

Embargoed until May 22, 2012

Harassment, Bullying and Free Expression: Guidelines for Free and Safe Public Schools

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Religious Freedom Education Project/First Amendment Center

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Harassment, Bullying and Freedom of Expression:

Guidelines for Free and Safe Public Schools

[These guidelines are not legal advice. Please contact your school attorney for guidance on the law as it has been applied in your jurisdiction.]

Free and Safe Public Schools

A core mission of public schools is to prepare young people to be engaged, ethical citizens in a democratic society. This means, in part, creating a safe learning environment that teaches respect for the rights of students to free speech and free exercise of religion guaranteed under our Constitution and law while simultaneously ensuring that student speech does not disrupt the learning environment or degenerate into bullying or harassment.

Students should be able to attend public schools where they are free to share their views and engage in discussions about religious and political differences while simultaneously attending safe schools that prohibit discrimination, bullying and harassment. Although in most instances these two principles are compatible, they collide in some cases.

These guidelines are intended to help public schools balance the need for school safety with the need for free expression. The balance between the two is not static: It changes depending on the specific circumstances in each case, and is affected especially by the age of the students involved.

These guidelines are based on current law. They do not provide guidance for every situation. But they should provide useful guidance for school officials seeking to create a safe and free learning environment.

Freedom of Expression

Educating for citizenship includes teaching students about the value of free speech in a democratic society. In a country that treasures—indeed depends on—freedom of expression, citizens will sometimes hear offensive, even hateful, speech. The fact that some speech deeply upsets, offends or angers some citizens is not a justification for banning or limiting the speech. Outside the school context, it is settled law that “absent ... narrow circumstances ... the burden normally falls upon the viewer to ‘avoid further bombardment of [his] sensibilities by averting [his] eyes.’”¹ The extent to which this principle applies in the school context is somewhat unsettled.

¹ *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 211 (1975).

In general, a listener is free to avoid hateful speech, to turn away, and, of course, to respond and to challenge it. But listeners may not insist that government silence the speech. While government cannot silence such speech, it is, as a general matter, free to condemn it.

These principles need to be applied with some modification in schools, because students are at different ages and stages of development, and are required to attend classes and other activities and often cannot easily turn away. The skill of listening to speech with which one profoundly disagrees nevertheless remains an essential element of preparation for democratic citizenship.

Teachers and school officials, because of the special places of power and influence they occupy, need to exercise special care in responding to controversial speech so that they do not either coerce or silence dissenters. Neither can they abdicate their responsibility to protect other students, or to convey the school's own views.

Freedom from Harassment

A school risks violating civil rights laws if it tolerates student-on-student harassment on the basis of race, color, national origin, sex, religion or disability. Under federal law, deliberate indifference to harassment that is so "severe, pervasive and objectionably offensive" that it "effectively bars the victim's access" to educational programs or benefits provided by the school constitutes illegal discrimination.² Many states have more

² If based on race, gender, national origin, handicap and religion. In some instances, failure to recognize anti-Semitic harassment may trigger responsibility under Title VI of the Civil Rights Act of 1964, which protects against discrimination on

prescriptive laws banning – or requiring schools to ban – harassment and bullying on these characteristics and others, including on the basis of sexual orientation and gender identity. A number of public schools go further in their efforts to eradicate such conduct, adopting policies “stricter” than federal and state law.

Students should be able to attend school without being – or even reasonably feeling – threatened by others. School officials should be mindful that abusive peer conduct may deny students full access to an education, even when it is not on a basis prohibited by law.

Whether on the basis of one of the prohibited grounds listed above, or non-specified grounds such as a perceived lack of athletic ability, perceived “geekiness,” jealousy over friendships, or simply the ability to exploit a power differential, harassment and bullying have no place in schools. All students deserve protection against bullying and harassment. A safe, caring learning environment is essential if students are to achieve their academic potential.

Public schools should not be satisfied with merely avoiding legal liability for harassment or bullying. School officials should affirmatively convey to students, first through character and civic education, but also with

the basis of race, color, or national origin in programs receiving federal financial assistance, if the harassment is reasonably viewed as an attack on the student’s race or national origin. Under other statutes, the U.S. Department of Justice has authority with respect to segregation in public schools involving equal protection on the basis of religion, as well as race, color, national origin, and sex.

disciplinary measures when appropriate and lawful, that harassment and bullying are unacceptable.³

In the special context of public schools, where students are required to attend and cannot easily escape their tormenters, school officials have a duty to make their best effort to end or remedy harassment or bullying, eliminate a hostile environment and prevent harassment or bullying from recurring.⁴

Verbal Harassment and Bullying

Much harassment and bullying is physical, targeting an individual student or classes of students for unwanted touching, bodily assault or threats of violence. Suppressing this kind of conduct in the schools raises no First Amendment concerns.

Harassment and bullying can also take the form of student expression, creating a hostile learning and social environment. First Amendment

³ For more information on effective, comprehensive character education that addresses bullying and harassment, see www.character.org For more information on how to measure and improve school climate see www.schoolclimate.org

⁴ Many organizations have offered assistance to schools in implementing anti-harassment rules and encouraging student dialogue including, for example, the U.S. Department of Education's Office for Civil Rights (OCR) (www.2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf) and the National School Boards Association (<http://www.nsba.org/Board-Leadership/Students-On-Board>).

considerations are fully pertinent in these instances, though they will not always be controlling. Certain verbal harassment and bullying may, in the end, be prohibited, but school officials must proceed with greater caution than in instances of physical harassment.

It is important to distinguish between speech that expresses an idea, including religious or political viewpoints—even ideas some find offensive—and speech that is intended to cause, or school officials demonstrate is likely to cause, emotional or psychological harm to the listener. Words that convey ideas are one thing; words that are used as assault weapons quite another.

A steady stream of mocking remarks specifically directed at an identifiable person or group due to their skin color, religion, national origin, body size or shape, athletic abilities, or sexual orientation, contributes little, if anything, to the marketplace of ideas, the core purpose of the First Amendment's protection of the freedom of speech. Repeatedly bombarding a fellow student with otherwise protected speech, even if it ostensibly conveys an idea, can also constitute harassment. In this context, a request by one student that another should cease direct, one-on-one communications with the student about a specific subject, as opposed to a request for the speaker to cease giving a broader message to a larger group of students of which the objecting student is a member, ordinarily should be respected.

Conflicts over Speech that Conveys Ideas

Student speech that is not a personal attack but that conveys ideas that are unpopular or disturbing to some listeners, presents complex questions for school administrators. What if a group (or individual) feels threatened, or is deeply offended by an expression of an idea by other students? Recall that in general, a person's desire to avoid speech or ideas he or she detests is no justification for governmental suppression of such speech.

The display or wearing of the Confederate flag, for example, will be seen by some students as proclamations of Southern pride. But other students, including many African American students, will see it as a symbol of support for slavery or racial segregation and oppression. Conversely, a policy requiring the removal of the Confederate flag will be seen by some as a reasonable policy designed to maintain respect for all students, and by others as censorship.

With respect to sexual orientation and behavior, one student's call for legalization of same-sex marriage may be perceived by another student as a challenge to his or her deeply held religious beliefs. Conversely, one student's expression of his or her religious convictions concerning what he or she regards as sinful sexual behavior will be perceived by another student as suggesting that gay and lesbian students have no place in the school. A student may wear a T-shirt proclaiming "Straight Pride" to counter another student's "Gay Pride" T-shirt, or vice versa.

Another example: A student may wear a "Choose Life" T-shirt to express the view that abortion is murder, and another student may wear a

“Respect Choice” T-shirt to express an opposing viewpoint. Although each expression may be claimed to be harassment or bullying by those holding an opposing viewpoint, such speech is presumptively protected by the First Amendment. As the next section explains, the First Amendment protects a wide range of student expression that some listeners may find offensive or upsetting.

Where Should Schools Draw a Line?

The U.S. Supreme Court has recognized that students have the right under the First Amendment to express religious, social and political views in public schools, even on subjects as controversial as the United States’ involvement in the Vietnam War while that war was still ongoing, unless the school can demonstrate or reasonably forecast that the expression will cause a substantial disruption of the school environment or violate the legal rights of others (*Tinker v. Des Moines Independent School District*, 1969).⁵ Most litigation has focused on the disruption prong of the test – what the Supreme Court meant by intruding on the legal rights of others is uncertain.

School officials may lawfully prohibit speech, upon a showing that the expression either causes an actual disturbance to the school’s educational program – or makes it reasonably foreseeable that the expression would cause such a disturbance.⁶ In reviewing the content of

⁵ More detailed summaries of *Tinker* and subsequent cases can be found at www.firstamendmentcenter.org/category/speech

⁶ The Supreme Court has recognized that public schools may in some circumstances restrict speech that is school-sponsored, lewd or vulgar, or related to illegal drug use.

student expression, school officials should apply the following safeguards and guidelines:

- Generally, the offensiveness of the content alone, without a showing that the speech is, or is likely to be, substantially disruptive, is not a basis for silencing speech. Fully-protected speech is often offensive to someone. Of course, grade level and developmental stage matter.
- When faced with disruptive or harassing student speech which conveys an idea, absent exceptional circumstances or a previously published specific rule, school officials should generally ask the students to discontinue the speech rather than immediately imposing discipline. At the same time, school officials have an affirmative duty to prevent anti-harassment and anti-bullying rules from being used as a “heckler’s veto” of unpopular speech.
- Narrowly tailored bans on speech determined to cause, or likely to cause, substantial disruption should, absent exceptional circumstances, be viewpoint neutral.
- Student expression of ideas occurring outside of school should be subject to school action only, if at all, upon a clear showing of disruption, or likely disruption to the school, or a violation of the rights of school administrators and officials, teachers and other

Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988); *Bethel v. Fraser*, 478 U.S. 675 (1987); *Morse v. Frederick*, 551 U.S. 393 (2007).

school employees, or students. The authority of school officials to discipline students for off-campus speech, and the liability for doing so, is currently in dispute in the state and lower federal courts. It is likely that, at some point, further legal guidance will come from the Supreme Court.

- Regardless of how the First Amendment issues about out-of-school speech are ultimately resolved, schools should consider incorporating proactive measures as part of their response, apart from discipline and suppression of speech. For example, schools could monitor the locations within the school where the students involved in incidents of off-campus bullying or harassment may interact; publicize statements that the school will not tolerate in-school harassment; incorporate harassment awareness education into the curriculum and professional development programs; and engage parents and community groups. If adopted, such programs should be designed with sensitivity to a wide range of community views.
- True threats of physical harm or targeted, continuing harassment may be the basis for disciplinary action, while speech intended to convey a student's viewpoint or ideas on social, religious, political, or cultural issues (among others) may not be the basis for disciplinary action absent a showing of substantial disruption (or likely disruption) or a violation of another student's legal rights. Schools should teach students that, as a general matter, there is no

right to be free of speech one does not like, whether in school or elsewhere.

Strategies for Handling Controversies

When confronting one student's claim that another student's speech conveying an idea is harassment and bullying, school officials should consider, time and circumstances permitting, explaining on an age appropriate basis, that disagreement about an idea is not necessarily a personal attack; that some students' faiths may require them to express their views publicly; that students have a right to disagree with the view of other students or the school and to express that disagreement; and that the most effective response to an idea one disagrees with is often to express a contrary idea, not censorship. Suppression of speech should be the last, not first, resort.

By the same token, students who express ideas that are offensive and unsettling to others should be made aware of the other students' reactions, and the fact that expressing a message in a manner that offends the audience is often counterproductive. Students need to be informed that in our diverse society they will often encounter people who disagree with them, and those people have a right to their own beliefs. Public schools may—and should—encourage all students to communicate with others in a tactful, respectful manner. Schools should endeavor to teach students to deal with controversy on an age appropriate basis.

The school should not attempt to coerce or pressure students to change the core content of a message that is constitutionally protected. Of

assistance in this context, the U.S. Department of Education has provided guidance since 1995 regarding the protection of students' religious expression in both curricular and non-curricular public school settings and has advised that teachers and school administrators may neither encourage nor discourage student expression because of its religious content.⁷ Nor may schools shield religious, non-religious or anti-religious beliefs from criticism.

Schools themselves are free to communicate in a non-coercive way their own views on subjects that generate controversy in the community, except, of course, that schools and school officials cannot, on behalf of the school, express views promoting or denigrating religion as such, or express themselves in ways that discriminate on legally prohibited grounds. Schools may adopt neutral policies that require appropriate, respectful behavior. Students are free to express disagreement with school district views in appropriate ways.

Even though there is a right to turn away from speech with which one disagrees, school officials should explain, on an age-appropriate basis, that it is a necessary habit of democratic citizenship to learn to listen to ideas with which one disagrees, to analyze arguments, and to respond, whether with a rebuttal or defense, or a change, modification or reaffirmation of one's own views. It is equally a necessary habit of democratic citizenship to learn to express oneself without giving

⁷ *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 29, 2003); *Religious Expression in Public Schools*, available at <http://www2.ed.gov/Speecher/08-1995/religion.html> (last visited July 11, 2011).

unnecessary offense even if toleration of offensive speech is also required. Schools should endeavor to teach these skills as well.⁸

CONCLUSION

Public schools in a democratic society should seek to develop strong civic character by teaching and modeling respect for the rights of others. Students should strive to master the skills of civil engagement both in the classroom and in relationships with their peers.

Prevention of harassment and bullying is essential for healthy, effective public schools. But that effort must not lead to excessive limitations on the constitutional right of students to freedom of expression. School officials have an obligation to seek the right balance between upholding free speech and maintaining a safe learning environment for all students.

⁸ Because the line separating appropriate restrictions on student speech from inappropriate ones continues to be hazy, public school officials are placed in a challenging position. The legal doctrine of qualified immunity protects public officials from financial liability for their reasonable decisions in situations where the law is less than clear. *See Morse v. Frederick*, 551 U.S. 393, 409 (2007) (“And even the dissent recognizes that the issues here are close enough that the principal should not be held liable in damages, but should instead enjoy qualified immunity for her actions.”)