

Rodney Clarkson, MBA, Ed.S.

Northcentral University

Background Issue of Legal Importance

Censorship of students' exercising their First Amendment rights by school officials is one of the most controversial issues in the American education system. Many lawsuits have been filed in courts by students aggrieved by school policies or actions of school officials aimed at restricting the exercise of their First Amendment rights. This is in light of the fact that the U.S. Constitution guarantees that all persons are entitled to enjoy their First Amendment rights. The basic freedoms covered under the First Amendment include freedom of speech, peaceful assembly, religion, and press.

The National Walkout planned by students nationwide reignited the debate on censorship of students' First Amendment rights. The protest planned to compel Congress to enact strict gun controls, elicited varied responses from school officials. Some officials threatened suspensions for those who planned to participate in the protest without permission from the school. Other officials penalized students, some with suspensions, for specific events of the day. However, civil rights groups criticized such school officials for potentially infringing on students' constitutional rights. This research paper seeks to provide insight into how school officials can best handle school-based student-led protests while protecting students' First Amendment Rights.

First Amendment rights of students

The First Amendment is one of several amendments to the U.S. Constitution that have a direct effect on the activities of public schools insofar as students and school personnel are concerned. It focuses on the exercise of basic personal freedoms of students and school personnel, including freedom of assembly, freedom of speech, freedom of religion, as well as, freedom of press. The First Amendment works in tandem with the Fourteenth Amendment

regarding due process rights of students, as well as, school personnel. Combined, these Amendments enable all individuals to enjoy equal protection under the law, as well as, fundamental fairness in matters pertaining to deprivation of liberty and property (Essex, 2012). Congress is prohibited from making or enacting into law restrictions on the exercise of the aforementioned freedoms, such as speech, assembly, religion, and press. As U.S. citizens, students are likewise entitled to the fundamental freedoms outlined under the First Amendment – although with certain restrictions under specific circumstances. Student-led protests, in particular, walkouts during the school day, is an issue that school officials need to communicate clear guidelines as to what is acceptable while protecting students' First Amendment rights.

Students are granted the right to peaceably assemble. Exercising this right is not absolute; rather, it is subject to certain restrictions related to time, manner, and place. Similar to public domain, school authorities are permitted to institute these restrictions provided that the restrictions are not guided or based on the content or subject of the peaceful assembly (Winston, 2014). Doing so would amount to censorship of the students' freedom of expression and assembly insofar as the First Amendment rights are concerned. The *Edwards v. South Carolina* case brought to light the fact that students are entitled to the right of peaceful assembly. The case – brought before the Supreme Court – was occasioned by the convictions of 180 African American students for a breach of peace after they marched to the state capital protesting against discrimination. The demonstration was halted by the police out of fear that there would be a confrontation between the students and the approximately 300 people who had gathered to see the demonstration (Greenberg, 1968). Subsequently, the Supreme Court overturned the convictions on the basis that the actions of the police equated to a penalization of the exercise of free speech, right to petition and peaceable assembly. It added that the police's fear of a riot or

disorderly conduct was not valid enough to warrant the stopping of the peaceful demonstration or cancelling it all together. *Edward's v. South Carolina* illustrates that school officials, dealing with student lead protests, cannot merely suspend students who participate based on the fact that it could be dangerous.

The exercise of the freedom of expression – as far as censorship is concerned – is warranted to the extent that the exercise of such freedom does not cause material or substantial disruption in the school environment. In *Tinker v. Des Moines Independent School District*, the Supreme Court asserted the identity of students as ‘persons’ under the U.S. Constitution. This meant that students do not cease to exercise their rights to freedom of expression when they arrive at school (Tsesis, 2017). The Court noted that the school – as an agent of the state – is obligated to respect the fundamental rights of students, and thus, do not hold absolute authority over them. The case involved the decision of the school to suspend two students – Mary Beth and John Tinker – for wearing black armbands to school in protest against American involvement in the Vietnam War and the subsequent loss of lives. The ruling, in this case, set a precedent for subsequent cases involving the infringement on the freedom of expression as far as students are concerned. In the Court’s view, the wearing of the armbands by the plaintiffs did not amount to the material or substantial disruption of the school. In contrast, in the *Blackwell v. Issaquena County Board of Education* case, the Fifth Circuit Court of Appeals ruled in favor of the school noting that the actions of the plaintiffs were indeed disruptive to the school environment (Bowman, 2009). The case involved students who had violated the principal’s order banning the wearing of political buttons due to increased noise disturbances in the corridors among students who were discussing the protest. The students wearing the buttons attempted to coerce other students to wear these buttons, which subsequently interfered with the

class instruction to the point of confusion and indiscipline. Consequently, students who had defied the order not to wear the buttons were suspended. In its ruling, the Fifth Circuit Court of Appeals noted that the school principal was legally obligated to regulate – via prohibition or punishment – any acts or activities that would undermine the school’s routine. As can be seen in the contrasting outcomes of these two cases, the freedom of expression for students is not absolute but is subject to censorship in instances where the exercise of this freedom may cause material or substantial disruption to the school.

Similarly, although students are entitled to freedom of speech, the exercise of this speech is not absolute. Willborn (1995) notes that the mid-1980s marked a period in which the courts tended to provide increased authority to school officials with regards to the censorship of student’s speech. The *Bethel School District No. 403 v. Fraser* is an example of a case in which the Supreme Court sided with school officials as far as curtailing students’ freedom of speech is concerned. The case was occasioned by the suspension of Matthew Fraser after he delivered a speech before 600 high school students in which he used sexual innuendos to refer to a student candidate. In its defense, the school noted that the speech met the threshold of material or substantial disruption by the fact that it caused considerable discomfort among the audience, whereas some of the students used sexual gestures and whistling in response to the speech. Furthermore, one of the teachers reported that she had to use a substantial amount of class time to enlighten her students on the importance of avoiding the use of lewd and vulgar words in their communication (Essex, 2012). In its ruling, the Court noted that the school board had not abrogated the constitutional rights of Fraser and that it was within its obligations to determine what manner of speech students can make in the classroom or school assembly. Even though Fraser was within his rights – freedom of speech – to advocate controversial rules, the Court was

of the opinion that this right should have been balanced against the school's obligation in teaching morally appropriate behavior.

Students' right to protest during school hours

Under the First Amendment, protests and demonstrations by students qualify as freedom of free expression. Thus, students are guaranteed the right to participate in protests and demonstrations in the exercise of their rights to freedom of expression. Nonetheless, just like the right to free speech and expression, the exercise of this freedom is subject to censorship under certain conditions. In exercising their reasonable care, school officials are permitted to regulate the time, place, and manner of protests and demonstrations to ensure the health and safety of all students. The *Karp v. Becken* case provides an example of instances where school officials may place time, manner and place restrictions on student demonstrations or protests (McMinimee, 2002). The case arose out of a suspension of a student who had planned a walkout at an athletics awards ceremony in protest at the school's failure to renew the contract of an English teacher. After receiving reports from student body officers that some of the athletes would attempt to prevent the walkout, the school officials cancelled the demonstration. However, the students defied the order and instead notified the news media of the impending walkout during which there were verbal and physical confrontations between the demonstrators and athletes. In light of these developments, the school suspended the student for five days, thus leading the student to file a suit against the former. In its ruling, the Ninth Circuit Court of Appeals noted that the school officials were justified in canceling the planned demonstration on the basis of anticipated material or substantial disruption to the school activities (McMinimee, 2002). It is noteworthy that censorship of students' exercising of freedom of expression does not require certainty of the occurrence of material or substantial disruption. Instead, the existence of facts suggesting the

likelihood of such disruptions is basis enough for school officials to curtail protests and demonstrations for students as part of freedom of expression (McMinimee, 2002).

Restriction of time, place, and manner by school officials is also applicable to the distribution of leaflets. The *M.A.L v. Kinsland* case affirmed that students' right to freedom of expression was subject to a reasonable time, place and manner restriction as far as distribution of literature is concerned (Mawdsley and de Waal, 2008). The case was brought forth as a result of the decision of the school to restrict the distribution of the leaflets to lunch hours rather than doing so between classes in the hallways. In its ruling, the Sixth Circuit Court of Appeals ruled in favor of the school noting that school hallways are a nonpublic forum, and thus, was justified in its time, place and manner restrictions of this exercise. Notably, the Court stated that in imposing the time, place and manner restrictions, school officials need not justify their actions with the likelihood that such activities would result in a material and substantial interference with normal school activities. Notably, the courts recognize that protests and demonstrations may result in minor disruptions due to contrasting points of view among the students concerned. On this basis, the courts generally agree that school boards should tolerate minor disruptions.

Handling of student protests

Student protests and demonstrations – as part of the freedom of expression – are permitted to the extent that they do not violate school rules or result in damage to school property. This provides a leeway for school officials to censor protests and demonstrations during school hours if there is a justifiable reason to believe that such activities may destroy school property or in contravention to school policy. Furthermore, the exercise of the freedom of expression insofar as protests and demonstrations are concerned may be censored if they are

likely to encourage engagement in illegal activities. The ruling in the *Morse v. Frederick* case affirms the strategies that school officials may use to handle student protests and demonstrations as well as their freedom of expression and speech (Schauer, 2007). The Supreme Court ruled in favor of school principal Morse after the plaintiff (Joseph Frederick) sued him for suspending him for ten days after Frederick had defied the principal's order to take down an offensive banner that seemed to advocate for illegal drug use.

The incident occurred during an Olympic Torch relay that was passing outside the school and which the school had permitted students to attend during school hours as a school event or trip – under the supervision of teachers. While standing across the streets – and in the full view of cameras and torchbearers – Frederick and co. unfurled a 14-foot banner written: “BONG HITS 4 JESUS” that was legible to everyone, including those standing on the opposite side of the street. The court ruled that the principal was exercising her administrative duties in demanding that the banner be taken down as, in her opinion she felt that it was promoting illegal drug use (Schauer, 2007). *Morse v. Frederick* shows the extent to which the exercise of the right to protest requires a balance between the exercise of the First Amendment by students and adherence to school policy against certain actions.

The Court noted that the words on the banner could be reasonably interpreted to mean that use of illegal drugs is encouraged and further agreed that the principal was justified in curtailing this freedom of expression considering that it was in violation of the school's policy as far as an illegal drug is concerned (Schauer, 2007). On his part, the plaintiff argued that the school principal was unjustified in suspending him, considering that the event was not a school activity. The Court disagreed noting that the fact that the event was occurring during school hours and had been sanctioned by the principal as a school activity meant that it was indeed a

school event. Thus, the student was bound by the obligation to behave in accordance with the school policy but had instead violated the school district policy by unfurling a banner that seemed to promote illegal drug use (Schauer, 2007). With reference to this case, protests and demonstrations by students during school hours may be construed as school activities especially if sanctioned by the school officials. Hence, the courts may offer protection to school officials who choose to censor students' freedom of expression and speech if these actions are in violation of school policies or amount to engaging in illegal activities.

Personal reflection

The National School Walkout is a contemporary example of the conundrum facing school officials regarding student-led protests that take place on school grounds during school hours. From a legal perspective, student-led protests are best handled using specific criteria and communication to avoid violating students' First Amendment rights. The event, organized by Youth Empower (a subdivision of Women's March), was a 17-minute protest by students seeking to compel Congress to enact stricter controls on gun possession. These protests were a result of the latest incident of a school shooting that occurred in February 2018 at Parkland, Florida where 17 people lost their lives. The planned protest elicited various opinions from the educational community regarding the legal ramifications of any student's decision to participate in the protest. Debate centered on whether the participating students were exercising their First Amendment rights by carrying out the protest during school hours (Campbell, 2018). Various schools alleged that student participation in the protest would amount to truancy or unexplained absence from class, which could make students susceptible to a range of sanctions by their schools including suspensions and written reprimand. One such example came from the Needville Independent School District's superintendent – Curtis Rhodes – who warned that

students who participated in the protest risked a 3-day suspension upon resumption to school. He issued the warning on the basis that the protest had the potential of causing material or substantial disruption of the school environment or activities (Waxman, 2018). In defense of the students, civil rights unions criticized schools intending to take such punitive actions pointing out that doing so would be an infringement on the constitutional rights of the students. A case in point is the American Civil Liberties Union (ACLU), which noted that the punitive actions are exceedingly harsh in comparison to those permitted by statute (Campbell, 2018). Some of the school officials, however, avoided the sanction of students who participated in the planned protests giving them the freedom to exercise their First Amendment rights. One such school was Hellgate High School whose school official used the legal principle of time, place and manner restrictions on the protest (Campbell, 2018). The students were first allowed to join the protests on February 21 in solidarity with their compatriots in Parkland, but the demonstrations had to be conducted under a safe environment. Implementing a procedure regarding the protest, the school notified parents whose students had participated in the protests and thus missed classes for that day. This was not the case at Ingleside Middle School in Arizona, which slapped dozens of students with 1-day suspensions for participating in the walkout.

Use of students' freedom of expression during school hours

In my opinion, school officials may be legally obligated to punish students who participate in a walkout during school hours without the consent of the school. As agents of the government, schools whose students participate in a walkout may apply the doctrine of *parens patriae*, which grants sovereign powers to the state over certain individuals, such as minors. This doctrine forms the basis for the legal requirement in every state that children between the ages of six to seventeen years old are required to attend private, public, or homeschool (Essex, 2018).

This compulsory attendance requirement makes it criminal for a parent to deny his or her child the opportunity to acquire an education. With this in mind, parents may have little sway over their children's attendance of the National Walkout with regards to the legal provisions for their role in their children's education. Violation of the compulsory attendance requirement may result in suspensions or expulsions of the affected students where the extent of these punitive actions depends on the extent of their absenteeism. An example of a case involving compulsory attendance – was a timely reminder for students participating in the National Walkout against the wishes of their school officials occurred in New York. A group of students filed a suit against their school in protest against its policy that outlined punitive actions for students who fail to attend 90 percent of their classes. The policy stated that those who missed this number of classes should be denied credits for the respective course in which they had enrolled. Even though the students argued that denial of credit would be tantamount to complete de-enrollment, the Appellate Court dismissed their appeal noting that being denied credit would not mean that the students had been deregistered because they could still take make-up classes. Participating in the National Walkout without the permission of the school also gave leeway to school officials to punish such students for truancy. Truancy occurs when a student absents himself or herself from school without the knowledge of the parents or permission from the school. In most states, there are a maximum number of days of absenteeism, which are subsequently classified as truancy.

From my perspective, concerning student-led protests taking place during school hours, school officials should permit students to attend the protests while placing time, manner and place restrictions. Borrowing from the *Morse v. Frederick case*, school officials could supervise the activities to ensure that all students participating in the protests adhere to respective school rules and policies. Furthermore, in *Tinker v. Des Moines Independent School District ruling*, the

majority judges noted that the plaintiffs' exercise of their freedoms of expression was an educating experience that provided them with a practical scenario for them to apply what they had learned in class pertaining to their First Amendment rights (Tsesis, 2017). Similarly, even though the exercise of their First Amendment rights is subject to censorship, students who participate in the student lead protests do not shed their rights as U.S. citizens when they enter their school gates. Thus, participating in student-led protests during the formal school day can be used as a teachable experience that offers students an opportunity to apply their knowledge of First Amendment rights. Furthermore, parents must be notified of the planned activity before the date and time of the demonstration. This ensures that parents have the opportunity to counsel their child before the scheduled activity.

From a school official's perspective, encouraging students to implement the use of symbolic expression is one-way schools can support student-led protests while minimizing the possible negative consequences that could arise. As happened with the Tinker's decision to wear armbands, the use of symbolic expression could allow the students to exercise their First Amendment rights without causing material and substantial disruption to the school or invading the rights of other students and school personnel. The latter situation could likely materialize in the event of a walkout during which some of the students may be more inclined towards attending classes the effect of which these students may be distracted by the walking out of their counterparts. In *Tinker v. Des Moines Independent School District*, the judges ruled in favor of the plaintiffs noting that the wearing of the armband was equal to the exercise of the rights to free speech clause of the First Amendment. Furthermore, the Court noted that the students/plaintiffs did not cause material or substantial disruption of school activities by donning the armbands. The fact that there were other students in school wearing political or controversial

symbols – and yet those wearing black armbands were singled – was indicative of the fact that the school was intent on infringing on the plaintiffs’ First Amendment Rights. *Chandler v. McMinnville* is another example of a case concerning symbolic expression from which students in the National Walkout could have drawn inspiration for exercising their First Amendment Rights without legal ramifications from their school officials. This was a case in which the Ninth Circuit Court of Appeals ruled that students who had donned “SCAB” buttons had not caused material or substantial disruption and hence it was illegal for the school to suspend students who wore them (Chemerinsky, 2000). Similarly, to *Tinker v. Des Moines Independent School District*, the Court pointed out that the school had applied its policy selectively by specifically banning the SCAB buttons yet there were other controversial political buttons worn by numerous other students in the school. The suspended students had worn the buttons in protest at the replacement of teacher during a teachers’ strike. An analysis of the two cases shows that attempts of school officials to suppress symbolic expression may be legally and successfully challenged by the students if the use of these symbolic expressions does not propagate material or substantial disruption of school activities. It would, therefore, be an effective avenue for students to use in expressing themselves, like in the case of the National Walkout, over the need for stricter gun controls to curb school shootings. This would have been the best option at the disposal of students who earned 1-day suspensions for their participation in the walkout. However, as outlined in the next section, freedom of expression (as far as the use of symbols) comes with certain restrictions or censorship in the school environment.

Limitations of students’ freedom of expression

In deciding the *Chandler v. McMinnville* case, the judges analyzed the buttons based on three specific areas of student speech: vulgarity/lewdness/offensiveness/obscenity; school-

sponsored speech; and speech that falls in either of the categories. Regarding the first category, the judges noted that the school officials would have been justified in banning the SCAB button if they contained vulgar, obscene, lewd, and offensive speech that contradicts the educational mission of the school. In that case, the school officials would not have been required to show that the wearing of the buttons had the potential of causing material and substantial disruption of the school activities. When applied to the use of the symbolic expression in the National Walkout, school officials would have the liberty to suppress or censor symbols or materials that have vulgar, obscene, offensive or lewd speech. In my opinion, school officials might only need to show that the messages contained in such symbolic expressions are in contravention of the educational mission of the respective schools.

The *Pyle v. The South Hadley School Committee* is an example of a case involving symbolic expression in which the courts sided with the defendants' decision to institute a school policy banning symbols that are offensive, lewd, obscene or vulgar. The plaintiffs – two minor high school students – argued that the school policy was an infringement on their First Amendment rights with regards to the freedom of expression (DeMitchell et al., 2000). Both students had been barred from wearing t-shirts that bore suggestive sexual slogans and slang references associated with male genitals. The U.S. District Court in Massachusetts ruled in favor of the school officials noting that the slogans on the t-shirts were demeaning to female students and in contravention of the school's mission. This ruling was further influenced by reports that female students had complained about how the message on the t-shirts was offensive to them and was inhibiting their ability to learn due to the fear of sexual harassment (Essex, 2012). In light of these complaints, the defendants were thus able to prove that the donning of these symbolic expressions was creating material and substantial disruption of the school's activities.

Notably, when using the symbolic expression on t-shirts, buttons, armbands et al., participants in the student-led protests should remember that school authorities would be legally mandated to censor material that may seek to mock other people based on their gender, race, religion, color, national origin or sexual orientation. The ruling in the *Scott v. School Board of Alachua County* is an example of instances in which the courts may rule in favor of principals who censor symbolic expression by students. The case was a result of the suspension of two students at Santa Fe High School for displaying a Confederate flag in school even after warnings from the principal. The principal rationalized his decision to ban the display of this flag on the grounds that it would appear racially offensive to many students, and thus cause material and substantial disruption of school activities – in addition to infringing on the rights of other students (Essex, 2012). Although the Eleventh Circuit Court of Appeals acknowledged that the Confederate flag could be perceived in certain quarters as a symbol of “southern heritage”, it also pointed out that its perception as a symbol of racism by many other people cannot be ignored. The ruling was also firmed up by reports of past fights in the school, some of which were racial-based.

Borrowing from *Chandler v. McMinville*, school officials may be within their administrative duties in censoring the use of symbolic expression if they permit students to participate in the student-led protest-as a school event. While rendering their ruling in the aforementioned case, the judges noted that school officials have greater control over the students’ freedom of expression in instances where the exercise of such freedoms occurs during a school-sponsored event. Such speeches or expressions that the school can censor include those that are inadequately researched, ungrammatical, biased, vulgar/profane, prejudiced or unsuitable for certain audiences. Indeed, the actions of the principal in *Morse v. Frederick* were justified

considering that watching the Olympic relay was a school-sanctioned event and thus, it had control over the freedom of expression by students who were in attendance. In *Chandler v. McMinville*, the Court of Appeals noted that the school has the right to dissociate itself from such expressions. In other words, failure by Frederick to put down his banner would have led some people to construe that the school policy does not have any problem with the use of illegal drugs. In the case of school-sponsored walkout events, school officials would exercise greater control over students' use of symbolic expression lest some individuals conclude that there is a link between school policy and the offensive symbolic expressions that may be used by some of the students. The *Bethel School District v. Fraser* is another example of a case where the school exercised its control over a student's use of free speech at a school-sponsored event (school assembly). Without action taken on the student, many other students would have concluded that the school tolerates the use of morally repugnant expressions, such as the graphics and sexually explicit content of the plaintiff's speech.

Conclusion

The National Walkout in protest against Congress' lack of enacting stricter gun controls brought to center the debate to what extent school officials can censor the exercise of First Amendment rights by students. School officials nationwide were torn between sanctioning the walkout as a school event and punishing those who participated in this event with an-unexcused absence. Legally, school officials can punish students partaking in demonstrations that violate school policies or rules. For students caught in a catch-22 situation – exercising their First Amendment rights or earning a suspension – a symbolic expression during school hours should have been encouraged by school officials as an unsanctioned option to exercising the First Amendment rights as far as the National Walkout was concerned. As was the case in *Tinker v.*

Des Moines Independent School District, this option is not subject to sanctions by school officials except in cases where the symbolic expressions may be of an offensive nature or likely to cause material and substantial disruption in the school. In light of the National Walkout, the issue of student-led protests, especially walkouts, should be formally addressed by school officials. Schools should have clear guidelines regarding what activities will constitute an absence, as well as what activities will result in formal discipline measures. This information should be communicated in advance to students, parents, and stakeholders. The overarching thesis supports the fact that students do not shed their First Amendment rights at the school gate. School officials must be aware of what specific laws come into play regarding students' exercising their rights under the First Amendment. School officials will do well to allow students to exercise their constitutional rights while keeping school policies at the forefront of the matter, and communicating possible outcomes to students and parents regarding how such actions may affect individual students.

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