

Freedom and the Constitution

A Curriculum for High School Classrooms in Connecticut



Unit 1: Student Guide

Freedom of Speech



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Introduction

Standing up for the constitutional rights of state residents is the mission of the American Civil Liberties Union Foundation of Connecticut. Educating people about those rights is central to that task, which is why we have created this learning unit on the First Amendment.

The purpose is to provide an understanding of the right to freedom of speech guaranteed by the First Amendment to the United States Constitution, the limits to that right and the particular application to public school students. This guide will help you:

- Analyze the concept of free speech and the controversies it has engendered.
- Differentiate among the major Supreme Court cases regarding student speech and the legal precedents set by those cases.
- Apply the legal principles you have learned to analyzing real and potential constitutional conflicts over free speech rights.

The unit includes four lessons. The first covers U.S. Supreme Court rulings that established the standards governing free speech in schools today:

1. Student Free Speech Rights

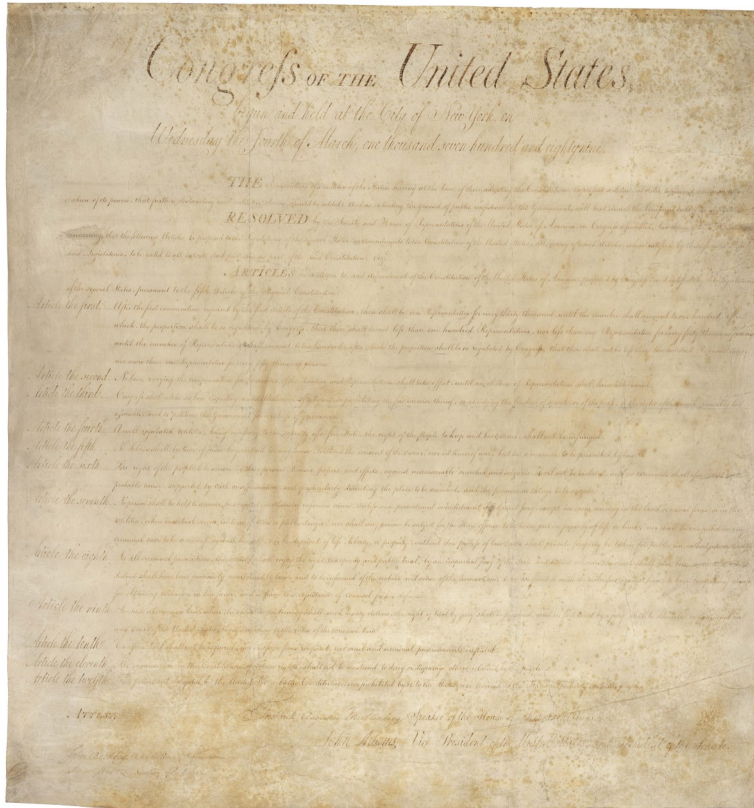
The other lessons concern recent free speech cases and controversies in Connecticut:

2. Groody T-shirt and the Wolcott Public Schools
3. *Doninger v. Neihoff*
4. Manchester Public Schools Social Media Policy

The Evolution of Free Speech Rights

***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 the people peaceably to assemble, and to petition the Government for a redress of grievances.*

The First Amendment to the U.S. Constitution guarantees a right to free speech, a right that government — whether local, state or federal — can restrict only in very narrow circumstances. One such circumstance is described in the famous admonition that one may not shout “fire” in a crowded theater



the general principle that Americans may speak their minds without government interference is widely supported to a degree that is unique among nations.

The standards for free speech and the Supreme Court cases that established them

The Supreme Court's first substantial rulings on free speech came in the years

because it would create a dangerous panic. Complicated bodies of law have grown around other exceptions, including the concepts of “fighting words,” “obscenity” and “incitement” and other doctrines describing when the government can limit free expression. The court cases brought to defend free speech rights often hinge on those narrow exceptions.

The courts have held the right of free speech to cover a wide range of expression in spoken and printed words, artistic works and the use of symbols. In 1989, for example, the Supreme Court ruled that flag burning is a form of expression protected by the Constitution. It remains a controversial opinion. But

after World War I, and they were not favorable to individual rights. The Court upheld the government's suppression of anti-war speech in several cases, notably *Schenck v. United States* and *Debs v. United States*. In 1942, in *Chaplinsky v. New Hampshire*, the Supreme Court upheld the arrest of a man whose sidewalk preaching had occasioned a disturbance. In this case, the Court articulated for the first time the “fighting words doctrine” that created an exception to speech rights for words that “tend to incite an immediate breach of the peace.” But starting in the late 1960s, the Supreme Court made a series of rulings that broadened speech rights, many of them involving student speech.

Tinker v. Des Moines

The Supreme Court famously ruled in *Tinker v. Des Moines* that **students don't "shed their constitutional rights to freedom of speech and expression at the schoolhouse gate."** At issue in that case was the right of students to wear black armbands to school as a protest against the Vietnam War, a right the school denied but the Court upheld.

While that 1969 ruling clearly established that public school students have free speech rights, it also acknowledged limits to those rights — restrictions beyond those that apply outside of school. So while the general public is subject to a few very narrow limits to free expression, students at public schools face additional restrictions.

The *Tinker* case produced standards that are still applied to student free speech cases more than 50 years later. The Supreme Court ruled that school officials could not censor student expression just



because they disagreed with it. In order to restrict student speech, school officials must be able to predict "substantial disruption of or material interference with school activities" or to show that the speech interfered with the rights of others. The Court added that the expectation of a substantial disruption must be "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. "

The *Tinker* precedent stood alone for nearly two decades, but subsequent Supreme Court rulings established additional bases for restricting speech in school. In *Bethel School District No. 403 v. Fraser* (1986) the Supreme Court allowed schools to restrict speech that is vulgar or lewd and in *Hazelwood School District v. Kuhlmeier* (1988) the Court allowed school officials to control some student speech in school-sponsored newspapers and at school activities. In 2007, in *Morse v. Frederick*, the Supreme Court allowed suppression of student speech promoting illegal drug use.

Bethel School District v. Fraser

In *Bethel School District No. 403 v. Fraser*, the Supreme Court held that **school officials could punish a student for speech that was vulgar or lewd at a school-sponsored event.** Matthew Fraser, a 17-year-old at Bethel High School in Washington, strung together a series of sexually suggestive *double entendres* in a speech before 600 students in a school assembly endorsing a candidate for student government. He said the candidate was " ... a man who is firm — he's firm in his pants ... in his character ... " The candidate won the election. Fraser was suspended from school for two days.

The Supreme Court ruled that school officials did not violate Fraser's First Amendment by punishing him for his lewd campaign speech, although two lower courts had ruled for Fraser because there was no disruption at the school after the speech.

Chief Justice Warren E. Burger drew a distinction between the political speech protected in *Tinker* and vulgar or lewd speech. The *Fraser* decision set a precedent allowing school officials to restrict student speech with-

out showing substantial interference, as required by *Tinker*, but only when they can show they have acted in what they reasonably believe is in the best interest of their educational responsibilities.

Hazelwood v. Kuhlmeier

The Supreme Court held in *Hazelwood School District v. Kuhlmeier* that **school officials may control some student speech in school-sponsored newspapers and at school activities**. In 1983, Robert Reynolds, principal of Hazelwood East High School in Missouri, reviewed an advance copy of the Spectrum, a school-sponsored newspaper produced in a journalism course, and found two articles objectionable. One covered teenage pregnancy at Hazelwood East and quoted pregnant students. The other explored the effects of divorce on students. Reynolds decided to delete the two pages on which those articles appeared, thus deleting additional articles, as well.

Reynolds believed the teen pregnancy article was inappropriate for a school newspaper and its intended audience, and the anonymity of the quoted girls was not adequately protected. He also believed that the divorce article, in which a student sharply criticized her father for not spending more time with his family, violated journalistic fairness because the newspaper did not give the girl's father a chance to defend himself. As the journalism class was, in part, designed to teach these notions of fairness, Reynolds asserted that he was acting in the best interests of the school by censoring the material.

Students on the Spectrum staff, surprised at finding two pages missing, sued the school on the grounds that their First Amendment rights had been violated. Five years later, the final decision came down in *Hazelwood*, the first Supreme Court case to focus specifically on high school student press rights. The U.S. Supreme Court voted 5-3 to reverse the decision of the U.S. Court of Appeals for the 8th Circuit in St. Louis, which had upheld the rights of the students. The Court ruled that the principal had the right to censor articles in the student newspaper that conflicted with the school's educational mission.

In this ruling, the Supreme Court acknowledged *Tinker's* basic premise that students "do not shed their constitu-



Some Landmark Decisions from the U.S. Supreme Court on Free Speech

- *Schenck v. United States* (1919) Limiting free speech during wartime.
- *Debs v. United States* (1919) Reinforcing limits on free speech during wartime.
- *Chaplinsky v. New Hampshire* (1942) No protection for "fighting words."
- *Tinker v. Des Moines* (1969) Students have right to political protest.
- *Bethel School District v. Fraser* (1986) Schools can limit lewd speech.
- *Hazelwood v. Kuhlmeier* (1988) Schools can censor school-sponsored newspapers.
- *Texas v. Johnson* (1989) Flag burning is protected speech.
- *Morse v. Frederick* (2007) Schools can censor speech advocating illegal drug use.
- *Snyder v. Phelps* (2011) Allowing offensive pickets of funerals.

tional rights to freedom of speech or expression at the schoolhouse gate.” But the Court, citing *Fraser*, modified this position when applied specifically to school-sponsored expressive activities, such as a school newspaper. In that case, “A school need not tolerate student speech that is inconsistent with its basic educational mission.” Such speech might include material that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences,” or any expression that advocates “conduct otherwise inconsistent with the shared values of the civilized social order.”

The Court found 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.”

Morse v. Frederick

In *Morse v. Frederick*, the Supreme Court allowed **limits on student speech that promotes illegal drug use**. In 2002, Joseph Frederick, a senior at Juneau-Douglas High School, unfurled a banner saying “Bong Hits 4 Jesus” during the Olympic Torch Relay through Juneau, Alaska. The court held that Frederick was taking part in a school-supervised activity, although he was not on school property. The school’s principal, Deborah Morse, told Frederick to put away the banner because she was concerned it could be interpreted as advocating illegal drug activity. After Frederick refused, Morse took the banner away. Frederick originally was suspended from school for 10 days.

Court ruled that the wearing of armbands by students to protest the Vietnam War had the highest level of constitutional protection because it was political speech. In *Fraser*, the Court declared “the constitutional rights of students at public school are not automatically” the same as the rights of the general public. And in *Hazelwood*, the speech rights of students were viewed “in light of special characteristics of the school environment.”

In *Morse*, the majority of justices said that the Constitution affords fewer protections to certain types of student speech at school or at school-supervised



The Supreme Court ruled that Frederick’s free speech rights were not violated, adding another layer to the interpretation of student speech rights. In *Tinker*, the Court stated that students do not “shed their constitutional right to freedom of speech or expression at the schoolhouse gate.” The

events. They found that the message Frederick displayed was by his own admission not political in nature, as was the case in *Tinker*. The Court further reasoned that the phrase “Bong Hits 4 Jesus” could reasonably be viewed as promoting illegal drug use and, as such, the state had a compelling interest in prohibiting or punishing that expression.

Resources

United States Courts: What Does Free Speech Mean?

A list of important free speech cases and links to a First Amendment quiz.

<http://www.uscourts.gov/EducationalResources/ClassroomActivities/FirstAmendment/WhatDoesFreeSpeechMean.aspx>

American Civil Liberties Union: Free Speech

A collection of information and documents from the ACLU about freedom of speech.

<http://www.aclu.org/free-speech>

Cornell University Law School: Texas v. Johnson

Text of the U.S. Supreme Court decision about flag burning.

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0491_0397_ZS.html

U.S. Supreme Court: Snyder v. Phelps

Text of the decision allowing the controversial Westboro Baptist Church to protest at military funerals.

<http://www.supremecourt.gov/opinions/10pdf/09-751.pdf>

FindLaw: Tinker v Des Moines

Text of the Supreme Court decision allowing students to wear armbands in protest of the Vietnam War.

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=393&invol=503>

The Oyez Project: Tinker v. Des Moines Independent Community School District

Audio of the oral arguments in *Tinker*, with scrolling transcript.

http://www.oyez.org/cases/1960-1969/1968/1968_21#argument

Cornell University Law School, Bethel School District No. 403 v. Fraser

Text of the Supreme Court decision permitting limits on lewd or vulgar student speech.

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0478_0675_ZS.html

University of Missouri, Kansas City, School of Law: Fraser speech

Text of the speech given by Matthew Fraser

<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/fraserspeech.html>

U.S. Supreme Court: Hazelwood School District v. Kuhlmeier

Information and links to audio of oral arguments and other material about the case.

<http://www.uscourts.gov/multimedia/podcasts/Landmarks/HazelwoodvKuhlmeier.aspx>

Freedom Forum: Case Summary: Hazelwood School District v. Kuhlmeier

A summary of the case, with details about the material removed from the school newspaper.

<http://www.freedomforum.org/packages/first/Curricula/EducationforFreedom/supportpages/L08-CaseSummaryHazelwood.htm>

U.S. Supreme Court, Morse v. Frederick

Text of the Supreme Court decision allowing censorship at school events of speech advocating drug use.

<http://www.supremecourt.gov/opinions/06pdf/06-278.pdf>

Discussion questions

1. Is freedom of speech an absolute right in all circumstances? Can anyone say whatever they like whenever they like?
2. *Tinker* is seen as an important confirmation of students' rights to free speech. Have the subsequent decisions in *Fraser*, *Hazelwood* and *Morse* enhanced or detracted from student speech rights?
3. In these student cases and in free speech cases involving the general public, the Supreme Court has made it clear that political speech has the highest level of protection under the Constitution. Why is this?
4. In *Morse*, the Court found that the student's speech in the "Bong Hits 4 Jesus" banner was not political. How do we define political speech?
5. If any non-student did the same things the students did in *Morse*, *Hazelwood* or *Fraser*, could they have been censored or punished?

Connecticut Cases and Controversies

The question of what students may say in school is not likely to be completely resolved. Throughout the nation and right here in Connecticut, cases continue to arise about slogans on T-shirts, remarks on Facebook, stories in student newspapers and other ways that students express themselves on campus and off.

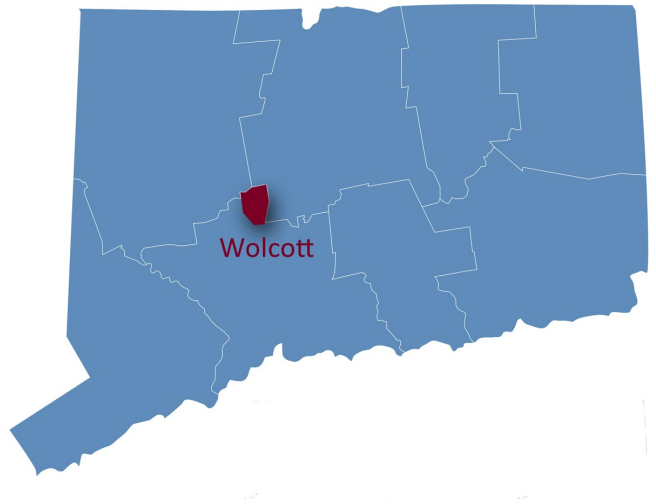
While there have no substantial student speech cases have reached the U.S. Supreme Court since *Morse* in 2007, the examination of the free speech rights of students continues in the lower courts and outside them, across the nation and right here in Connecticut.

The Wolcott T-Shirt Controversy

One such debate arose in the Waterbury suburb of Wolcott. April 20, 2012 was designated a Day of Silence at Wolcott High School as part of a national movement to raise awareness of bullying and harassment of gay, lesbian, bisexual and transgendered people.

Seth Groody, a junior at the school, wore a T-shirt that day to express his opposition to same-sex marriage. One side of the shirt depicted a rainbow — the commonly recognized symbol of gay rights — with a slash through it. The other side showed a male stick figure and a female stick figure holding hands above the legend, "Excessive Speech Day."

According to Seth, he was called to the school office, where school officials ordered him to remove the T-shirt, which he did under protest. School officials said they merely suggested that Seth remove the shirt, and that he did so voluntarily.



Seth and his father contacted the American Civil Liberties Union of Connecticut, which sent a letter on their behalf to the Wolcott school superintendent. The letter asked Wolcott school officials to affirm Seth's rights to wear the T-shirt, citing *Tinker* and some recent cases involving students' political views that had reached the federal circuit court level elsewhere in the country. Having received no response for several months, the ACLU of Connecticut prepared to file a federal lawsuit against the school district.

In February 2012, a lawyer for the Wolcott schools wrote a letter affirming Seth Groody's right to wear the T-shirt. Because the agreement settled the dispute, the ACLU of Connecticut did not file the lawsuit. A copy of the complaint that was drafted for the lawsuit — but never filed — is available in this guide and at:

www.acluct.org/wp-content/uploads/2014/01/groody-draft-complaint.pdf

Resources

Letter from the ACLU of Connecticut to Joseph Monroe, principal of Wolcott High School

The letter asking Wolcott school officials to affirm Seth Groody's free speech rights.

<http://www.acluct.org/wp-content/uploads/2014/01/wolcott-letter-060512.pdf>

Wolcott Whisper: 'Teaching Moment' Sparks Debate Over Speech

A local news website's article on the controversy.

<http://wolcottwhisper.com/2012/06/11/teaching-moment-debate/>

WATR –AM (Waterbury): Talk of the Town interview with Sandra Staub

The legal director of the ACLU of Connecticut discusses the Groody T-shirt issue.

<http://www.acluct.org/watr>

MSNBC: Teen wins right to wear 'Jesus Is Not a Homophobe' T-shirt to school

A news story about a similar case involving opposite views.

<http://usnews.msnbc.msn.com/news/2012/05/29/11939795-teen-wins-right-to-wear-jesus-is-not-a-homophobe-t-shirt-to-school>

FindLaw: Zamecnik v Indian Prairie School District # 204

A federal court case cited by the ACLU of Connecticut as relevant to the Groody issue.

<http://caselaw.findlaw.com/us-7th-circuit/1557587.html>

Discussion questions

1. Could school officials have settled the matter by adopting a rule forbidding T-shirts with political messages? What if they banned any words on T-shirts? What if they adopted school uniforms?
2. Some people suggested that Seth's T-shirt was a form of hate speech. What is hate speech?
3. The American Civil Liberties Union of Connecticut fought for same-sex marriage in Connecticut but defended Seth Groody's right to wear a T-shirt opposing same-sex marriage. Why?

Doninger v. Neihoff

In 2007, Avery Doninger, a junior at Lewis S. Mills High School in Burlington, CT, criticized school administrators for canceling a student concert. From her home computer, she posted a blog entry referring to "douchebags in the central office" and from the school computer lab she sent email asking students and parents to complain to the school superintendent "to piss her off more."

As a consequence, the school refused to let Avery run for re-election as class secretary in her senior year.

On the day of the election, Avery and supporters were required to remove T-shirts that said "Team Avery." She won the election as a write-in candidate but was not allowed to take office.

Avery and her mother sued the school district, saying her constitutional rights to free speech, due process and equal protection had been violated. A federal court judge denied their request for an injunction to allow Avery to take office as class secretary. The Doningers filed an appeal of another part of that decision, which concerned school officials' liability, which was

unsuccessful. The U.S. Supreme Court refused to hear a further appeal of the case.

The case was widely seen as a setback for student speech rights and many news reports

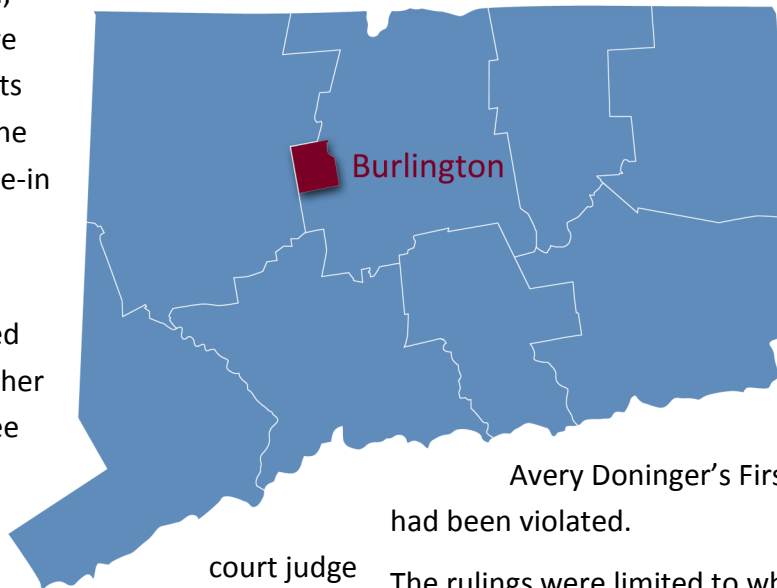
described it as an indication that school officials could punish students for what they say on the Internet.

But the outcome was not quite so clear-cut because the case ended without settling most of the issues in question. The courts never ruled on the core question of whether

Avery Doninger's First Amendment rights had been violated.

The rulings were limited to whether Avery could get an immediate injunction and to the level of liability that school officials would face if the court had ultimately found that they had violated her rights. While the courts' rulings on those matters might indicate

that they would have ruled against Avery in a final decision, the case never got that far. And to complicate matters further, students who were punished for insulting their principals online won two very similar Pennsylvania lawsuits that that did address the core free



Resources

Second Circuit Court of Appeals Opinion, *Doninger v. Niehoff*

Decision upholding a lower court's refusal to grant Doninger an injunction allowing her to take office.

<http://www.acluct.org/wp-content/uploads/2013/08/Doningerappealopinion1.pdf>

Amicus Brief, ACLU of Connecticut, *Doninger v. Niehoff*

The ACLU of Connecticut did not represent Avery Doninger but filed a friend of the court brief on her behalf.

<http://www.acluct.org/wp-content/uploads/2009/09/DoningerAmicus09.pdf>

Third Circuit Court of Appeals Opinion, *Layshock v. Hermitage School District*

This case involved a similar controversy over an online insult to a school official but ended very differently.

<http://www.ca3.uscourts.gov/opinarch/074465p1.pdf>

Discussion questions

1. Does it make a difference, as a free speech issue, whether Avery Doninger was at home or at school when she wrote her email and blog entry?
2. School officials said that Avery's conduct met the Tinker standard for disruptive speech. Did the blog post create a reasonable expectation of "substantial disruption of/or material interference" with school activities? What about the email? What about the T-shirts?
3. The appeals court ruling suggested a distinction between punishing students with expulsion or suspension from regular school activities and barring them from extracurricular activities, such as serving in student government. Would Avery Doninger have had a stronger case if she had been expelled for her actions?

Manchester Public Schools Social Media Policy

In May 2012, the Manchester, CT, Board of Education was considering a policy that would have restricted social networking by teachers and other employees.

The policy would have imposed rules about employees' comments and posts on personal accounts on Facebook, Twitter and other social networking sites accessed off campus. Employees could be punished or fired for violating the rules. The policy was not intended to apply to students.

Alerted by a newspaper report, the American Civil Liberties Union of Connecticut objected to provisions in the proposed policy that would have forbidden speech that would harm "the goodwill and



reputation of the school district in the community" and speech that was not "appropriately respectful."

In a letter to the school board, the

ACLU-CT pointed out that the speech

the policy sought to restrict is protected by the First Amendment. It cited the case of *Pickering v. Board of Education*, in which it was held that a public school teacher could not be punished for criticizing a school board's handling of its budget.

After receiving the ACLU letter, the school administration withdrew the policy from consideration, and it was not adopted.

Resources

Manchester Board of Education, Proposed Social Networking Policy

<http://acluct.org/wp-content/uploads/2012/05/mansmpolicy.pdf>

Letter, ACLU of Connecticut to Manchester Board of Education

<http://www.acluct.org/wp-content/uploads/2012/05/manboe052512.pdf>

Hartford Courant: ACLU Says Proposed Manchester Social Media Policy Violates Free Speech

http://articles.courant.com/2012-05-25/community/hc-manchester-school-social-media-0525-20120525_1_social-media-school-board-school-rules-and-regulations

Orlando Sentinel: 2 views on Teachers and social media:

Schools must enforce teachers' boundaries, keep students safe

http://articles.orlandosentinel.com/2011-09-23/news/os-ed-against-jerry-buell-092311-20110922_1_gay-man-anti-gay-attitudes-superintendent-susan-moxley

Schools can't squelch free speech outside the classroom

http://articles.orlandosentinel.com/2011-09-23/news/os-ed-favor-of-jerry-buell-092311-20110922_1_free-speech-personal-facebook-page-teachers

Findlaw: *Pickering v. Board of Education*

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=391&page=563>

Discussion questions

- 1. The policy would have prohibited the use of social networking to harass coworkers, create a hostile work environment or violate student confidentiality. Why didn't the ACLU object to those provisions?**
- 2. Does new communication technology always bring new efforts to control speech? What happened in Europe after the invention of the printing press in 1439?**
- 3. Some employers have required employees and job applicants to share Facebook and other social media passwords with supervisors or recruiters. Is that legal?**

Glossary

These definitions reflect the legal meaning of the following terms, some of which have different meanings in other contexts.

Bill of Rights: the first ten amendments to the U.S Constitution, ratified together in 1791, which outline essential individual rights.

Circuit Court of Appeals: any one of 13 federal courts that handle appeals from the federal district courts, acting as intermediary between the district courts and the U.S. Supreme Court

complaint: in a lawsuit, the initial legal document describing the facts on which the legal claim is based

constitution: a document describing the fundamental principles of law that govern a nation, state or other political subdivision. The U.S. Constitution is sometimes called “the supreme law of the land.” Connecticut has its own constitution, which provides some individual rights in addition to those provided by the U.S. Constitution.

decision: the judgment of a court in a lawsuit or other matter brought before it.

defendant: in a lawsuit, the person or entity being sued

dissent: in a split court decision, the position of one or more judges or justices who disagree with the majority.

District Court: a trial court for federal cases, covering all or part of a state. A party can appeal a decision made in District Court to the Circuit Court of Appeals.

fighting words: words that cause injury or incite an immediate breach of peace. Fighting words are not protected by the First Amendment, but the Supreme Court has interpreted the term narrowly to mean words that are intended to cause immediate violence.

First Amendment: the first of ten amendments to the U.S Constitution that were ratified in 1791. The First Amendment prohibits government from interfering with freedom of religion, speech, press or assembly or the right to petition the government. These are sometimes called “the five freedoms.”

freedom of speech: the right to speak without government interference, guaranteed by the First Amendment. It has been broadly interpreted to cover a wide range of non-verbal expression, ranging from works of art to acts of political protest, such as flag burning.

hate speech: generally considered to be a communication that carries no meaning other than the expression of hatred for some group, it has no legal definition in the United States. Much of what could be considered hate speech, and which might be illegal in other countries, is protected by the First Amendment in the United States.

injunction: a judge’s order to prevent or require a particular action. In *Doninger*, the plaintiff sought an injunction requiring the school district to allow Avery Doninger to take office as student council secretary.

obscenity: material that depicts sexual activity in a an offensive way without artistic, scientific or cultural

value. (Acknowledging the difficulty of defining obscenity, Supreme Court Justice Potter Stewart wrote, “I know it when I see it.”)

opinion: the formal reason given for a court’s judgment or decision. A dissenting opinion expresses the reason one or more judges or justices disagrees with the majority opinion.

plaintiff: one who brings a complaint into a court of law

precedent: a settled legal case that supports an argument in a current case because it contains a relevant court decision or opinion.

prior restraint: governmental ban on expression before the expression takes place, usually referring to an order not to publish an article in a newspaper or magazine.

protected speech: speech or other forms of expression that are protected from government interference. Under the standards established by First Amendment cases, all speech is protected except for certain kinds of *unprotected* speech, such as obscenity, threats and fighting words.

standard: a rule or principle stemming from a settled legal case, for example *the Tinker standard* is based on the U.S. Supreme Court judgment in *Tinker v. Des Moines*

U.S. Supreme Court: the highest court and final authority on constitutional questions in the U.S. federal court system, it consists of a chief justice and nine associate justices appointed by the president with the approval of the U.S. Senate.