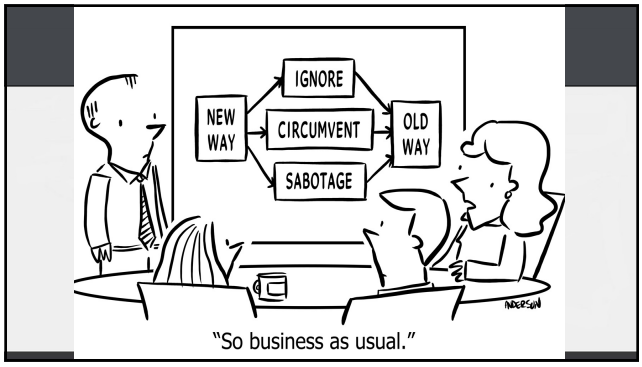
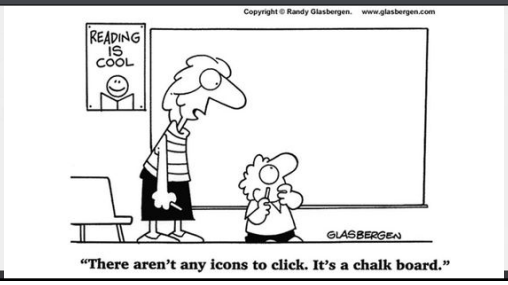


Today

- First Amendment Issues
  - Students
  - Teachers and Coaches
- *Endrew F.*
- Stupid Teacher Tricks

Student Speech



"There aren't any icons to click. It's a chalk board."

Student Expression Issues

- Last Spring:

Student Expression Issues

- This Fall:

Student Expression Issues

- This Fall:


High Schools Threaten to Punish Students Who Kneel During Anthem

By CHRISTINE HAUSER SEPT. 25, 2017

RELATED COVERAGE

READERS REACT
'I Served for What Th
Readers React to N.F.L.

After Trump Blasts N.
and Lock Arms in Soli

STILL PROCESSING
Still Processing: Take

SEPT. 25, 2017

Von Miller of the Bron

Tinker v. Des Moines Comm. Sch. Dist., 393 U.S. 503 (1969)

Tinker v. Des Moines Comm. Sch. Dist., 393 U.S. 503 (1969)

- Court:
  - School cannot suppress student expression unless school officials reasonably conclude that it has or will "materially and substantially disrupt the work and discipline of the school."
  - Conduct which involves "invasion of the rights of others" could be subject to limitations in a school settling

Student Speech

- Reasonable Forecast:
- Specific and significant fear
- Of disruption at school
- More than remote apprehension of disturbance
- School must point to well-founded expectation of disruption

Student Speech

Courts will look at:

- What officials knew–facts, training, and application
- Basis of knowledge
- Severity of threat
- Likelihood of actual disruption

Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986)

Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986)

"I know a man who is firm -- he's firm in his pants, he's firm in his shirt, his character is firm -- but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts -- he drives hard, pushing and pushing until finally -- he succeeds.

Jeff is a man who will go to the very end -- even the climax, for each and every one of you.

So vote for Jeff for A. S. B. vice-president -- he'll never come between you and the best our high school can be."

Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986)

- Court: "The school's interest in teaching students the boundaries of socially appropriate behavior gives the school the right to determine what manner of speech in the classroom or in a school assembly is inappropriate"

Morse v. Frederick (2007)

Morse v. Frederick (2007)

- During Olympic torch ceremony, a student unfurled a banner that read: BONG HITS FOR JESUS.
- Attendance at the ceremony was school-sponsored and school-supervised
- Circuit court ruled First Amendment violated, school did NOT demonstrate risk of substantial disruption

Morse v. Frederick (2007)

- Supreme Court:
  - " The special characteristics of the school environment, and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse."
  - "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."

Morse v. Frederick (2007)

- Supreme Court:
  - "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school environment."

Morse v. Frederick (2007)

- Supreme Court:
  - "Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. **We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some.** The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use."

Student Speech

Courts will look at:

- Is this a school activity?
- Is this education of students?

Scott v. Sch. Bd. Of Alachua County, 524 F.3d 1246 (11th Cir. 2003)

- Applied *Tinker* to uphold school punishment for display of Confederate flag
- "even if a disruption is not immediately likely" school could punish because "school officials are charged with the duty to 'inculcate the habits and manners of civility….'"

Scott v. Sch. Bd. Of Alachua County, 524 F.3d 1246 (11th Cir. 2003)

"In light of the above principles, the Court finds that the ban on the display of Confederate symbols was not unconstitutional. School officials presented *evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying this case.* Additionally, one only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke. Therefore, under both Tinker and Fraser, the school administrators did nothing wrong in banning the display of Confederate flags on school property."

Scott v. Sch. Bd. Of Alachua County, 524 F.3d 1246 (11th Cir. 2003)

"In light of the above principles, the Court finds that the ban on the display of Confederate symbols was not unconstitutional. School officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying this case. *Additionally, one only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke*. Therefore, under both Tinker and Fraser, the school administrators did nothing wrong in banning the display of Confederate flags on school property."

Castorina v. Madison Co. Sch. Bd., 246 F.3d 536 (6th Cir. 2000)

Castorina v. Madison Co. Sch. Bd., 246 F.3d 536 (6th Cir. 2000)

- School banned students from displaying Confederate flag on clothing
- Students sued; school defended using *Tinker*

Castorina v. Madison Co. Sch. Bd., 246 F.3d 536 (6th Cir. 2000)

- Court
  - Students had been allowed to wear Malcom X t-shirts
  - School failed to show "a likelihood of violence or other disruption" warranting the ban
  - No chance of others believing this was school-sponsored speech

Denno v. School Bd. Of Volusia County, 218 F.3d 1267 (11th Cir. 2000)

- Student was civil war buff
- Ct: student's subjective intent not dispositive
- "the more relevant factor is that the school official might reasonably think that other students would perceive the display as racist or otherwise uncivil"

Confederate Flag Cases in Nebraska

- Case #1
  - 4 students with flags in back window of trucks
  - 3 admitted they did for attention, took down
  - 1 refused
  - No history of race problems or disturbances
  - Advice:
    - give us some disruption

Confederate Flag Cases in Nebraska

- Case #2
  - 1 student with flag in back window of truck
  - No history of race problems or disturbances
  - In fact, no black kids in school
  - Advice:
    - give us some disruption
  - Result: Research paper as educational reaction, not "punishment"

Cheerleading…

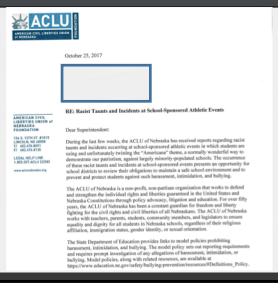
Kountze Indep. School District

- 4-year battle over banners at football games
  - "I can do all things through Christ, who strengthens me"
  - "If God is for us, who can be against us?"
  - "For it is God who is working in you, both to will and to act for his good purpose."
  - "But thanks be to God, which gives us victory through our Lord Jesus Christ."
- Freedom From Religion threatened to sue
- School stopped the banners
- Parents of the cheerleaders sued the school

Kountze Sch. Dist. v. Matthews
2017 Tex. App. LEXIS 9165 (Sept. 28, 2017)

- Court: "While the school district has shown that it exercises some editorial control over the preparation of the run-through banners, the facts fail to establish the level of control necessary to equate the Cheerleaders' speech with "government speech." First, the policy of approving" banners to ensure they did not include obscene or objectively offensive material does not transform the Cheerleaders' speech into government speech."

America Night in the Student Section



ACLU

October 25, 2017

RE: Racist Taunts and Incidents at School-Sponsored Athletic Events

Dear Superintendent:

During the last few weeks, the ACLU of Nebraska has received reports regarding racist taunts and incidents occurring at school-sponsored athletic events in which students are using and unfortunately twisting the "Americana" theme, a normally wonderful way to demonstrate our patriotism, against largely minority-populated schools. The occurrence of these racist taunts and incidents at school-sponsored events presents an opportunity for school districts to review their obligations to maintain a safe school environment and to prevent and protect students against such harassment, intimidation, and bullying.

The ACLU of Nebraska is a non-profit, non-partisan organization that works to defend and strengthen the individual rights and liberties guaranteed in the United States and Nebraska Constitutions through policy advocacy, litigation and education. For over fifty years, the ACLU of Nebraska has been a constant guardian for freedom and liberty fighting for the civil rights and civil liberties of all Nebraskans. The ACLU of Nebraska works with teachers, parents, students, community members, and legislators to ensure equality and dignity for all students in Nebraska schools, regardless of their religious affiliation, immigration status, gender identity, or sexual orientation.

The State Department of Education provides links to model policies prohibiting harassment, intimidation, and bullying. The model policy sets out reporting requirements and requires prompt investigation of any allegations of harassment, intimidation, or bullying. Model policies, along with related resources, are available at https://www.education.ne.gov/safety/bully-big-prevention/resources/#Definitions_Policy.

Practical Steps

- Consider the forum
  - Courts: Different rules for cheerleaders, band members
  - Fan Federation? Unclear
- Document the current environment to justify forecast of disruption
- Consider discipline versus other alternatives
- Consider obligation to protect players
- Train staff – particularly coaches
- Be prepared for media

Staff Speech Issues

Staff Speech

Pickering, 391 U.S. 563 (1968)

"If a employee speaks as a citizen on a matter of public concern the district must show it had an adequate justification for treating the employee differently from any other member of the public."

Teacher Speech

Garcetti, 547 U.S. 410 (2006)

"When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline."

Staff Prayer

- 1962-1992: USSC – rejected all policies and practices involving prayer at school activities
- *Doe v. Duncanville ISD* I and II (5th Cir.)
  - Group prayer at BB game led by coach
  - Coach's direction of players was impermissible, state-sponsored coercive activity that violated EC
  - Schools and officials may not lead, encourage, promote, or participate in prayers during school or extracurricular activities

Santa Fe ISD v. Doe, 530 U.S. 290 (2000)

- 2 school adopted policies
- District's policy permitting student-led, student-initiated prayer at football games violates EC
- FB game prayers were not private speech:
  - Public speech authorized by government policy
  - Took place on government property at government-sponsored school-related events
  - Involved both perceived and actual government endorsement of the delivery of prayer at important school events.

Prayer

- Dissent noted the "disturbing" tone of the Court's opinion that "bristle[d] with hostility to all things religious in public life."
- People who disagree with *Santa Fe* grab hold of the following quote from it:
  "Nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day."

Kennedy v. Bremerton Sch. Dist., No. 16-35801, 2017 U.S. App. LEXIS 16106 (9th Cir. Aug. 23, 2017),

- Bremerton HS(WA) assistant coach Joe Kennedy
- Post-game prayers with players at 50 yard line for 7 years
- Told to stop engaging in overt, public religious displays on the football field while on duty Followed directive for a few games, then prayed again
- Fired
- Court: No first amendment violation

Nebraska Issues

Some Cases are Just too Obvious…

Daniel Rapp: Math and Sexting

- Rapp is a JH math teacher
- Created a unique algebra lesson

"Tony can send 5 texts and 3 nudes in 19 minutes. He could also send 3 texts and 1 nude in 9 minutes. How long would it take him to send one text and one nude?"

In re Lynn Miller
Warrensburg, Mo (2017)

Using Instagram Unprofessionally

- Dionna Mendez
  - Special education teacher
  - Username: sexxxymendez
  - "This is what happens when u give special ed kids standardized tests and don't look at them for 5 min."
  - Pictures of student work, with students names legible
  - Threatened to take pictures of kids who were misbehaving and to post them on Instagram
  - "I have the dumbest parents in my class #lifeofspsecialedteacher #teaching #sped #specialed"

Munroe v. Cent. Bucks Sch. Dist. 805 F.3d 454 (3rd Cir. 2015)

- Teacher blog: "Where are we going, and why are we in this handbasket?"
  - Called S's "dunderheads" and "whiny, simpering grade-grubbers"
  - Parents were "breeding a disgusting brood of insolent, unappreciative, selfish brats"
  - Others: "argumentative f***"; "I hate your kids"; "unrealistically high perception of [your kid's] ability"
  - Graphic of a school bus with a "Short Bus" sign and "I DON'T CARE IF YOU LICK THE WINDOWS, TAKE THE SPECIAL BUS OR OCCASSIONALLY PEE ON YOURSELF ... YOU HANG IN THERE SUNSHINE, YOU'RE FRIGGIN SPECIAL."

Munroe v. Cent. Bucks Sch. Dist. 805 F.3d 454 (3rd Cir. 2015)

- School received more than 200 opt-out requests from parents
- Teacher allowed to return from maternity leave, given remediation plan, ultimately noticed for termination
- Employee sued claiming First Amendment violations

Munroe v. Cent. Bucks Sch. Dist. 805 F.3d 454 (3rd Cir. 2015)

- Court
  - Comments not protected under the Pickering balancing test
  - Unnecessary to determine speech caused termination and if remediation plan was pretextual
  - "In this case, Plaintiff's speech, in both effect and tone, was sufficiently disruptive so as to diminish any legitimate interest in its expression, and thus her expression was not protected."

Endrew F.

Endrew F. v. Douglas Co. Sch. Dist. RE-1
580 U.S. ___ (2017)

- Student with autism
  - Parents claimed that IEP had same basic goals from year to year
- Removed from public school and enrolled in "Firefly Autism House"
  - Behavior improved dramatically
  - Made "a degree of academic progress that had eluded him in public school"

Endrew F. v. Douglas Co. Sch. Dist. RE-1
580 U.S. ___ (2017)

- School presented a new IEP 6 months after private school enrollment
- Parents rejected because similar BIP
- Filed D.P. for tuition reimbursement
  - Contended that final IEP was not "reasonably calculated to enable Endrew to receive educational benefits."

Endrew F. v. Douglas Co. Sch. Dist. RE-1
580 U.S. ___ (2017)

- ALJ found for school
- District Court found for school
  - performance under past IEPs "did not reveal immense educational growth"
  - annual modifications to IEP were "sufficient to show a pattern of, at the least, minimal progress"
- 10th Circuit found for school
  - School's IEP was calculated to confer "*some* educational benefit"

Endrew F. v. Douglas Co. Sch. Dist. RE-1
580 U.S. ___ (2017)

- Supreme Court granted *certiorari*
- Unanimous decision to remand to district court
- Court: It true that Rowley said "some education benefit" - but in Rowley the issue was not whether student was receiving minimum of benefit
- **"An IEP is not a form document"**

Endrew F. v. Douglas Co. Sch. Dist. RE-1
580 U.S. ___ (2017)

- For a child integrated in the regular classroom
  - "an IEP typically should . . . be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."
  - When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum."[footnote]

Endrew F. v. Douglas Co. Sch. Dist. RE-1
580 U.S. ___ (2017)

- For a child not integrated into regular classroom
  - "If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances**. . .**
  - "…every child should have the chance to meet challenging objectives."
  - "…this standard is **markedly more demanding** that the 'merely more de minimis' test. . .

Endrew F. v. Douglas Co. Sch. Dist. RE-1
580 U.S. ___ (2017)

- "a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all."
- "The IDEA demands more. It demands an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

Endrew F. on Remand
2018 U.S. Dist. LEXIS 22111 (Feb. 12, 2018)

- Parents – 10th Cir. said "close case" under old standard; and that SCOTUS decision
- School – IEP was not "ideal," but it was a reasonable calculation of educational progress
  - Objectives in reading comp., writing, math, communication and inter/intra-personal goals increased from prior IEPs
  - IEP addressed special and unique circumstances of Endrew's autism, ADHD, behaviors, sensory needs

Endrew F. on Remand
2018 U.S. Dist. LEXIS 22111 (Feb. 12, 2018)

- In other words, "appropriately ambitious in light of his circumstances"
- Court
  - Previously ruled "minimal progress"
  - Small IEP changes = "some educational benefit"
  - Progress was "minimal at best"

Endrew F. on Remand
2018 U.S. Dist. LEXIS 22111 (Feb. 12, 2018)

- "I agree with Petitioner that the minimal progress evidenced in his educational plan . . . was ***clearly impacted by the District's lack of success in providing a program that would address Petitioner's maladaptive behaviors***."

Endrew F. on Remand
2018 U.S. Dist. LEXIS 22111 (Feb. 12, 2018)

- *"The District's inability to develop a formal plan or properly address Plaintiff's behaviors . . . impact the assessment of whether [IEP] it offered to [Endrew] was or was not reasonably calculated to enable him to make progress appropriate in light of his circumstances.*
- *The District's inability to properly address Petitioner's behaviors that, in turn, negatively impacted his ability to make progress on his educational and functional goals, also cuts against the reasonableness of the April 2010 IEP."*
- District's IEP was not reasonably calculated to enable E.F. to make progress, even in light of unique circumstances.

Endrew F. on Remand
2018 U.S. Dist. LEXIS 22111 (Feb. 12, 2018)

- Last brief on damages due March 29th

MUST follow IEP

- IEP is staff's "safe harbor"
- District liable for failure to follow:
  - Due Process
  - OCR Complaint
  - Rule 51 Complaint
- Personal Liability
  - Doe v. Withers, (WV. 1993)
  - PPC claim

"Just out of curiosity, who do you punish on weekends?"

Questions?

"OK, I'll take one more question and then I'll begin backpedaling."