

The First Amendment in Schools: Resource Guide

Contents

Introduction: Avoiding Censorship in Schools	2
Religious Expression in the Public Schools	4
Sex and Sexuality Education	7
Harassment and Hate Speech	9
Student Publications	11
Student Expression: Web Pages, Dress Codes, & More	13
Access to Information on the Internet	19
Teachers' Rights	23
Parents' Rights	25

Introduction

Avoiding Censorship in Schools

Efforts to remove books and other materials from the classroom, curriculum, and school library represent one of the most significant forms of censorship in the United States today. Classics of Western literature, like *Lysistrata* and *The Miller's Tale*, to *Harry Potter*, celebrations of Earth Day, studies of world religion, discussions of feminism, and more, have all been challenged. Sometimes these efforts are initiated by a parent or other member of the community; sometimes organizations campaign to change educational norms and practices to reflect their particular views and perspectives. They may circulate a list of "objectionable" books, stimulating challenges in communities around the country.

Local school boards generally have the authority to prescribe the curriculum, within state-approved guidelines. Two Supreme Court cases, *Hazelwood School District v. Kuhlmeier* (1988) and *Bethel School District v. Fraser* (1986) grant administrators considerable discretion in deciding what is educationally suitable. For example, lower courts upheld action against one teacher for permitting violations of school policy against profanity in teaching creative writing (*Lacks v. Ferguson Reorganized School District* (8th Cir. 1998) and against another for staging a dramatic production with controversial content (*Boring v. Buncombe County Board of Education* (4th Cir. 1998). However, courts defer to administrators and educators equally when their decisions promote, rather than suppress, speech, as when schools administrators elect to include controversial materials in the curriculum. (*Monteiro v. Tempe Union High School*, 9th Cir. 1998).

The outcome of contested censorship cases often depends on the factual context, how competing interests are balanced, and in some cases motive. As a result, decisions vary widely, and the same action can be upheld in one district and struck down in the next. This can be confusing, to put it mildly. However, a few rules of thumb are available.

Policies and practices designed to respect free expression and encourage discourse and discussion are rarely, if ever, disturbed by courts. They may be challenged by students or parents who are offended by certain books or other materials with racial or ethnic content (e.g., *Monteiro v. Tempe Union School District*, 9th Cir. 1999), or with content that offends religious beliefs. (E.g., *Altman v. Bedford Central School District*, 2d Cir. 2001). However, it is rare that a court will order educators to remove materials that have legitimate educational purposes, even if they cause offense to some. (Many schools will offer students alternative assignments in such cases.)

The decision to remove material is more vulnerable, and often places motivation for the removal at issue since actions motivated by hostility to particular ideas or speakers is not permitted. (E.g., *Campbell v. St. Tammany's Parrish School Board*, 5th Cir. 1995). As the Supreme Court has observed: "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 109 S. CT. 2533 (1989).

The deference frequently shown school administrators with regard to the curriculum is not always accorded when a dispute arises over material in the school library. Under a 1982 Supreme Court ruling, school administrators may regulate library content based on “educational suitability,” but may not do so to suppress ideas or instill political orthodoxy. (*Board of Education v. Pico*) Noting the importance of “the regime of voluntary inquiry” that characterizes the library setting, as distinct from the “compulsory environment of the classroom,” the Court has affirmed students’ right of access to a broad range of information “to inquire, to study and to evaluate, to gain new maturity and understanding.” Observing this distinction, lower courts tend to inquire more searchingly into decisions to remove library materials, and to order materials restored when there is proof of an impermissible motive. (*Case v. Unified School District*, D. Kans. 1995; *Campbell v. St. Tammany Parish School Board*, 5th Cir. 1995).

Useful information is available from the American Library Association, including the Library Bill of Rights, Tips for Library Directors, and Tips for Young Adult Librarians:

- Make sure the library has an up-to-date selection policy, reviewed regularly by your library board, which includes a request for reconsideration form.
- Have the request for reconsideration form available at your major service desk
- Work with your trustees (school board representatives) to ensure that they know and understand the library’s policies.
- Model the behavior you want staff to practice. When confronted by a parent or other individual who wants an item removed or reclassified, listen carefully to what is being said (and what is not). Respect that person’s right to have an opinion, and empathize. Keep the lines of communication open to the greatest possible extent.
- Work with your frontline staff (reference librarians, circulation, support staff, etc.) to make sure they understand the library’s policies.
- Build a good working relationship with your local media before controversy arises. Provide them with positive, upbeat stories about what the library is doing.
- Put key contacts on the library’s mailing list. The time to build these relationships is before you need them.

Once a school district accedes to a demand to censor, it can become increasingly difficult to resist such pressures. Once one perspective is accommodated, those with a different view come to expect similar treatment. Listening to community concerns, and taking them into account in structuring the educational environment, is not the same as removing material because someone does not agree with its contents. School officials always have the legal authority to refuse to censor something. They may need to do more to help members of their community understand why it is the right choice for children’s education.

Religious Expression

The First Amendment guarantees of religious liberty include the freedom to believe or not to believe, and to observe one's faith openly without government interference. Freedom of speech encompasses religious as well as secular speech, but the Establishment Clause imposes limitations on government endorsement of religion that has important implications for religious speech and observance in public schools.

Thomas Jefferson described the Establishment Clause as erecting "a wall of separation between church and state." Government neutrality toward religion is increasingly important with the proliferation of diverse religious beliefs, and schools are among the most important places where this principle is tested.

Public school teachers, principals, administrators, and other personnel may not:

- promote a particular religion as being superior to any other,
- promote religion in general as superior to a secular approach to life,
- be antagonistic to religion in general or to a particular religious belief in particular
- be antagonistic to secularism, or
- do things to advance or inhibit religion.

This does not imply that the public schools may not teach about religion. Indeed, "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, and the like." *Stone v. Graham*, 449 U.S. 39, 42 (1980)(per curiam). Schools may teach about religion, explain the tenets of various faiths, discuss the role of religion in history, literature, science and other endeavors, and the like, as long as it has a secular purpose to promote educational goals, and there is no effort to promote or inhibit any religious belief.

School-Sponsored Prayer

Prayer and Bible-reading have long been excluded from the public schools. *Engel v. Vitale* (1962) and *School Dist. V. Schempp* (1963). Even a moment of silence for "meditation or voluntary prayer," is impermissible if its purpose is to promote prayer. *Wallace v. Jaffree* (1985).

Student-Led Prayer

In *Santa Fe Independent School District v. Jane Doe* (2000) the Court held that student-led prayer at school-sponsored football games was unconstitutional, because the circumstances implied official endorsement of religion.

While the case leaves open the possibility that student-initiated prayer is permissible under some circumstances, it is clear that schools must exercise care to avoid the appearance of promoting religion. The difficulty in finding the right balance is clear from the split in opinion in the lower courts. In the same month, a federal appellate panel in Georgia upheld student-initiated “prayer or other personal message” at graduation because the administration had no control over the student’s statement, and a district court in Illinois temporarily banned a student-led prayer at graduation because of “the degree of school involvement.”

Perhaps the most unusual case in the recent past involved a first grader who was not allowed to read a story from *The Beginner’s Bible* for an assignment in which students were asked to read their favorite stories aloud in class. Equally divided, the Third Circuit Court of Appeals sitting en banc, upheld the teacher’s exercise of judgment, rather than confronting the question of the place of religion in school. (*Hood v. Medford Board Of Education*, 3rd Cir., 2000).

Religious Holidays

Holiday observations in public schools have been a persistent bone of contention in many communities. Although schools may teach about the religious beliefs underlying religious holidays and may celebrate secular aspects of such holidays, schools may not observe holidays as religious events or promote such observance among their students.

Religious Messages:

Schools may not permanently display religious messages like the Ten Commandments. (*Stone v. Graham* (1980)). They may, however, display religious symbols in teaching about religion, as long as they are used as teaching aids on a temporary basis as part of an academic program.

Teaching of evolution:

In *Epperson v. Arkansas* (1968) the Supreme Court struck down a state law prohibiting teachers in public schools from teaching “the theory or doctrine that mankind ascended or descended from a lower order of animals,” on the ground that it violated the Establishment Clause of the constitution. The decision was reaffirmed in *Edwards v. Aguillard* (1987), which required evolution to be taught alongside “creation science.” The Court rejected the state’s alleged secular purpose to protect academic freedom, finding it a “sham.”

Religious Clothing and Symbols:

Religious clothing and symbols, if not disruptive, are a protected form of expression. Even schools with dress codes ordinarily make an exception for religious articles.

Released Time:

Students may be dismissed from school for off-campus religious instruction, provided that the schools do not encourage or discourage participation or penalize those who do not attend. (*Zorach v. Clauson* (1952)).

Use of Public School Facilities by Religious Groups:

Under a 1993 Supreme Court ruling, public schools that permit their facilities to be used by community groups are not permitted to discriminate against religious groups. *Lamb's Chapel v. Center Moriches School District* (1993). This holding was recently reaffirmed in the context of a religiously-affiliated after-school program that sought to use public school facilities. *Good News Club v. Milford Central School* (2001).

Religious Exemptions from State Education Law:

When public education requirements severely conflict with sincerely-held religious beliefs, the courts have fashioned a remedy to address the conflict. For example, in *Wisconsin v. Yoder* (1972), Amish families challenged a state requirement that children be enrolled in school until the age of 16. The parents claimed that they would be unable to raise their children in the Amish faith, which repudiates most aspects of modern life, if their children were required to attend school outside the Amish community past the eighth grade. The Supreme Court upheld their right to educate their children at home under the circumstances of this case, but subsequent cases cast some doubt about how far this doctrine can be extended. (*Employment Division v. Smith*, 1990.)

The Equal Access Act

(20 U.S.C. §§4071-74), adopted by Congress in 1984, was intended to prevent discrimination against student extra-curricular activities “on the basis of the religious, political, philosophical, or other content of the speech” at such student-run events. The Act applies to any “public secondary school which receives Federal financial assistance” and which allows “noncurriculum related student groups to meet on school premises during noninstructional time.” In 1990, in *Board of Education v. Mergens*, the Supreme Court upheld the constitutionality of the Act, affirming the right of “equal access” to student groups without regard to the “religious, social, philosophical or other content” of their activities.

In practice, the Act has mixed results. In one case, students sued for the right to organize a support group for gays and lesbians. A federal court rejected the school's claim that any discussion of same-sex relationships and safer-sex would conflict with its policy to teach “abstinence-only until marriage,” and ordered the school to allow the group to meet. However in another case in California, a school district decided to ban all extracurricular clubs from campus rather than allow formation of a club called Christian Athletes.

U.S. Department of Education, Guidelines on Religious Expression in the Public Schools

Guidelines were originally adopted in 1995 and updated since then to provide every school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in the public school. The guidelines affirm two obligations imposed on school officials: 1) schools may not forbid students acting on their own from expressing their personal religious beliefs; 2) schools may not discriminate against private religious expression by students, but must instead give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity. Schools are strongly encouraged to develop their own district-wide policy regarding religious expression and to engage parents, teachers, various faith communities and the broader community.

Sex and Sexuality

Sex is a contentious topic in this country, and has been for many years. Unlike Western European nations, where openness on sexual matters is more accepted, efforts to teach about sexuality in the United States have been opposed on religious, moral, cultural and other grounds. However, the First Amendment applies to material with sexual content as long as it is not "obscene" or "harmful to minors."

Information about sex and material with sexual content are often challenged on the ground that they are not "age appropriate." The true concern in such cases is usually not whether children are old enough to understand the information, but whether keeping such information from them is necessary to "preserve their innocence" or keep from "putting ideas in their heads." These arguments are advanced in challenges to novels with sexual content, like Judy Blume's novels, *Are You There God? It's Me, Margaret* and *Forever*. *Margaret* is commonly challenged for its discussion of puberty and menstruation, and *Forever* for its story about a high school senior's first sexual experience. Teen magazines like *Seventeen*, *Savvy*, and *Teen People*, have been removed from school libraries because of objections to their "health and body" columns, including a description of a visit to the gynecologist.

Sexuality education is also controversial in some communities. On the one side, most major medical organizations, sex educators, and many parents advocate comprehensive sex education encompassing a wide range of information, including abstinence, safer sex methods, contraception, sexual orientation, sexually transmitted diseases, pregnancy, abortion, relationship skills, and so forth.

While public support for comprehensive fact-based sexuality education is widespread, there are some who believe that sex education has no place in public school and that parents should control what their children learn about sex, and when. If it is taught, they urge schools to instruct students to simply abstain from all sexual activity outside of marriage.

Both approaches may elicit parental complaints based on free speech and religious freedom. Some parents argue that comprehensive sexuality education impedes their ability to inculcate their children in their religious beliefs. On the opposite side, parents who want their children to get uncensored information about sex complain that the abstinence-only curriculum denies their children access to vitally important health information and imposes a religious perspective on all.

Abstinence-Only-Education

In 1996, Congress adopted legislation to promote sex education that teaches “abstinence-only until marriage.” The law specifies that programs must teach “that a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity,” and “that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects.”

Students in such programs receive only information consistent with this viewpoint. Instead of a comprehensive review of the facts about contraception, safer sex practices, and sexuality, they often receive false and exaggerated information about contraceptive failure and are told that contraceptives undermine romance and spontaneity. They typically learn about homosexuality only in the context of HIV/AIDS. Abortion is presented as morally wrong and physically and emotionally dangerous. In some programs, fetuses are referred to as “babies.” While individuals may promote abstinence-only education for non-religious reasons, support for teaching abstinence, like support for teaching creationism, is historically tied to religious convictions and represents a particular religious viewpoint about sexuality. It thus poses the question whether religion has improperly influenced the health and sexuality curriculum.

Lack of Sex Education Policies

Perhaps out of a desire to avoid controversy, some schools simply fail to adopt policies about sex education, and many fail to provide anything more than the minimum - usually state-mandated information about AIDS/HIV. A nationwide survey of school district practices published in 1999 found that 31 percent of school districts do not have a district-wide policy to teach sex education, leaving such decisions to individual schools or teachers. Only 14 percent of students in grades six or higher live in districts with a district-wide policy to teach sex education.* This leaves many young people with little or no information on this important subject.

Sexual Orientation

The Equal Access Act, discussed previously, entitles students in many schools to form clubs or groups to discuss issues of interest, including sexuality and sexual orientation. A federal court of appeals struck down an Alabama law banning funding for gay and lesbian students at public universities. The court ruled that the law reflected “naked viewpoint discrimination” and that it was an unconstitutional attempt to limit discussions about sexuality to only one viewpoint. Laws preventing discrimination on the basis of sexual orientation are beyond the scope of this manual, but offer wide-ranging protection to students if they are discriminated against on the basis of sexual orientation. See also NCAC's collection of materials on censorship involving LGBT issues.

Harassment and Hate Speech

One of the thorniest issues in recent years has been the question of restricting "hate speech" and harassment in schools. Schools must provide access to education on a non-discriminatory basis, prevent harassment that interferes with their educational mission, and socialize students to live and work in a diverse community - and they must do all these things while recognizing that the right of free speech sometimes means the right to say things that are offensive to others.

Discrimination in education is addressed, at the federal level, by Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. These laws impose on public schools the responsibility to insure that educational opportunities are provided on a non-discriminatory basis.

To rise to the level of discrimination, objectionable speech must create a "hostile environment." Under Supreme Court decisions, reflected in guidelines issued by the Department of Education Office of Civil Rights, discrimination occurs only when harassment is so "severe, persistent, or pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment." Age and maturity of students is also relevant. For example, under the DOE Guidelines, "a kiss on the cheek by a first grader does not constitute sexual harassment."

"A comment by one student to another that she has a nice figure [or] a request for a date... even if unwelcome" does not constitute harassment. The Guidelines make it clear that "Title IX is intended to protect students from ... discrimination, not to regulate the content of speech.... [O]ffensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a ... hostile environment." Thus, under DOE rulings, the "use of Native American symbols [that] was offensive to some Native American students and employees was not dispositive, in and of itself, in assessing a racially hostile environment claim." Nor, under current Supreme Court standards, is the "mere utterance of an ethnic or racial epithet which engenders offensive feelings" sufficient to make a hostile environment claim.

Notwithstanding these guidelines, many schools penalize and suppress speech because it might be offensive to others. On the one hand, this is understandable, as schools strive to socialize students and prepare them to live in a democratic diverse community. However, these policies can go too far. Suppressing speech and ideas, by imposing a political orthodoxy, destroys candor, hampers students in working through their own ideas and disagreements, and undermines the ability of students to understand one another. In addition, it can impede the educational program.

When school policies suppress campus speech because it might be offensive, parents and students will likely fail to understand why they should read books with "offensive" language. Ironically, African-American authors, such as James Baldwin, Claude Brown, Maya Angelou, Alice Walker, Toni Morrison, Malcolm X, Richard Wright, and others, are most often challenged on grounds that they might give offense. And if derogatory speech can be suppressed, why not news stories, cartoons, poems, and other material dealing with issues of race, ethnicity, gender, or other sensitive topics.

Eliminating discrimination in education is of the highest priority. Accomplishing this without creating an educational culture repressive of speech and ideas - including those that are sometimes objectionable - is obviously one of the public schools' most delicate, and important, tasks. Schools that have tried to avoid claims of harassment and discrimination by suppressing "offensive" speech have sometimes found the approach divisive, counterproductive, and expensive, in the case of First Amendment challenges. Schools may be better off doing what they do best - focusing on education, teaching about the First Amendment, discrimination, and the tools of civil dialogue.

Department of Education, Office of Civil Rights

The federal laws cited above are enforced by the Department of Education's Office of Civil Rights (OCR). Relevant OCR guidelines include its Investigative Guidance on Racial Incidents and Harassment Against Students, 59 Fed. Reg. 11448 (1994) and Sexual Harassment Guidance, 62 Fed. Reg. 12033 (1997).

Student Publications

What role do student publications play in the school setting? The answers to this question may reveal different expectations and goals for student press and literary publications, depending on who is asked. Administrators may view student publications as representing the school in the community at large, or as an adjunct to the English curriculum. Or they may see them as providing opportunities and experiences for students learning how writers, reporters, and editors work, by functioning as they would in real life. Faculty advisors and student authors may see them as an open forum for student views, or as a training opportunity where students learn from their experiences and mistakes acting as reporters, writers, and editors. It is important to understand the various functions student publications can perform in the school setting, to avoid controversies about who controls the content of such publications.

In general, administrators have the authority to decide the purpose and objectives of student publications. If they conclude that journalistic independence is an objective, it is unlikely that courts would interfere with policies to implement this goal. At the same time, courts would also be unlikely to interfere with a determination by school authorities to exercise oversight, as long as they are not trying to suppress dissent or disfavored ideas.

A handful of Supreme Court decisions define the contours of students' rights and administrative authority in this area. The landmark Supreme Court decision in *Tinker v. Des Moines Independent Community School District* (1969) overturned the suspension of several students for wearing black armbands to school in protest against the Vietnam War, acknowledging that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Under *Tinker*, student expression would have to threaten substantial disruption of the educational environment to be subject to suppression. *Tinker's* applicability to student publications is tempered by two subsequent decisions, however.

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) upheld the school's ability to censor student expression on campus that is vulgar, lewd, or obscene. *Hazelwood School District v. Kuhlmeier* (1988) upheld the authority of school officials to control content of school publications for educational purposes or to insure that it represents the school accurately and appropriately. These cases define the limits of school authority over student expression and speak to the legality, but not necessarily the wisdom, of speech-restrictive practices and policies.

The Court's ruling in *Hazelwood* is generally viewed as granting educators considerable latitude to control the content of student publications, if they do so for legitimate educational reasons and not out of hostility to particular ideas. Judicial deference to educators under *Hazelwood* has permitted restrictions on student publications, often without careful scrutiny of the educational rationale offered. As a result, some states have enacted what are commonly referred to as "anti-*Hazelwood* laws" to restore student free speech protection.

State "Anti-Hazelwood" Laws

Since 1977, California has had a law on its books protecting student expression. In its present form, this section of the California Education Code, No. 48950, says school districts cannot make or enforce any rule subjecting a high school student to disciplinary sanctions on the basis of speech or other communication that—outside campus—is protected by the First Amendment or Section 2 of Article 1 of the California Constitution. Students can take civil action to obtain legal relief and the court can award attorney's fees to a prevailing plaintiff in a civil action. This does not apply to private religious secondary schools, and nothing prohibits disciplining students for harassment, threats, or intimidation. According to the code, free speech rights are subject to reasonable time, place, and manner regulations.

Five other states—Massachusetts, Iowa, Colorado, Kansas and Arkansas—have enacted anti-Hazelwood legislation since 1988. Student press defenders are pushing for similar laws in other states and advocating other state-level protections. At Oregon's Brookings Harbor High School where student journalists can refuse to publish a newspaper rather than submit to prior review, legislation is pending before the legislature that would protect student newspapers from prior review.

Student articles about drug use, teen sexuality, death, suicide, divorce, and other controversial topics, are most likely to generate censorship controversies. School officials typically seek to censor such articles on the ground that they reflect badly on the school, or that they are inappropriate subjects for students, or that they are offensive to some readers. In one recent situation at Hinsdale Central High School outside Chicago, the principal censored then destroyed a school paper report on school violence. The story "Scared of School," was to be published on the second anniversary of the killings at Columbine High School in Colorado (April 2001). The principal objected to the headline of one story, "Getting a Gun," and to "alarmist" illustrations, including a hooded figure with a gun.

Regardless of whether the principal has the legal authority to suppress a story, it is not always the best course of action. In the Hinsdale case, students published on the Internet, and a local paper editorialized in support of the article and included its Web address. The school board later issued a statement that censorship would only exacerbate the problem of violence in schools. In another recent incident in Wisconsin, a school principal decided to pre-review the student magazine before publication. The students, considering it a forum for the expression of student views, fear that the magazine will lose its personality and appeal, in which case they may decide to publish off-campus.

Student Expression

The Internet has given student journalists access to enormous sources of information and easy opportunities to share ideas with a much bigger audience than ever before. Independent Internet publications can take the form of message boards, single Web sites, a network of links between Web pages, or full-fledged online newspapers complete with editorials, sports and entertainment sections. Underground Internet publications often contain hard-hitting commentaries on school-related topics as well as political and social issues of interest to students. Students choose to go online for many reasons, including the Internet's expansive reach and the low cost of online publishing.

Concerns about censorship in "official" school papers also may prompt students to publish material in underground papers produced outside of school, or on Web sites maintained privately without use of school facilities. Some schools have attempted to censor these publications and suppress off-campus speech they find offensive, disturbing, or unflattering. While the school has considerable authority over what students do during the school day, on school property, or with school equipment, the effort to control what students write or say on their own time at their own expense is much more questionable.

Courts have been willing to uphold school censorship of off-campus speech only in unusual circumstances. In one case, the Seventh Circuit Court of Appeals upheld the expulsion of a student who published an article about "hacking" the school's computer system in an underground newspaper. The court relied on the fact that the newspaper was distributed on campus, advocated on-campus activity by other students, and constituted a "call to action detrimental to the tangible interests of the school." (*Boucher v. School Bd. of the School Dist. of Greenfield*, 7th Cir. 1998.) The on-campus activities and consequences were plainly determinative of the result in the case.

In contrast, the Second Circuit Court of Appeals has held that school officials had no authority to penalize students in connection with an off-campus underground paper that contained articles on sexual subjects and made fun of school officials. Some work on the paper was done on school premises, but the court discounted it as "scant and insignificant." Absent evidence that such activity would interfere with the educational environment, the court observed the "the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon."

The same principles generally apply to student Web sites. To justify discipline for privately maintained Web sites, schools must show that it interferes with the educational process; being vulgar, insulting, or offensive is not enough. (*Beussink v. Woodland R-IV School District*, 30 F.Supp. 2d 1175, E.D. Mo. 1998 and *Biedler v. North Thruston School District No. 3*, (Wash. Super. Ct., 7/18/00). On the other hand, when personal Web sites maintained by students off-campus do interfere with the school's ability to function effectively, disciplinary action has been upheld. One such case involved a student whose Web site appeared to threaten a teacher by asking, among other things, for contribution to "help pay for the hitman." (*J.S. v. Bethlehem School Dist.*, 757 A. 2d 412, Pa.Comm. Ct. 2000.)

Students who understand their legal rights and responsibilities can help avoid conflict with school officials by ensuring their Internet publications are produced and maintained apart from any school course, without the use of school materials or teacher assistance. The Student Press Law Center answers frequently asked questions about student use of online media:

Question: Do school officials automatically have more control over online student media than printed media?

Answer: No. Different First Amendment protections have historically applied depending on which category the medium falls into. The Supreme Court has suggested that online media more closely resembles the print media than broadcast. This means the same protections that apply to print newspapers should apply to online publications or Web pages.

Question: Our school has just connected to the Internet, and my principal wants us to publish an online version of our student newspaper but has demanded that we first remove all controversial stories. What can we do?

Answer: Since you are just starting out, it may be difficult to argue that the school's computer server has been designated as an open forum for student expression. Assuming that school officials can articulate a reasonable educational justification for their censorship (which is no sure thing), and that their regulations are viewpoint neutral, school officials will probably have considerable leeway in deciding what they will allow on the school server.

Question: What is an Acceptable Use Policy? What is its significance?

Answer: An Acceptable Use Policy (AUP), which often is found in district guidelines or in a student handbook, sets out the rules and regulations governing student use of school computer networks. The Virginia Department of Education Division of Technology has a Web site that includes examples of high school AUP's: <http://www.pen.k12.va.us/VDOE/Technology/AUP/home.shtml#intro>

Question: Can administrators stop an online student publication from hosting a comment bulletin board or "chatroom" where students can, for example, post comments about course offerings or debate controversial topics?

Answer: No. Such a prohibition would constitute a restriction based on content, which is not allowed at the university (or public school) unless there is a compelling reason.

Question: Can school administrators punish a student for material she publishes from her house on an independent (non-school sponsored) Web site?

Answer: Generally, no. Students, like all citizens, have strong First Amendment protection when it comes to expressing themselves off-campus. Public school officials cannot legally censor or punish a student for posting a personal homepage, publishing a Web-based "zine" or using a personal computer to send e-mail outside of school from a home computer, even if the subject matter of the site is school-related or offensive.

Other Forms of Student Expression

Disputes over expressive activities in schools are not confined to debates over curricular materials, the library and the school paper, but occur in a wide variety of contexts, ranging from hair length and message t-shirts to jewelry and concerts.

Any activity that is "school-sponsored" - be it in the classroom, at a school assembly, during a student meeting or a student club meeting, in the campus newspaper or in a school play - is governed by the same principles that have already been articulated with regard to classroom materials and student publications: in the event of a court challenge, judicial decisions are likely to show great deference to school boards and administrators if they rely on sound educational criteria, their actions are consistent with the school's educational mission and policies, and there is no evidence of an impermissible motive to suppress certain ideas or dissenting views. By the same token, when educators decide to take a "hands off" approach - for example, by providing students with editorial control over publications and student events - that judgment is also entitled to the same degree of deference.

Hair, Dress, and Appearance

Since the Tinker case in 1969, students, school administrators and courts have struggled with the boundaries and limits of student dress and grooming requirements. Beginning in the early 1970s, the courts were inundated with cases that confronted the issue, and have found few clear answers. As of 2001, the circuit courts remain split over the control school administrators can exercise with respect to student dress and grooming. In one recent case, a school disciplined a boy for wearing an earring, although earrings are permitted under the dress code for girls. As this reveals, the issue often is complicated by gender. Other examples are hair length restrictions for boys but not girls, or dress requirements designed to enforce notions of modesty for girls but not boys. Some public schools have required uniforms, but this has hardly solved the problem, as rigid dress codes of this sort are often challenged. In contrast, gender-neutral guidelines about appropriate dress rarely result in challenges.

Gang Symbols and Insignia

Public school administrators often struggle to find ways to minimize gang activity in their schools. Since gang members often identify themselves through clothes and insignia, principals have often turned to dress codes in an effort to discourage gang membership and activities. Courts have generally held that these codes are valid but have sometimes considered such attire as "speech." Enforcing restrictions such as prohibitions against wearing an earring that symbolizes gang activity is a difficult and potentially frustrating exercise. The chosen symbol may be as traditional a form of expression such as jewelry with religious symbolism; it may change from one week; and it may be unrecognizable to outsiders - a shoelace color, the shape of an earring, the way a scarf is tied. An appearance code directed at the prevention of violence can cover so large an area that non-gang members can be denied their expressive rights (see *Olesen v. Board of Education of School District*, 676 F. Supp. 821 (N.D. Ill. 1982)). In sum, gang-related behavior can be monitored and regulated more readily than the insignia used to symbolize those relationships.

Message T-Shirts

With respect to slogans and images on t-shirts, courts have upheld the actions of principals who prohibit students from wearing T-shirts with expressions considered vulgar or offensive. However, courts have been appropriately deferential towards political messages or those that reflect on matters of public concern. One court upheld a school district's right to ban T-shirts that read, "Co-ed Naked Band: Do it to the Rhythm," *Pyle v. South Hadley School Community*, 824 F. Supp. 7 (D. Mass. 1993), and another found the message on a t-shirt, "Drugs Suck," sufficiently vulgar to allow for its restriction. *Broussard v. School Board of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992). Some courts, however, are more receptive to students' free expression claims and have sustained the right to wear message t-shirts as long as they did not interfere with school activities or other students. *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992).

Profanity and Suggestive Language

In a 1986 Supreme Court case, the Court upheld a three-day suspension of a high school student whose speech nominating a classmate for a student government position was filled with sexual innuendo: "Jeff is a man who will go to the very end -- even the climax, for each and every one of you." (*Bethel School District v. Fraser*, 478 U.S. 675 (1986)). Since then, courts have been deferential to rules against profanity in school, in one case going so far as to permit termination of a teacher whose students used profanity in their creative writing class. (*Lacks v. Ferguson-Florissant Reorganized School District* (8th Cir. 1998).) As one federal judge concluded, "[c]ivility is a legitimate pedagogical concern."

Violence in Schools and "Zero Tolerance" Policies

In the aftermath of violent events resulting in injury and death in several schools in the past few years, there has been a marked increase in discipline of students for behavior deemed "threatening." While some incidents involve possession of weapons, fighting, or bullying, others involve only expression - poems, short stories, off-hand comments, jokes, or artwork depicting violence.

Violent language and imagery are protected by the First Amendment. There are many important reasons to safeguard the ability to express thoughts about violence. Much classical art and literature, including the Bible, Shakespeare, and *The Odyssey*, contain violence, as does historical accounts and a great deal of contemporary literature, art, film and theater. Expression that employs or depicts violence has thus been consistently accorded protection by the courts in this country. Unlike obscenity, which is not protected as free speech, violence is treated like other speech entitled to legal protection.

First Amendment cases have acknowledged the connection between political speech, which is highly valued, and violent speech. For example, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court recognized the crucial distinction between advocacy of unlawful conduct, which is protected under the First Amendment, and intentional, imminent incitement of unlawful conduct, which is not. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) held that leaders of the NAACP had a First Amendment right to advocate violence in their efforts to achieve racial justice. The Court held that "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment." To fall outside the scope of the First Amendment, there must be an "imminent threat" of violence or unlawful conduct.

These cases raise concerns about punitive responses to student fiction, poetry or art with violent themes or imagery. These expressive activities, if unaccompanied by any threatening or disruptive behavior, would ordinarily be considered protected, even in the school context. While educators must be vigilant in guarding against school violence, they face a difficult choice when a student's only "offense" is expression.

Predictably, the courts have encountered some difficulties applying these principles. In one case, school administrators in Washington State suspended a student who had written a poem about a school shooting. The Ninth Circuit Court of Appeals upheld that decision, but emphasized that its decision was based on a larger factual context, not just the poem that triggered the disciplinary action. The student in the case had expressed suicidal ideations to school personnel, had recently experienced serious family problems that the school knew about, and had just broken up with a girlfriend. Given the circumstances, the court held that the school's decision to suspend the student pending a psychological evaluation was not unreasonable. (*LaVine v. Blaine School District*, 9th Cir. 2001.) In another situation, a middle school student in Pennsylvania was expelled after posting messages about a teacher on his Web site, which, among other things, solicited money "to pay for the hitman" to kill the teacher. The court considered his behavior sufficiently threatening and disruptive to the educational process to justify the expulsion. (*J.S. v. Bethlehem Area Sch. Dist.*, 757 A. 2d 412, Pa. Commw. Ct. 2000.)

In contrast, a student who was suspended over artwork depicting the thoughts of a mentally ill person threatening violence was reinstated after challenging the school's action on First Amendment grounds. (*Boman v. Bluestem Unified School District*, D. Kan. 2000). In another case, a student whose Web site contained a "mock obituary" for friends with their agreement, was suspended after a local television station characterized it wrongly as a "hit list." A federal judge ordered the student reinstated pending a hearing, and the case was later settled. (*Emmett v. Kent School District*, 92 F. Supp. 2d 1089, W.D. Wash. 2000.) And a student in Rhode Island who was suspended because of an essay containing threatening language was reinstated when the school agreed to settle the case. (*Parent v. Johnston School Department*, D.R.I. 2000.) In these three cases, the courts found no evidence that the students posed a threat, and concluded that they were penalized solely for their thoughts and expression.

These cases suggest that there is little justification for disciplining a student for pure expression, including expression of hatred or works of imagined violence. The equation is changed by the addition of other factors, such as a threat of harm against an identifiable individual, a personal history suggesting grounds for concern, or other facts suggesting the possibility of an actual intent to inflict violence and an ability to carry out such a threat.

Zero Tolerance

Some schools have adopted "zero tolerance" policies to deter violent, threatening, or anti-social behavior in schools. Such policies are often characterized by severe punishment for infractions of school rules, without regard to a mitigating circumstances or a student's history. Critics claim these policies sometimes go too far, disciplining students for minor infractions and for behavior that is not in fact threatening. The American Bar Association has issued a statement in opposition to such policies because they "fail to take into account the circumstances or nature of an offense or an accused student's history." One of the principle concerns, addressed in a report by The Civil Rights Project of Harvard University and others, relates to the impact of "zero tolerance" policies on minority students, who are more frequently subjected to discipline.

The National School Boards Association, which views "zero tolerance" for threats of violence as successful in curbing violence in schools, nonetheless cautions that policies must "preserve constitutional rights." NSBA counsels that policies "should define the offense to exclude expression protected by the First Amendment. Vague and overly broad policies are more vulnerable to court challenge."

Common sense in achieving the important goal to preserve school safety is obviously needed, along with an understanding that speech and other forms of pure expression enjoy certain protections. Aside from constitutional considerations, schools should foster rather than suppress the ability to express anger and fear in non-threatening, socially constructive ways - by encouraging students to explore the difficult issue of violence through dialogue, fiction, art, and drama.

Access to Information on the Internet

The Internet is a powerful source of information and forum for free expression. It is, in the words of the Supreme Court, a venue where "any person can become a town crier with a voice that resonates farther than it could from any soapbox." It is also a technology that permits the dissemination of all kinds of ideas, including some that are hateful, dangerous, and threatening. With its increasingly widespread use have come efforts to regulate it, in the name of preventing harm to minors from material sexual, violent, or objectionable content.

In 1997, the Supreme Court struck down parts of the Communications Decency Act ("CDA"), which prohibited the transmission of "indecent" material to minors over the Internet on First Amendment grounds. *ACLU v. Reno*, 521 U.S. 844 (1997). Since then, Congress has enacted other laws intended to prevent minors from exposure to sexual and violent content on the Internet. The Child Online Protection Act ("COPA") and the Children's Internet Protection Act ("CIPA") are the two most recent examples. COPA made it a federal crime to use the Internet to transmit material thought to be "harmful to minors" for commercial purposes. Like its predecessor CDA, COPA has been held to violate the First Amendment and it is no longer good law. *American Civil Liberties Union v. Ashcroft*, 322 F.3d 240 (3rd Cir. 2003).

In December 2000, Congress passed CIPA, requiring all public libraries and schools that receive federal funds for Internet access to install blocking software. On June 23, 2003, the Supreme Court held that the CIPA provision requiring public libraries to install blocking software is constitutional, reversing a lower court decision that held CIPA unconstitutional on First Amendment grounds. *U.S. v. American Library Assoc., Inc.*, 539 U.S. (2003). Although no one has contested CIPA's provisions requiring elementary and secondary schools to install blocking software, it is almost certain that a constitutional challenge would fail.

Specifically, CIPA requires schools and libraries that receive federal funds for Internet access under the E-rate Program of the Universal Services Program and the LSTA to adopt and implement Internet safety policies. CIPA requires schools to (1) monitor the online activities of students under 17 years of age and (2) restrict access of minors and adults to visual depictions that are obscene, child pornography, or "harmful to minors." Adult Internet-users, including students age 17 and older, may request that the blocking software be disabled in order to conduct bona fide research or simply to view material that is otherwise protected by the First Amendment. Libraries must also restrict access to visual depictions that are obscene, child pornography, or harmful to minors and may disable filtering software upon request. However, libraries are not required to monitor the Internet activity of their patrons.

Standards for Filtering Internet Content

Filtering software that has been developed to block restricted material is imperfect and costly. Therefore, schools and libraries are advised to weigh the costs and benefits of installing the software and maintaining it with the amount of federal subsidy received -- some libraries have chosen not to install the software because it costs more than the federal subsidy forgone as a result. If the choice is made to install filtering software, it is important to understand the criteria that the software uses to exclude content, to retain control over what kind of material is blocked, and to have procedures in place to bypass the system or to correct any viewpoint discrimination that the filters may generate. Among its flaws, filtering software has a tendency to block access to sites that do not contain restricted material (such as sites about Mars exploration, Super Bowl XXX, and sextants); it may allow access to material that, by its own standards, should be blocked; it often fails to distinguish between "good" and "bad" information about sex, violence, etc.; and it may restrict access to controversial topics that are appropriate subjects for research. (The flaws in such software have been documented by Consumer Reports, Computer Professionals for Social Responsibility, and other groups.) Some students have reported that they are unable to do research assignments at school, access information about health or learn how to do computer research effectively because of the effects of overly restrictive filters. Thus, students who do not have home computers may be at a competitive disadvantage in such situations.

There are three kinds of filtering software that can be used to restrict Internet access. Online content is posted on Web sites that have addresses called URLs (uniform resource locators). Internet filters may be characterized as either "blacklists," "whitelists," or word-rule blocking. Blacklists block access to a specific list of "inappropriate" URLs, as determined by individuals who evaluate them based on a specific standard. They leave access open to everything else. Whitelists limit access to a selected list of URLs, blocking entry to all other sites. Word-rule filters block URLs that fit a certain rule, such as those which block the letter combinations "sex" or "breast", and leave other URLs unblocked. These filtering methods might be used separately or in combination. That is, a software vendor could design a filter to block out sites according to a word-rule standard, but provide an automatic override that unblocked any URLs that are on a specific whitelist.

Acceptable Use Policies

School librarians may plainly create lists of recommended sites and search engines, to guide students toward educationally valuable material, and they can create menus that direct students to these sites. Schools may also clearly implement "Acceptable Use Policies" (AUP's) to instruct students in standards and procedures governing use of school computers. These may restrict students to use of computers for "educational" purposes, instruct students in good research practices, alert them to the presence of fraudulent and illegal information, advise about the risks of communicating with unknown persons, and so forth.

AUP's become more difficult to interpret and enforce when they try to restrict student (and faculty) access to certain categories of information, such as entertainment, sports, and even "pornography." Students may have legitimate research needs that take them into such areas, and deciding what is included may become an issue. While some sites are "pornographic" by almost any standard, other sites may be more ambiguous. For example, explicit safe-sex instruction, literature and art with sexual themes, and even government documents (like the Starr Report) would all be classified as "pornographic" by some viewers, but not others.

State Online Indecency Laws

State legislatures have also actively tried to enact legislation to censor material on the Internet, under their power to regulate material that is "harmful to minors." While numerous laws have been enacted, few have survived judicial scrutiny. An exception is a Virginia law prohibiting state employees from using the state's "information infrastructure" to access or download material with "sexually explicit" content. The law was challenged on constitutional grounds by six college professors but upheld on the theory that the state is authorized to control how its employees perform their jobs. Since the statute provides that employers may exempt employees from compliance with the law, its practical consequences may be limited. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000)(en banc).

Summary of Recent Court Decisions

Children's Internet Protection Act

In *U.S. v. American Library Assoc., Inc.*, 539 U.S. 194 (2003), a group of libraries, library associations, library patrons, and Web site publishers challenged the constitutionality of CIPA. The Supreme Court upheld CIPA, which requires schools and libraries that are recipients of federal funds for Internet access under the subsidized "E-rate" of the Universal Service Program and the Library Services and Technology Act ("LSTA") to install filtering software that blocks visual images that are obscene, constitute child pornography, or are harmful to children under the age of 17. The Supreme Court reasoned that CIPA does not violate the First Amendment because previous cases have ruled that the government has discretion to limit the content of speech made available to the public through government funded programs and because CIPA authorizes officials to disable filtering software upon request, allowing users to view constitutionally protected materials.

Child Online Protection Act

On remand from the Supreme Court, the Third Circuit Court of Appeals held COPA unconstitutional. *American Civil Liberties Union v. Ashcroft*, 322 F.3d 240 (3rd Cir. 2003). COPA penalized individuals and entities that knowingly transmitted, for commercial purposes, material that was "harmful to minors" by means of the World Wide Web. The Supreme Court held that COPA's reliance on community standards in determining whether content was "harmful to minors" was unconstitutional, despite the fact that World Wide Web transmissions reach many communities with a wide range of standards. The Supreme Court remanded the case to the Court of Appeals for the Third Circuit to determine whether COPA was unconstitutional on separate grounds. Subsequently, the Court of Appeals held COPA unconstitutional on many grounds, reasoning that: COPA's definition of "minor" was problematic -- material harmful to a seven-year old minor might not be harmful to a 16-year old minor; COPA impermissibly burdened the transmission of material that was otherwise protected for adults; COPA's evaluation of potentially obscene material took place in isolation, rather than in context of the whole work; and less-restrictive means of protecting minors from harmful Internet communications were available.

Communications Decency Act

The Supreme Court in *ACLU v. Reno*, 521 U.S. 844 (1997), struck down CDA, which made it a felony, punishable by fines and up to two years in prison, to knowingly transmit "indecent" messages to anyone under 16 years of age or to display "patently indecent" messages. Federal judges reviewing the case noted that the wording of the law was so vague and broad that it might have covered not just hard-core pornography but ribald literature and even information about breast cancer. The safe-harbor provisions were unrealistic, either because the technology described did not exist or because the blocking mechanisms would be too costly for noncommercial providers, including nonprofit groups and individuals. The Supreme Court held that the Internet was entitled to the same level of protection under the First Amendment as printed material like books and newspapers, and that it was unconstitutional to deprive adults of access to legal material in order to protect minors against the hypothetical risk of harm from exposure to material considered "harmful" because of sexual content.

Teachers' Rights

To a considerable degree, the rights of teachers are governed by the same principles applied to other government employees. When the government acts as employer, it may impose rules and regulations on employees, including some that affect their speech rights on work-related matters. For example, in government-funded health programs, the government may instruct its personnel to provide advice about family planning services, but not about abortion. *Rust v. Sullivan*, 500 U.S. 173 (1991). Public employees do not lose their First Amendment rights entirely, however, and are generally protected when they speak on matters of public concern in their capacities as private citizens. *Waters v. Churchill*, 511 U.S. 661 (1994).

In general, a public employee's speech involves issues of public concern when it communicates information that helps society make decisions about government operations, political or social matters, and other community concerns. For example, the Supreme Court held that a school board violated a teacher's free speech rights when it dismissed him for writing a letter that criticized the school board's allocation of funds between academic and athletic programs -- a matter of public concern. *Pickering v. Board of Ed.*, 391 U.S. 563 (1968). Recently, a federal court held unconstitutional a school's termination of a teacher for inviting a guest speaker into the classroom to educate students on industrial hemp. *Cockerel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001). The court reasoned that the teacher's speech was on a matter of public concern and that it outweighed the school's interest in workplace loyalty and efficiency. **Id.** Personal grievances about employment situations, however, are generally considered matters of private concern and thus, are unprotected speech. For example, the Supreme Court concluded that the discharge of a public hospital employee was constitutional where the employee had criticized her supervisor and discouraged transfers into her department. **Waters.**

Teachers' academic freedom interests are often viewed as subordinate to a school's freedom to make its own decisions about the content of the curriculum and research. One court has held that even in the higher education context, academic freedom is a right that inheres in the institution, not the individual. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (*en banc*).

These principles are reinforced in situations involving primary and secondary school teachers, since other cases establish the deference accorded school officials in decisions that are made for sound educational reasons. While court decisions appear split, they have a unifying theme: The outcome of censorship challenges most often depends on the extent of support for free speech and academic freedom principles by school administrators, and the extent to which the school administration stands by their faculty's exercise of professional judgment.

Teachers thus tend to lose when pitted against administrators. Disputes that are litigated most often reveal this as an underlying problem. When the teacher finds support in the administration, the situation tends to be resolved informally without the need for court intervention. There's reason to believe that, as a practical matter, teachers enjoy more rights than are reflected in court decisions and than they could enforce in a court of law.

A few examples reveal the uphill battle for teachers asserting independent First Amendment or academic freedom rights against their schools. Ninth grade teacher Margaret Boring chose the play *Independence* for a student drama project. The play deals with a single-parent family in which the mother is divorced, one of her daughters is a lesbian, and another is unmarried and pregnant. After some parents objected, the principal told Boring to delete sections of the play. She refused and was transferred. She filed suit contending her free speech rights were denied, but the court treated the case like an employment dispute and supported the principal's decision, adding that a public high school teacher has no "First Amendment right to participate in the makeup of the school curriculum." *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998).

Similarly, in recent cases, courts have upheld school administrators' decisions to discipline teachers for:

- showing adult-themed movies without obtaining prior approval. *Board of Education of Jefferson County School District R-1 v. Alfred Wilder*, 960 P. 2d 695 (Colo. S. Ct. 1998) (Bertolucci's 1900); *Fowler v. Board of Education*, 819 F.2d 657 (6th Cir., 1987) (Pink Floyd's *The Wall*); and
- sanctioning the use of profanity in students' creative writing assignments (*Lacks v. Ferguson Reorganized School Dist.*, 147 F.3d 718 (8th Cir., 1998).

Other cases demonstrate the opposite result when school administrators support faculty decisions in their use of controversial materials. For example, in *Monteiro v. Tempe Union High School*, 158 F.3d 1022 (9th Cir. 1998) the court upheld a school district's use of *The Adventures of Huckleberry Finn* by Mark Twain and *A Rose for Emily* by William Faulkner, despite objections to their use of the word "nigger" and claims that it fostered an atmosphere of racial discrimination. See also *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987).

Parents' Rights

While not specified in the Constitution, the courts have historically recognized the rights of parents in the raising of their children. *Meyer v. Nebraska*, 262 U.S. 390 (1923). Court decisions have bolstered parental rights, in the interests of protecting children: "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. It is also assumed that natural bonds of affection ordinarily lead parents to act in the best interests of their children. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Unless they are abusive or neglectful, parents to a great extent are free from state intervention in the rearing of their children. *Troxel v. Granville*, 530 U.S. 57 (2000).

Public, Private and Home Schooling

Parents' right to direct their child's education was recognized in 1923, in *Meyer v. Nebraska*, which concerned a student's right to study German, in violation of a Nebraska statute prohibiting the teaching of a foreign language before eighth grade. A few years later, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court upheld the right of parents to send their children to private or religious school, rather than public school, although the state retains the right to establish educational standards which such schools must meet.

More recently, the Supreme Court relied on Meyer and Pierce in ruling that Amish parents had a constitutional right to direct their children's moral and educational upbringing consistent with their religious students, and were exempt from the state's compulsory school attendance law. *Wisconsin v. Yoder*, 406 U.S. 205, 284 (1972). Based on these decisions, it is clear that parents may choose where their child will learn—in a public school, a private school, a religious school, or even in the home, as long as the education they receive meets state standards and criteria.

Considerably more difficulties arise when the issue is not where students learn, but what they are taught. Here, the balance of interests shifts heavily in favor of the state's right to set standards and prescribe how they will be achieved through the curriculum.

Teaching about Evolution and Creationism

(see also: NCAC's project on Science & Censorship)

Conflict over teaching about evolution has flared periodically throughout the 20th Century, but it was not until 1968 that the Supreme Court ruled definitively. In *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968), the Court held that a state law prohibiting the teaching of evolution was unconstitutional on church-state grounds:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to non-religion; and it may not aid, foster, or promote one religion or religious theory over another. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Despite this seemingly definitive statement, *Epperson* did not quell the debate over evolution. In 1987, the Supreme Court revisited the issue and considered a Louisiana law that required the public schools to give "balanced treatment" to "creation science" and "evolution science." The statute did not require that either be taught, but that if one was, the other had to be taught as well. Challenged by parents, teachers and religious leaders, the Court found the requirement of equal time was unconstitutional because it advanced "a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety." *Edwards v. Aguillard*, 482 U.S. 578, 596 (1987).

Parents who want their children's education to reflect or incorporate their religious perspectives will have difficulty achieving that goal in the public education system, but are free to send their children to a religious school. They may request to be excused from certain classes and assignments, and such requests are often accommodated, within the limits imposed by state standards and graduation requirements. What schools are not likely to do, nor should they, is to change the course content to reflect the religious views of some parents: "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." *Epperson v. Arkansas*, 393 U.S. at 106.

These principles have been applied recently in a case brought by Catholic parents who charged that various activities and exercises in the Bedford, New York schools promoted paganism, Satanism, and other beliefs that conflicted with Catholic teachings. The parents objected to magic games, an Earth Day event, stories and art projects about Indian and Aztec deities, worry dolls, yoga classes conducted by a Sikh minister, a Taos Indian incantation, and many other activities. The court rejected the parents' claims on several grounds, and held that the activities addressed on appeal had a secular purpose, were not coercive, and did not endorse religion. *Altman v. Bedford Cent. School District*, 245 F.3d 49 (2nd Cir. 2001).

Condom Distribution

Can parents prevent a school from distributing condoms? Can they be supplied through a school clinic, handed out in a sex ed class, or sold in a vending machine in a high school washroom? This is another area in which parents have tried to assert their rights, and the case law to date has sent conflicting messages regarding the limits of parent intervention on this matter.

Parents who have tried to prevent their children from obtaining contraceptives at school argue that such programs violate parents' rights to control the upbringing of their children and their right to free exercise of religion. One appeals court rejected these claims in *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980), finding that Michigan had a legitimate state interest in establishing birth control clinics to protect young women from the risk of unwanted pregnancy and sexually transmitted diseases. Use of the clinics was voluntary, and parents remained free to exercise their traditional care, custody and control over their children. An intermediate appellate court in New York held that public schools must offer parents the opportunity to opt their children out of a condom distribution program. *Alfonso v. Fernandez*, 195 A.D.2d 46 (2nd Dept. 1993). The Supreme Court of Massachusetts, in contrast, upheld a mandatory sexuality education program and found that it did not have a coercive effect or infringe parental rights. *Curtis v. School Committee of Falmouth*, 420 Mass. 749 (S. Ct. Mass. 1995).