school's educational goals and what was an acceptable part of the assembly program. Similarly, in Hazelwood, the Supreme Court did not consider the school newspaper to be a public forum. Because the newspaper was a school-sponsored publication over which school authorities had historically exercised editorial control, the Court concluded that the principal acted in a constitutionally proper manner when he deleted certain articles prior to publication. In addition, the Court held that a school activity does not become a

public forum unless school officials show a clear intent to create such a forum.

The Supreme Court drew a sharp contrast between toleration of personal student expression, which is constitutionally required in circumstances such as in Tinker, and the circumstances in Hazelwood, which did not constitutionally require administrators to promote student expression that carried the school's imprimatur. Determining that student expression which represented the school could be censored, the Court granted school administrators considerable discretion to assure that students' expressive activities were congruent with the school's pedagogical objectives. As in Bethel, the Hazelwood Court adhered to a comprehensive interpretation of student expression and censorship. The Court affirmed that student expression was subject to reasonable administrative regulation if that expression occurred in a school-sponsored activity, including any extracurricular activity that was supervised by a faculty member and was designed to impart knowledge or skills to students.

Unlike student expression and speech that bears the school's imprimatur, personal expression and speech by students on school premises is governed by the Supreme Court's ruling in Tinker. In sum, the Court held that a student in a public school may express opinions about controversial issues on school grounds if such expression does "not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" (Tinker, p. 738) or collide with the rights of others. Fol-

lowing the Tinker standard, school administrators must accept mere disturbance when students exercise their First Amendment rights of free expression and free speech (La Morte, 1996). The essence of Tinker is the concept that students in America's public schools are the recipients of fundamental rights which the state is required to respect. On the other hand, federal courts have stressed that school officials have the authority and duty to maintain order and discipline in the schools. Administrators simply must take into account the constitutional rights of students as they exert control (Tinker v. Des Moines Independent Community School District, 1969; McCarthy & Cambron-McCabe, (1992).

Relevant to order and discipline, a current problem which encompasses students' expressive rights and school administrators' duty to maintain a safe school environment concerns the increasing presence of gangs and hate groups in public schools. As La Morte (1996) comments,

> The prevalence of gangs and hate groups in public schools three decades after Tinker poses serious problems for school officials because the presence of such groups on campus may contribute to substantial disruption and threats to safety. Members of such groups often wear clothing or symbols signifying their group membership. Since such dress may be in violation of dress and grooming codes, when litigated, courts must balance the First Amendment rights of students to express themselves against the legitimate right of school authorities to maintain a safe and disruption-free environment. (p. 93)

Examples of controversial student expression which may lead to First Amendment conflict include colored bandannas, baseball or other caps, brightly colored hair, tattoos, pierced noses, earrings, words shaved in scalps, ripped or

baggy pants, t-shirts depicting violence, decorative dental caps, distinctive haircuts or styles for males, and so forth. The federal courts generally contend that such expression is not worthy of First Amendment protection if there is violence in the community or school, such as intimidation of students and faculty, shootings or knifings, or racial turmoil which is related to gang or hate group activity (Jeglin v. San Jacinto Unified School District, 1993; La Morte, 1996).

The scope of Tinker's substantial disruption standard was narrowed by the decisions in Bethel and Hazelwood. In fact, the Tinker standard presently applies only to expression that clearly does not give the impression of representing the school (McCarthy & Cambron-McCabe, 1992). Furthermore, the Bethel decision revealed that, in the Supreme Court's view, assessing the appropriateness of student expression and speech ought to be a matter for school officials, not federal judges.

Without a doubt, federal case law is clear in allowing students to be punished after the fact if their expression fosters a disruption in the operation of the school, is obscene or libelous, or encourages others to engage in unlawful or dangerous activity. But prior restraint on students' personal expression necessitates a greater burden of justification on the part of school administrators. Prior restraint initiated because of an expectation of disruption must be based on fact, not intuition, to justify restrictions. The enforcement of a prior restraint policy must

bear a substantial relationship to a weighty state interest. Any such policy must be written in terms of narrow specificity so that students are fully aware of what activities are prohibited (Williams v. Spencer, 1980; McCarthy & Cambron-McCabe, 1992).

Although personal expression merits greater First Amendment protection than does school-sponsored expression, the federal judiciary has consistently endorsed the right of school administrators to institute policies regulating the time, place, and manner of personal expression. However, it is imperative that time, place, and manner restrictions be reasonable, viewpoint-neutral, uniformly applied, and not so limiting that they prevent the dissemination of student opinions (Nitzberg v. Parks, 1975; McCarthy & Cambron-McCabe, 1992; Schimmel, 1993). Also, it is incumbent upon school authorities to inform students specifically as to when and where they can express their ideas and distribute their materials (Vail v. Board of Education of Portsmouth School District, 1973; McCarthy & Cambron-McCabe, 1992). Even expressive activities such as underground newspapers, generally seen by the courts as being beyond the school's regulatory reach, may be subject to reasonable time, place, and manner restrictions. Two significant points for administrators to consider when implementing these restrictions are whether the nonschool publications are distributed on campus and what impact such student expression has on the educational process (Jacobs v. Board of School Commissioners, 1973, Ahlers et al., 1996).

A relatively recent First Amendment issue regarding student expression and speech centers on the Equal Access Act, passed by Congress in 1984. The Equal Access Act, initially supported by organizations advocating increased religious expression by students in public schools, protects far more than religious expression (Searcey v. Harris, 1989; McCarthy, 1996). Under this act, it is unlawful for school officials in a public secondary school that receives federal financial assistance and has created a limited public forum to deny recognition of any student-initiated group on the basis of religious, political, philosophical, or other content of the speech which occurs at its meetings (Board of Education of the Westside Community Schools v. Mergens, 1990; Green, 1996; La Morte, 1996). As evident from its wording, the Equal Access Act is premised on the principle of true equal access for all student-initiated groups, regardless of their ideological perspective, once the threshold of applicability is reached (Mergens, 1990; Green, 1996). Accordingly, the act offers legal protection for the expressive activities of student-initiated groups that may have little school or no community support, groups such as the Satanists, Skinheads, Gay-Straight Alliance, Homosexuals for Christ, and various nonviolent "gangs" (Student Coalition for Peace v. Lower Merion School District Board of School Directors, 1996; McCarthy, 1996; La Morte, 1996). Administrators should bear in mind that official school recognition of such groups entitles them to be participants in the school's student activities program. This

status allows student groups access to the school newspaper, bulletin boards, public address system, and school fairs (Mergens, 1996; La Morte, 1996). The only way school administrators can deny these groups official recognition is by sanctioning only those student organizations directly related to the curriculum, for example, the student council, band, athletic teams, debate teams, foreign language clubs, and the like (Garnett v. Renton School District No. 403, 1989; McCarthy, 1996; La Morte, Robles, & Robson, 1996). Even if a public school receives federal money and has established a limited public forum, administrators may ban meetings of student groups that engage in unlawful conduct, threaten or create a disruption, or threaten the safety and well being of students, employees, or school property (McCarthy & Cambron-McCabe, 1992; Robles & Robson, 1996).

An important limitation to the Equal Access Act and student-initiated groups is the fact that public school students have unsuccessfully claimed that free expression and association rights protect student-initiated social organizations with exclusive memberships, such as fraternities and sororities. The courts have upheld the decision of school authorities in denying recognition of these clubs and secret societies and prohibiting student membership in them. The federal judiciary has endorsed the idea that exclusive, student-initiated social organizations "tend to engender an undemocratic spirit of caste, to promote

cliques, and to foster contempt for school authority" (McCarthy & Cambron-McCabe, 1992, p. 121).

In the final analysis, three Supreme Court decisions—Bethel, Hazelwood, and Tinker—articulate the essential First Amendment principles that apply to student expression and speech in public schools. A review of these Supreme Court cases reveals a sense that the First Amendment's guarantee of free expression and free speech applies broadly to students' personal views (Tinker v. Des Moines Independent Community School District, 1969) and narrowly in speech that is inconsistent with socially appropriate behavior (Bethel School District No. 403 v. Fraser, 1986) or narrowly in areas considered to be part of the school's curriculum (Hazelwood School District v. Kuhlmier 1988).

A summary of the findings in this study leads to important generalizations that correspond to those identified in the literature. Schimmel (1993), in particular, emphasizes several overriding concepts derived from the holdings of the Supreme Court in Bethel, Hazelwood, and Tinker. Key to the Tinker decision is its focus on a student's personal expression and speech. Specifically, when a student in a public school speaks or writes as an individual, this type of expression is shielded by the First Amendment and cannot be prohibited unless it causes substantial disruption or interferes with the rights of others. School authorities may not punish students for expressing their opinions about controversial political, social, religious, or educational

issues, even if these opinions conflict with the views of most students, teachers, and administrators.

However, school administrators have expansive discretion in regulating student expression and speech that takes place within the curriculum (Hazelwood School District v. Kuhlmeier, 1988). In Hazelwood, the Supreme Court ruled that school officials may exercise extensive editorial control over students' expressive activities, such as publications and theatrical productions, when there are legitimate educational reasons for doing so. Administrators may also define and determine what constitutes vulgar and offensive speech (Heller v. Hodgin, 1996). In Heller, the district court upheld the suspension of a high school student who repeated vulgar, offensive speech directed toward her by another student in the cafeteria. Further, school officials, more than likely, can control students' expressive activities that are not a part of the formal curriculum as long as the activities are educational, school-sponsored, and teacher-supervised (Frasca v. Andrews, 1979; Schimmel, 1993).

The federal courts still hold to the Tinker standard regarding personal expression in that students have First Amendment rights to express controversial personal opinions in America's public schools. If the students' expression or speech occurs outside of the curriculum and does not involve special school interests, the Tinker standard of substantial disruption prevails (Bartlett & Helms, 1994). As a rule, if expression or speech occurs within the context of

school-sponsored activities, as in Bethel, administrators possess wide latitude in controlling the expression or speech. Ultimately, however,

> What may prove to have the most significant bearing on local policy and practice is the approach taken by the lower courts in applying Hazelwood principles to various permutations on the "free speech" theme, from [extracurricular] activities to underground newspapers to nonsponsored political, religious, or controversial speech. [T]he impact of a Supreme Court decision depends on individuals, institutions, and circumstances far beyond the confines of the court itself. (Salomone, 1994, p. 59)

Recommendations for Further Study

The findings and conclusions produced from this study lead to the following recommendations:

1. Studies of federal court cases after 1997 regarding students' First Amendment rights of expression and speech should be conducted to determine whether significant trends in First Amendment litigation are evident.

2. Beneficial data could be generated from studies of how the federal courts interpret students' rights to free expression and free speech within individual federal districts and individual federal circuits. Differences and similarities among specific districts or circuits should be analyzed.

3. A study should be conducted concerning the rulings of state courts in regard to the free expression and free speech rights of students to discern to what extent federal decisions have affected court decisions at the state level.

4. Research could be done to assess the impact of landmark Supreme Court cases (e.g., Tinker, Bethel, and Hazelwood) on the policies and practices of school administrators, superintendents, and boards of education.

5. A study should be made to discover if post-Hazelwood rulings at the district or circuit level have had a chilling effect on the freedom of expression and speech exercised by students in public schools.

6. Research could be conducted regarding the impact of the Equal Access Act on student expression and speech in local public schools.

7. A demographic comparison (e.g., urban-suburban-rural, upper income-lower income, large-small) of school systems within a particular judicial district or circuit should be undertaken to determine whether demographic factors influence the degree to which freedom of expression and speech is extended to students.

8. A study measuring the knowledge school administrators have of students' rights to free expression and free speech should be conducted. The data could then be analyzed to discover if there is a difference in administrative policies and practices related to the administrators' knowledge of students' First Amendment rights.

9. A study should be made at the school system level or the state level to assess the consistency of policies and practices implemented by administrators within a particular school system or state in addressing issues related to student expression and speech.

10. Local boards of education or state departments of education should be studied to evaluate their knowledge of First Amendment issues related to student expression and speech, and how their level of knowledge affects their policy-making decisions regarding First Amendment issues.

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APPENDIX A

PRINCIPLES

Principles by Category

Censorship:

1. School officials should not censor or remove materials from student access merely based on personal preferences or tastes.

2. Even when attempting to maintain community standards, federal courts are apt to rule against school officials on censorship of library material unless officials can prove that a compelling state interest is at stake.

3. In the area of curriculum, the federal courts tend to grant school officials greater discretionary control. The critical factor is establishing a nexus between an act of censorship and a legitimate pedagogical concern. If the censorship can be shown to be related to a legitimate pedagogical concern, it is likely that the court will rule in favor of school officials.

Corporal Punishment:

1. School administrators have the authority to impose, in a reasonable manner, responsible and nondiscriminatory corporal punishment upon public school students without violating the students' constitutional rights, including the right of free expression and free speech.

Distribution of Religious Material:

1. Even if school administrators have created a limited public, or limited open, forum in their schools by allowing student groups to meet during noninstructional time, students do not find protection, under the Equal Access Act, for the distribution of religious material in hallways.

2. School administrators may impose content-neutral time, place, and manner restrictions on the distribution of religious material inside the school.

3. Approving the distribution of religious material in school by outside, nonstudent organizations may expose administrators to legal action based on violation of the Establishment Clause.

4. Outside organizations do not possess free speech rights to distribute religious material to students on school grounds.

5. Administrators may prohibit the distribution of religious material by students in school by showing that the distribution would materially and substantially

interfere with school operations or with the rights of other students.

6. School administrators may restrict the distribution of religious material on school grounds by showing that such restriction serves a compelling state interest and that the restriction is narrowly drawn to serve that state interest.

7. Administrators may not prohibit the distribution of religious material based solely on the objections of other students.

8. If school officials choose to implement a policy of prior restraint, it is imperative that the policy include reasonable time limits as to when officials will render a decision about the proposed distribution of religious material.

9. School officials do not possess unbridled discretion in restricting the distribution of religious material.

Graduation Requirement of Community Service:

1. School authorities, as a rule, are afforded wider latitude by the courts in matters related to the curriculum.

2. If students are not required to adopt an organization's philosophy, are free to criticize the program, and are permitted to express their views on the value of community service, administrators are on strong legal footing regarding First Amendment challenges to a graduation requirement of community service.

3. The fact that value judgments may be implicit in the notion of community service should not deter school officials who are interested in a community service requirement. The appellate court found that the value judgments implicit in community service are not materially different from those underlying more widely accepted programs, such as drug education, health education, and sex education.

Homosexuality:

1. Actions by homosexual students that involve expressive conduct could come under the umbrella of protected speech.

2. Although school administrators have the authority to regulate students' conduct to ensure safety, before curtailing expression and speech, administrators should employ the least restrictive alternative.

3. Administrators may not squelch student expression and speech (e.g., a homosexual couple attending a prom) simply because they disagree with the conduct.

4. Unless school administrators can reasonably forecast that the actions of homosexual students would materially and substantially interfere with school discipline, they may not prohibit the conduct of the students. Fear of disruption alone would be inadequate to suppress the conduct.

5. If other students react in a threatening or violent manner toward homosexual students, it is incumbent on administrators to protect the speakers rather than prohibit the speech. In brief, other students should not be granted a hecklers' veto by allowing them to determine, through prohibited and violent means, what speech will be heard.

Loitering:

1. A regulation prohibiting loitering will pass constitutional muster if it is crafted in specific terms by defining the proscribed conduct.

2. Schools may restrict the rights of students to speech and assembly if students exercise these rights in a manner that involves substantial disorder, invades the rights of others, or endangers themselves or others. In the case regarding loitering, there was concern for student safety because of traffic in the area and because residents reported property damage as a result of students congregating in the area.

Nonschool Publications:

1. Prior restraint policies, that is, policies requiring review and approval of student publications prior to their distribution, are not unconstitutional per se.

2. Federal courts are likely to rule against administrative actions they view as prior restraint unless school officials can prove that such restraint was necessary to prevent disruption of the educational process or was initiated to protect the rights of others.

3. School officials are on firmer legal ground if they have established reasonable and proper policies concerning the distribution of nonschool publications on campus, and discipline is based on the students' disobedient conduct in failing to follow the stipulated policies.

4. Federal courts are less likely to side with administrators who seek to ban totally the distribution of non-school publications which occurs off school grounds.

5. School officials cannot justify the suppression of nonschool publications merely because they dislike or disagree with the viewpoints expressed in the publications.

Offensive Speech, Threats, and Hazing:

1. Administrators have wide latitude in prohibiting offensive, vulgar speech by students when it occurs in the context of school-sponsored activities.

2. School officials possess the authority to ban the use of offensive, vulgar terms in public discourse within the school premises.

3. Offensive, vulgar speech directed at school personnel by students outside of school and after school hours may subject students to disciplinary action if such speech constitutes fighting words, or if school officials can show that such speech can adversely affect the orderly operation of the school.

4. In determining whether alleged threats fall outside First Amendment protection, school administrators should consider the alleged threats in light of the totality of circumstances, including surrounding events and the reaction of listeners.

5. Administrators may punish students who make threatening remarks to school personnel if a reasonable person could consider the threat to be a serious expression of the intent to harm or assault, or if a reasonable person should have foreseen that the threat could be interpreted as a serious expression by the listener.

6. School authorities may not deny a student benefits, including participation in extracurricular activities, or take punitive action against a student for exercising the free speech right of reporting unpleasant incidents such as hazing.

Performances, Films, and Speakers:

1. With a broadening legal interpretation of curriculum after the Hazelwood decision, administrators are given greater leeway to ban performances, films, and speakers if these activities are incorporated in the school's curriculum.

2. The federal courts tend to support administrative content-based prohibition of performances, films, and

speakers if school authorities predicate their action on legitimate pedagogical concerns.

3. If performances, films, and speakers are considered part of a voluntary, extracurricular program, school officials bear a heavy burden of proof in justifying restrictive policies or actions.

4. Basing restrictive policies or actions on personal beliefs, tastes, or preferences will not withstand First Amendment scrutiny.

5. Movie ratings provide a constitutionally acceptable standard on which to support a decision regarding the showing of films.

6. School administrators should offer students who object to participating in practices and performances of a religious nature the option of choosing not to participate. There should be no reduction in the student's grade if the choice is nonparticipation.

Pledge of Allegiance, National Anthem, and Flag Salute:

1. Students cannot be compelled to recite the Pledge of Allegiance the National Anthem or to salute the flag.

2. Mandating that students who refuse to participate actively in such ceremonies stand quietly or leave the classroom is not a constitutionally viable option.

3. School administrators may allow school time for the Pledge of Allegiance, the National Anthem, or the flag salute provided that students who choose not to participate are permitted to sit quietly in their classrooms during these ceremonies.

Prayer in School:

1. The free speech rights of students are not abridged if students are prevented from leading prayers in a public manner during regular school hours.

2. Students may pray in a silent or nondisruptive manner during school hours if such prayer is not initiated, organized, or led by a school authority.

3. Students, as individuals, are permitted to engage in sectarian, proselytizing prayer, or religious speech, if such conduct does not materially disrupt classwork, involve substantial disorder, or invade the rights of others.

4. The Establishment Clause has no bearing on private speech. It operates only on government or state-sponsored speech, and then it prohibits all religious speech, not only sectarian, proselytizing religious speech.

5. Because the Supreme Court has not ruled directly and specifically on prayer at school events occurring outside of normal school hours, such as graduation ceremonies and athletic contests, school administrators should become familiar with the federal court rulings particular to their circuit or district, and base their actions on the legal guidelines stipulated by those courts.

Religious Expression:

1. School authorities have the right to exercise wide control over students' religious expression in the classroom setting.

2. School officials may prohibit students' religious expression if this expression is presented in a way that could reasonably be viewed as having the school's approval.

School Emblems:

1. School administrators are free to eliminate the use of a particular emblem, mascot, or symbol if its use is a source of irritation to students, is offensive to members of the school's population, or is the proximate cause of disruption in the educational process.

School Publications:

1. Administrators have the authority to exercise control over school publications if the cause of this action is related to legitimate pedagogical concerns.

2. School administrators retain a high degree of control over student publications when it can be shown that such publications are produced as part of the school's curriculum.

3. School-sponsored publications bear the imprimatur of the school. Hence, administrators have the right to disassociate the school from articles that are inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.

4. Although prior review and approval policies are not unconstitutional per se, the federal courts tend to place a heavy burden on school administrators to prove

that these policies do not inflict unconstitutional prior restraint on student expression and speech.

5. Policies which merely call for a review of written material, but do not require administrative approval of the material in advance of distribution, are much more likely to be within First Amendment boundaries.

6. Unless school officials have by policy or by practice indicated otherwise, school-sponsored publications, such as newspapers, cannot be characterized as open fora for public expression and controversial issues.

7. A regulation enacting prior restraint, to pass constitutional muster, must be tailored to a compelling state interest and written much more precisely than a regulation imposing post-publication sanctions.

8. If administrators permit the school newspaper to become a limited public forum by printing views promoting one side of a debatable issue, they cannot deny access to that forum to those who wish to express an opposing viewpoint.

9. If school officials, by policy or by practice, allow the advertising pages of school publications, such as newspapers and yearbooks, to become limited public fora, refusing to print objectionable or controversial ads constitutes viewpoint discrimination and violates the First Amendment's guarantees of free expression and free speech.

Sending Information Home Via Students:

1. School administrators may utilize student messengers without establishing a public forum if the information sent home is directly related to school events and other activities that would reasonably be considered to be a logical function of the school.

2. Administrators may invite a public forum challenge by sending home information with students that is controversial in nature, thereby raising the question of equal access by those individuals who advocate an opposing point of view.

3. It is prudent for school administrators to refrain from sending information home via students unless the information is connected to a logical and proper function of the school.

Student Dress and Appearance:

1. A key element in formulating constitutionally sound dress and grooming regulations is correlating the regu-

lations with the orderly operation of the school or with the health and safety of students.

2. School administrators may ban attire that contains vulgar expression or messages that are contrary to the educational mission of the school.

3. School administrators may ban the wearing or displaying of symbols, such as the Confederate flag, which are the source of material and substantial disruption or are racially controversial.

4. School administrators may prohibit the wearing of certain jewelry or clothing which is associated with gang-related attire.

5. Dress codes should define the term "gang" in concrete, specific language to provide students with fair warning about the type of conduct that is prohibited.

6. Absent a showing of disruption of the educational process, health and safety concerns, or gang-related activities, students have a right to determine their personal appearance.

7. Although student dress and appearance codes were frequently litigated in the past, the Supreme Court has not ruled on this issue. Therefore, school administrators should become familiar with the case law which is relevant to their federal judicial district and circuit.

Student Protests:

1. Orderly student protests which do not materially and substantially interfere with the daily operation of the school have been viewed by the federal courts as a constitutionally permissible exercise of free expression and free speech.

2. Administrators may restrict student protests that disrupt the work or discipline of the school.

3. If there is a reasonable forecast of disruption because of planned student protests, officials may act to prevent the disruption.

4. School administrators are on firm legal ground if they can deal with student protests on the basis of statutes or existing, reasonable school rules that do not implicate First Amendment rights.

5. Punishment of student protesters places a heavier burden of proof on school administrators than does the mere limiting of their protests.

Symbolic Speech:

1. The Tinker standard of substantial disruption remains viable in today's federal courts and should be given utmost consideration before students' symbolic speech is prohibited.

2. School authorities should feel free to limit or ban symbolic speech if that speech results in material interference with or substantial disruption of the functioning of the school, or if such speech collides with the rights of others.

3. Administrators do not have to wait for an actual disturbance to occur. If it can be reasonably forecast that the symbolic speech will result in disruption of the school program, administrators may act beforehand to prohibit the students' speech without violating the First Amendment.

4. Students who continue to be involved in symbolic expressive activity after the activity has disrupted the work and order of the school may be subject to disciplinary action because of their conduct.

5. Students who continue to be involved in symbolic expressive activity after school officials have established a reasonable forecast of substantial disruption may be subject to disciplinary action because of their conduct.

6. School authorities may not restrict symbolic speech or discipline students for such speech based on an unsubstantiated fear of disruption.

7. Students' right to symbolic speech may not be limited nor may students be punished for merely expressing an unpopular or controversial point of view with which school officials do not wish to contend.

Use of School Facilities:

1. In public schools which receive any sort of federal funding; create, by policy or by practice, a limited public forum; and allow noncurriculum-related (i.e., extracurricular) student groups to meet on school premises outside of regular school hours, equal access to school facilities must be granted to students who wish to form a religious group.

2. Besides student religious groups, given the aforementioned criteria, the Equal Access Act stipulates that school administrators may not deny access to school facilities to any extracurricular student group based on the viewpoint, or content, of their speech.

3. Within the dictates of the Equal Access Act, if administrators permit one extracurricular student group to have access to the school newspaper, the bulletin boards, the public address system, and the like, all extracurricular student groups must be afforded the same opportunity.

4. If school authorities permit only curriculum-related student groups to use school facilities, questions of equal access, free speech, and viewpoint discrimination are moot because a limited public forum has not been created.

5. A student group is considered curriculum-related if the group is concerned with subject matter that is taught, or will soon be taught, in a regularly offered course; if the subject matter of the group relates to the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.

6. If a limited public forum has been established, school officials may choose to discontinue the forum by denying all extracurricular student groups access to school facilities.

APPENDIX B

PRINCIPLES BY CATEGORY

Principles by Category

Censorship:

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Offensive Speech, Threats, and Hazing:

1. Administrators have wide latitude in prohibiting offensive, vulgar speech by students when it occurs in the context of school-sponsored activities.

2. School officials possess the authority to ban the use of offensive, vulgar terms in public discourse within the school premises.

3. Offensive, vulgar speech directed at school personnel by students outside of school and after school hours may subject students to disciplinary action if such speech constitutes fighting words, or if school officials can show that such speech can adversely affect the orderly operation of the school.

4. In determining whether alleged threats fall outside First Amendment protection, school administrators should consider the alleged threats in light of the totality of circumstances, including surrounding events and the reaction of listeners.

5. Administrators may punish students who make threatening remarks to school personnel if a reasonable person could consider the threat to be a serious expression of the intent to harm or assault, or if a reasonable person should have foreseen that the threat could be interpreted as a serious expression by the listener.

6. School authorities may not deny a student benefits, including participation in extracurricular activities, or take punitive action against a student for exercising the free speech right of reporting unpleasant incidents such as hazing.

Performances, Films, and Speakers:

1. With a broadening legal interpretation of curriculum after the Hazelwood decision, administrators are given greater leeway to ban performances, films, and speakers if these activities are incorporated in the school's curriculum.

2. The federal courts tend to support administrative content-based prohibition of performances, films, and

speakers if school authorities predicate their action on legitimate pedagogical concerns.

3. If performances, films, and speakers are considered part of a voluntary, extracurricular program, school officials bear a heavy burden of proof in justifying restrictive policies or actions.

4. Basing restrictive policies or actions on personal beliefs, tastes, or preferences will not withstand First Amendment scrutiny.

5. Movie ratings provide a constitutionally acceptable standard on which to support a decision regarding the showing of films.

6. School administrators should offer students who object to participating in practices and performances of a religious nature the option of choosing not to participate. There should be no reduction in the student's grade if the choice is nonparticipation.

Pledge of Allegiance, National Anthem, and Flag Salute:

1. Students cannot be compelled to recite the Pledge of Allegiance the National Anthem or to salute the flag.

2. Mandating that students who refuse to participate actively in such ceremonies stand quietly or leave the classroom is not a constitutionally viable option.

3. School administrators may allow school time for the Pledge of Allegiance, the National Anthem, or the flag salute provided that students who choose not to participate are permitted to sit quietly in their classrooms during these ceremonies.

Prayer in School:

1. The free speech rights of students are not abridged if students are prevented from leading prayers in a public manner during regular school hours.

2. Students may pray in a silent or nondisruptive manner during school hours if such prayer is not initiated, organized, or led by a school authority.

3. Students, as individuals, are permitted to engage in sectarian, proselytizing prayer, or religious speech, if such conduct does not materially disrupt classwork, involve substantial disorder, or invade the rights of others.

4. The Establishment Clause has no bearing on private speech. It operates only on government or state-sponsored speech, and then it prohibits all religious speech, not only sectarian, proselytizing religious speech.

5. Because the Supreme Court has not ruled directly and specifically on prayer at school events occurring outside of normal school hours, such as graduation ceremonies and athletic contests, school administrators should become familiar with the federal court rulings particular to their circuit or district, and base their actions on the legal guidelines stipulated by those courts.

Religious Expression:

1. School authorities have the right to exercise wide control over students' religious expression in the classroom setting.

2. School officials may prohibit students' religious expression if this expression is presented in a way that could reasonably be viewed as having the school's approval.

School Emblems:

1. School administrators are free to eliminate the use of a particular emblem, mascot, or symbol if its use is a source of irritation to students, is offensive to members of the school's population, or is the proximate cause of disruption in the educational process.

School Publications:

1. Administrators have the authority to exercise control over school publications if the cause of this action is related to legitimate pedagogical concerns.

2. School administrators retain a high degree of control over student publications when it can be shown that such publications are produced as part of the school's curriculum.

3. School-sponsored publications bear the imprimatur of the school. Hence, administrators have the right to disassociate the school from articles that are inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.

4. Although prior review and approval policies are not unconstitutional per se, the federal courts tend to place a heavy burden on school administrators to prove

that these policies do not inflict unconstitutional prior restraint on student expression and speech.

5. Policies which merely call for a review of written material, but do not require administrative approval of the material in advance of distribution, are much more likely to be within First Amendment boundaries.

6. Unless school officials have by policy or by practice indicated otherwise, school-sponsored publications, such as newspapers, cannot be characterized as open fora for public expression and controversial issues.

7. A regulation enacting prior restraint, to pass constitutional muster, must be tailored to a compelling state interest and written much more precisely than a regulation imposing post-publication sanctions.

8. If administrators permit the school newspaper to become a limited public forum by printing views promoting one side of a debatable issue, they cannot deny access to that forum to those who wish to express an opposing viewpoint.

9. If school officials, by policy or by practice, allow the advertising pages of school publications, such as newspapers and yearbooks, to become limited public fora, refusing to print objectionable or controversial ads constitutes viewpoint discrimination and violates the First Amendment's guarantees of free expression and free speech.

Sending Information Home Via Students:

1. School administrators may utilize student messengers without establishing a public forum if the information sent home is directly related to school events and other activities that would reasonably be considered to be a logical function of the school.

2. Administrators may invite a public forum challenge by sending home information with students that is controversial in nature, thereby raising the question of equal access by those individuals who advocate an opposing point of view.

3. It is prudent for school administrators to refrain from sending information home via students unless the information is connected to a logical and proper function of the school.

Student Dress and Appearance:

1. A key element in formulating constitutionally sound dress and grooming regulations is correlating the regu-

lations with the orderly operation of the school or with the health and safety of students.

2. School administrators may ban attire that contains vulgar expression or messages that are contrary to the educational mission of the school.

3. School administrators may ban the wearing or displaying of symbols, such as the Confederate flag, which are the source of material and substantial disruption or are racially controversial.

4. School administrators may prohibit the wearing of certain jewelry or clothing which is associated with gang-related attire.

5. Dress codes should define the term "gang" in concrete, specific language to provide students with fair warning about the type of conduct that is prohibited.

6. Absent a showing of disruption of the educational process, health and safety concerns, or gang-related activities, students have a right to determine their personal appearance.

7. Although student dress and appearance codes were frequently litigated in the past, the Supreme Court has not ruled on this issue. Therefore, school administrators should become familiar with the case law which is relevant to their federal judicial district and circuit.

Student Protests:

1. Orderly student protests which do not materially and substantially interfere with the daily operation of the school have been viewed by the federal courts as a constitutionally permissible exercise of free expression and free speech.

2. Administrators may restrict student protests that disrupt the work or discipline of the school.

3. If there is a reasonable forecast of disruption because of planned student protests, officials may act to prevent the disruption.

4. School administrators are on firm legal ground if they can deal with student protests on the basis of statutes or existing, reasonable school rules that do not implicate First Amendment rights.

5. Punishment of student protesters places a heavier burden of proof on school administrators than does the mere limiting of their protests.

Symbolic Speech:

1. The Tinker standard of substantial disruption remains viable in today's federal courts and should be given utmost consideration before students' symbolic speech is prohibited.

2. School authorities should feel free to limit or ban symbolic speech if that speech results in material interference with or substantial disruption of the functioning of the school, or if such speech collides with the rights of others.

3. Administrators do not have to wait for an actual disturbance to occur. If it can be reasonably forecast that the symbolic speech will result in disruption of the school program, administrators may act beforehand to prohibit the students' speech without violating the First Amendment.

4. Students who continue to be involved in symbolic expressive activity after the activity has disrupted the work and order of the school may be subject to disciplinary action because of their conduct.

5. Students who continue to be involved in symbolic expressive activity after school officials have established a reasonable forecast of substantial disruption may be subject to disciplinary action because of their conduct.

6. School authorities may not restrict symbolic speech or discipline students for such speech based on an unsubstantiated fear of disruption.

7. Students' right to symbolic speech may not be limited nor may students be punished for merely expressing an unpopular or controversial point of view with which school officials do not wish to contend.

Use of School Facilities:

1. In public schools which receive any sort of federal funding; create, by policy or by practice, a limited public forum; and allow noncurriculum-related (i.e., extracurricular) student groups to meet on school premises outside of regular school hours, equal access to school facilities must be granted to students who wish to form a religious group.

2. Besides student religious groups, given the aforementioned criteria, the Equal Access Act stipulates that school administrators may not deny access to school facilities to any extracurricular student group based on the viewpoint, or content, of their speech.

3. Within the dictates of the Equal Access Act, if administrators permit one extracurricular student group to have access to the school newspaper, the bulletin boards, the public address system, and the like, all extracurricular student groups must be afforded the same opportunity.

4. If school authorities permit only curriculum-related student groups to use school facilities, questions of equal access, free speech, and viewpoint discrimination are moot because a limited public forum has not been created.

5. A student group is considered curriculum-related if the group is concerned with subject matter that is taught, or will soon be taught, in a regularly offered course; if the subject matter of the group relates to the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.

6. If a limited public forum has been established, school officials may choose to discontinue the forum by denying all extracurricular student groups access to school facilities.

APPENDIX C

CHAPTER 4 CASES IN ALPHABETICAL ORDER BY FEDERAL JURISDICTION

Chapter 4 Cases in Alphabetical Order by Federal Jurisdiction

District Courts:

Alabama and Coushatta Tribes of Texas v. Trustees of the Big Sandy Independent School District, 817 F. Supp. 1319 (E.D. Tex. 1993)

Aguirre v. Tahoka Independent School District, 311 F. Supp. 664 (N.D.Tex. 1970)

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Banks v. Board of Public Instruction of Dade County, 314 F. 285 (S.D.Fla. 1970)

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Bell v. U-32 Board of Education, 630 F. Supp. 939 (D.Vt. 1986)

Bivens by Green v. Albuquergue Public Schools, 899 F. Supp. 556 (D.N.M. 1995)

Borger v. Bisciglia, 888 F. Supp. 97 (E.D.Wis. 1995)

Bowman v. Bethel-Tate Board of Education, 610 F. Supp. 577 (D.C.Ohio 1985)

Boyd v. Board of Directors of McGehee School District No. 17, 612 F. Supp. 86 (D.C.Ark. 1985)

Brandon v. Board of Education of Guilderland, 487 F. Supp. 1219 (N.D.N.Y. 1980)

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Jeglin v. San Jacinto Unified School District, 827 F. Supp. 1459 (C.D.Cal. 1993)

Johnston-Loehner v. O'Brien, 859 F. Supp. 575 (M.D.Fla. 1994)

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Right to Read Defense Committee v. School Committee of the City of Chelsea, 454 F. Supp. 703 (D.Mass. 1978)

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Roberts v. Madigan, 702 F. Supp. 1505 (D.Colo. 1989)

Rumler v. Board of School Trustees for Lexington County District No. 1, 327 F. 729 (D.S.C. 1971)

Salvail v. Nashua Board of Education, 469 F. Supp. 1269 (D.N.H. 1979)

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Sheck v. Baileyville School Committee, 530 F. Supp. 679 (1982)

Sheldon v. Fannin, 221 F. Supp. 766 (D.Ariz. 1963)

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Bender v. Williamsport Area School District, 741 F.2d 538 (3rd Cir. 1984)

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Gambino v. Fairfax County School Board, 564 F.2d 157 (4th Cir. 1977)

Garnett v. Renton School District No. 403, 874 F.2d 608 (9th Cir. 1989)

Goetz v. Ansell, 477 F.2d 636 (2nd Cir. 1973)

Good News/Good Sports Club v. School District of the City of LaDue, Missouri, 28 F.3d 1501 (8th Cir. 1994)

Gregoire v. Centennial School District, 907 F.2d 1366 (3rd Cir. 1990)

Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970)

Harris v. Joint School District No. 241, 41 F.3d 447 (9th Cir. 1994)

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Ingebretsen v. Jackson Public School District, 88 F.3d 274 (5th Cir. 1996)

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Planned Parenthood of Southern Nevada, Inc. v. Clark County School District, 941 F.2d 817 (9th Cir. 1991)

Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989)

Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971)

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Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996)

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Settle v. Dickson County School Board, 53 F.3d 152 (6th Cir. 1995)

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West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178 (1943)

APPENDIX D

CHAPTER 4 CASES IN CHRONOLOGICAL ORDER BY FEDERAL JURISDICTION

Chapter 4 Cases in Chronological Order by Federal Jurisdiction

District Courts:

Sheldon v. Fannin, 221 F. Supp. 766 (D.Ariz. 1963)

Davis v. Firment, 269 F. Supp. 524 (E.D.La. 1967)

Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969)

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Einhorn v. Maus, 300 F. Supp. 1169 (E.D.Pa. 1969)

Crews v. Cloncs, 303 F. Supp. 449 (S.D.Ind. 1969)

Westley v. Rossi, 305 F. Supp. 706 (D.Minn. 1969)

Brick v. Board of Education, School District No. 1, Denver, Colorado, 305 F. Supp. 1316 (D.Colo. 1969)

Stevenson v. Wheeler County Board of Education, 306 F. Supp. 97 (S.D.Ga. 1969)

Baker v. Downey City Board of Education, 307 F. Supp. 517 (C.D.Cal. 1969)

Giangreco v. Center School District, 313 F. Supp. 776 (W.D.Mo. 1969)

Miller v. Gillis, 315 F. Supp. 94 (N.D.Ill. 1969)

Hatter v. Los Angeles City High School District, 310 F. Supp. 1309 (C.D.Cal. 1970)

Aguirre v. Tahoka Independent School District, 311 F. Supp. 664 (N.D.Tex. 1970)

Corley v. Daunhauer, 312 F. Supp. 811 (E.D.Ark. 1970)

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Banks v. Board of Public Instruction of Dade County, 314 F. 285 (1970)

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Poxon v. Board of Education, 341 F. Supp. 256 (E.D.Cal. 1971)

Wallace v. Ford, 346 F. Supp. 156 (E.D.Ark. 1972)

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Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974)

Cintron v. State Board of Education, 384 F. Supp. 674 (D.P.R. 1974)

Pliscou v. Holtville Unified School District, 411 F. Supp. 842 (S.D.Cal. 1976)

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Bauchman by and through Bauchman v. West High School, 900 F. Supp. 254 (D.Utah 1995)

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Denno v. School Board of Volusia County, 959 F. Supp. 1481 (M.D.Fla. 1997)

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Burnside v. Byers, 363 F.2d 744 (5th Cir. 1966)

Blackwell v. Issaquena County Board of Education, 363 F.2d 748 (5th Cir. 1966)

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Karp v. Becken, 477 F.2d 171 (9th Cir. 1973)

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New Rider v. Board of Education of Independent School District No. 1, Pawnee County, Oklahoma, 480 F.2d 693 (10th Cir. 1973)

Jacobs v. Board of School Commissioners, 400 F.2d 601 (7th Cir. 1973)

Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974)

Augustus v. School Board of Escambia County, Florida, 507 F.2d 152 (5th Cir. 1975)

Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975)

Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976)

Gambino v. Fairfax County School Board, 564 F.2d 157 (4th Cir. 1977)

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Crosby by Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988)

Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988)

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Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992)

Berger v. Rensselaer Central School Corporation, 982 F.2d 1160 (7th Cir. 1993)

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Campbell v. St. Tammany Parish School Board, 64 F.3d 184 (5th Cir. 1995)

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Board of Education of the Westside Community Schools v. Mergens, 110 S. Ct. 2356 (1990)

Lamb's Chapel v. Center Moriches Union Free School District, 113 S. Ct. 2141 (1993)

APPENDIX E

CHAPTER 4 CASES IN CHRONOLOGICAL ORDER BY CATEGORY

Chapter 4 Cases in Chronological Order by Category

Censorship:

Minaricini v. Strongsville City School District, 541 F.2d 577(6th Cir. 1976)

Right to Read Defense Committee v. School Committee of the City of Chelsea, 454 F. Supp. 703 (D.Mass. 1978)

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Sheck v. Baileyville School Committee, 530 F. Supp. 679 (D.Me. 1982)

Board of Education, Island Trees Union Free School District No. 26 v. Pico, 102 S. Ct. 2799 (1982)

Roberts v. Madigan, 702 F. Supp. 1505 (D.Colo. 1989)

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Campbell v. St. Tammany Parish School Board, 64 F.3d 184 (5th Cir. 1995)

Case v. Unified School District No. 233, 908 F. Supp. 864 (D.Kan. 1995)

Corporal Punishment:

Sims v. Board of Education School District No. 22, 329 F. Supp. 678 (D.N.M. 1971)

Distribution of Religious Material:

Thompson v. Waynesboro Area School District, 673 F. Supp. 1379 (M.D.Pa. 1987)

Rivera v. East Otero School District R-1, 721 F. Supp. 1189 (D.Colo. 1989)

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Muller by Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996)

Graduation Requirement of Community Service:

Steirer by Steirer v. Bethlehem Area School District, 987 F.2d 989 (3rd Cir. 1993)

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Loitering:

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Thomas v. Board of Education, Granville Central School District, 607 F.2d 1043 (2nd Cir. 1979)

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Chandler v. McMinnville School District, 978 F.2d 524 (9th Cir. 1992)

Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996)

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Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992)

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Boyd V. Board of Directors of McGehee School District No. 17, 612 F. Supp. 86 (D.C.Ark. 1985)

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Aguirre v. Tahoka Independent School District, 311 F. Supp. 664 (N.D.Tex. 1970)

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Bell v. Little Axe Independent School District No. 70 of Cleveland County, 766 F.2d 1391 (10th Cir. 1985)

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Hsu v. Roslyn Union Free School District No. 3, 85 F.3d 839 (2nd Cir. 1996)

APPENDIX F

CHAPTER 4 CASES IN ALPHABETICAL ORDER

Aguirre v. Tahoka Independent School District, 311 F. Supp. 664 (N.D.Tex. 1970)

Alabama and Coushatta Tribes of Texas v. Trustees of the Big Sandy Independent School District, 817 F. Supp. 1319 (E.D. Tex. 1993)

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Banks v. Board of Public Instruction of Dade County, 314 F. 285 (S.D.Fla. 1970)

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Bell v. Little Axe Independent School District No. 70 of Cleveland County, 766 F.2d 1391 (10th Cir. 1985)

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Board of Education, Island Trees Union Free School District No. 26 v. Pico, 102 S. Ct. 2799 (1982)

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Borger v. Bisciglia, 888 F. Supp. 97 (E.D.Wis. 1995)

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