

Freedom of Expression in Schools

Does the Free Speech Clause of the First Amendment of the United States Constitution entitle all students to speak or express themselves in any way they choose?

No. Three cases demonstrate the application of the First Amendment protections to the ways in which students express themselves:

1. *Tinker v. Des Moines Independent Community School District*, 393 US 503 (Sup. Ct. 1969).

a. Facts

In 1965, three public high school students planned to wear black armbands from December 16 through New Year's Day to protest the U.S. government's policy in Vietnam and to show their support for a truce. The school board learned of the students' plans and adopted a policy that any student wearing an armband to school would be asked to remove it, and if the student refuse, the student would be suspended until the student returned to school without the armband. The students were aware of the new policy but on December 16th, they wore their armbands to school. The three students were suspended from school for wearing the black armbands.

The students filed suit for nominal damages and an injunction against the school district regulation prohibiting the wearing of armbands.

The District Court dismissed the complaint finding the regulation was within the school board's power and expressly declined to follow the Fifth Circuit's prior holding in a similar case that armbands cannot be prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Burnside v. Byars*, 363 F2d 744, 749 (1966). The Court of Appeals for the Eighth Circuit affirmed without opinion; the court was equally divided.

b. Questions Presented

Is the wearing of armbands within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment?

Are First Amendment rights available to students in a school environment?

Is this school's prohibition permissible under the First and Fourteenth Amendments?

c. Findings

The Supreme Court held that the wearing of armbands is within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth

Amendment. The wearing of armbands was “entirely divorced from actually or potentially disruptive conduct” and “was closely akin to ‘pure speech’” which has been repeatedly found to be entitled to “comprehensive protection” under the First Amendment.

First Amendment rights are available to both teachers and students in the school environment. The Supreme Court held “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

The prohibition against armbands is not permissible under the First Amendment. Such “silent, passive expression of opinion, unaccompanied by any disorder or disturbance” is protected. There was no evidence of the students’ “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.” For those reasons, the wearing of the armbands by these students does not concern speech or action that interferes with the work of the school or rights of other students. Further, there were no facts to suggest the school authorities were justified in forecasting substantial disruption of or material interference with school activities.

2. *Morse v. Joseph Frederick*, 551 US ____ (Sup. Ct. 2007).

a. Facts

The Olympic Torch Relay was scheduled to pass by student Frederick’s high school on January 24, 2002. Morse, the principal of the school, decided to allow a school-sanctioned, school-supervised event to participate in the Relay. Students assembled across the street from the school to watch the torch pass. Just as the television cameras passed by, Frederick and his friends unfurled a 14-foot banner reading “BONG HiTS 4 JESUS.” Morse ordered Frederick to take down the banner, but he refused. Frederick was suspended from school for 10 days because his banner violated a school policy prohibiting encouragement of the use of substances illegal to minors.

Frederick administratively appealed his suspension but it was upheld by the School District Superintendent and also by the School District Board of Education. Frederick filed suit in District Court. The District Court dismissed the complaint ruling the school was entitled to qualified immunity, the student’s First Amendment rights had not been violated, and Morse had the authority, if not the obligation, to act. The Ninth Circuit reversed holding that the school punished Frederick without demonstrating a “risk of substantial disruption.” Further, the student’s right to display the banner was clearly established and Morse was not entitled to qualified immunity.

b. Questions Presented

Is this a school-speech case?

Did Frederick have a First Amendment right to raise his banner?

Was that right so clearly established that Morse may be held liable for damages?

c. Findings

This is a school-speech case because the event occurred during school hours, was sanctioned by the principal, teachers and administrators were supervising the students, the school band and cheerleaders performed, and the banner was directed towards the school so that most students could see the banner. Frederick cannot claim he was not at school.

The phrase on the banner undeniably references illegal drugs, whether it sends a message to encourage drug use or celebrate drug use is not the issue. The phrase does not convey any political or religious message. Deterring drug use by schoolchildren is an “important – indeed, perhaps compelling” interest.

Morse was required to act on the spot and it was reasonable for Morse to conclude that the banner promoted illegal drug use. Failing to act would send a powerful message to the students about how serious the school was about the dangers of illegal drug use. “The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.”

Because there is no First Amendment violation, there is no liability for damages.

3. *Gillman v. School Board for Holmes Co., Florida*, Case No. 5:08-cv-00034-RS-MD (N. Dist. Fla. 2008).

a. Facts

A high school student reported being harassed by other students because of her sexual orientation. The Principal counseled the student that it was not “right” to be homosexual, told the student that he would inform her parents that she was a lesbian, and told her to stay away from the students she accused of harassing her or she would be suspended from school. Numerous students supported her by displaying messages of support for gay rights.

The Principal responded to the show of support by interrogating students, instructing homosexual students to not discuss their sexual orientation, and prohibited displaying messages of support. The Principal threatened to suspend a student if she failed to follow his instructions. Eventually eleven students were suspended for 5 school days for participating in the gay pride movement at school. A week later, Gillman displayed gay support messages but caused no disruption or other negative reactions and she was not reprimanded or punished.

The School Board supported the Principals ban on all “gay pride” messages and symbols because it indicated membership in an “illegal organization” and was disruptive to the educational process. Gillman filed suit alleging deprivation of free speech and political

expression and viewpoint-based discrimination in violation of the First and Fourteenth Amendments.

The District Court conducted a bench trial resulting in granting all injunctive relief sought by Gillman and awarding her \$1.00 in damages. Later, the parties settled for \$325,000 in fees and costs in favor of Gillman.

b. Questions Presented

Can a public high school prohibit students from wearing or displaying messages and symbols advocating the acceptance of and fair treatment for persons who are homosexual?

c. Findings

The Supreme Court has identified four categories of student speech 1) vulgar, lewd, obscene or plainly offensive; 2) school sponsored speech; 3) government speech; and 4) pure student expression. This case presents an issue of pure student expression.

The District Court applied the *Tinker* Supreme Court ruling to the facts of this matter. Here, the School Board banned speech that was “pure, political, and expresses tolerance, acceptance, fairness, and support for not only a marginalized group, but more importantly, for a fellow student.” The Court stated the student had been “victimized” by the Principal and “in the capacity of a role model and authority figure,” the Principal’s conduct was deplorable. The students were simply taking “prophylactic measures” to counteract the Principal’s illegal conduct in stifling their speech and support. The students’ episodes involving speech were indistinguishable from the typical background noise of high school.

The actions and messages of the students supporting their classmate caused no threats of violence from which disruption could have occurred. The students did not force their views and opinions; those in disagreement with the message were free to walk away. The Court recognized that a nation-wide controversial topic such as homosexuality is likely to spur some debate, but high school students should not be foreclosed from that national dialogue.

The Court applied viewpoint-discrimination by identifying the Principal’s right to express his own opinion about homosexuality but stated that he may not lawfully extinguish the speech of those whose views are contrary to his own. The School Board was required to take affirmative steps to remedy the past restraints of expression by including, but not limited to written notification that students are permitted to support their respect, equal treatment, and acceptance of homosexuals.