

First Amendment Free Speech Training Materials

There are four components to the training materials included in this packet:

- The National School Boards Association (“NSBA”) Coercion, Conscience, and the First Amendment: A Legal Guide for Public Schools on the Regulation of Speech
- The Orange County Department of Education’s (“OCDE”) Q&A pamphlet: How Free is My Speech? Guidance for California Public School Students
- The ACLU’s resource Know Your Rights – Students’ Rights: Do I have First Amendment rights in School?
- A link to additional in-depth resources from the OCDE’s legal office

Introduction: Finding Balance

In politically-charged times such as these, as the public raises its many voices on social issues like police shootings of unarmed African-American men, sexual harassment and violence, and immigration, we witness the First Amendment at work. Through its protections, the public expresses and debates ideas, lobbies policy-makers, and informs itself through the media, producing a robust dialogue and rich resource for democratic decision-making. People march in the streets, and spread their message far and wide through modern media. This marketplace of ideas is just what our founders had in mind, and why they protected the rights of free speech, press, petition, assembly and religion so prominently in our Constitution. And courts interpreting these rights often have bolstered them in the face of government attempts to restrict them.

Public schools, as units of government, must follow the First Amendment's guidelines. Students and employees do not check their First Amendment rights at the schoolhouse gate.¹ But a public school is not a public street. Schools have a duty, and recognized authority, to limit expression to maintain order, to protect the safety of the school community, and to provide a nurturing environment for learning. In today's climate, as political and social debates find their way into school communities, school officials face the often-daunting challenge of balancing the constitutional rights of students and employees with their responsibility to maintain a safe and orderly environment for learning.

It is not always easy to determine which interest—individual free speech rights or collective order—should outweigh the other in a given situation. If student-athletes wish to “take a knee” during the pre-game National Anthem, modeling protests they've seen NFL players make, may schools prevent that? What if a teacher, or coach, engages in similar protest during the Anthem? Does it matter who the protester is (student, teacher, bus driver)? Does it matter where the speech takes place (on-campus or off)?

This guide raises questions school officials may be asking as they approach student and employee speech in politically-charged environments. The answers provided here should help public school boards get a sense of the legal framework that applies to student and employee speech, and how that framework might be applied in sticky, real-life situations. As you consider your own district's policies and practices, we urge you to consult with a member of NSBA's Council of School Attorneys, as well as your state school boards association. We hope the guide ultimately will encourage the rich and thoughtful conversations envisioned by our founders as you develop policy to reflect community values and legal standards.

A. Students

1 Do students have a constitutional right to free speech at school?*

Yes. Students have a constitutional right to free speech at school, but schools may regulate speech that interferes with the operations of the school or infringes upon the rights of others.

The U.S. Supreme Court first recognized students' free speech rights in *Tinker v. Des Moines Indep. Comm. Sch. Dist.*² In *Tinker*, three public school students in Des Moines, Iowa, were suspended from school for wearing black armbands to protest the United States government's policy in Vietnam. The students sued the school district, and the Supreme Court ultimately ruled in favor of the students, saying that schools cannot regulate student speech unless it materially or substantially interferes with the operations of the school or impinges on the rights of others.

2 Is a student's right to free speech at school absolute?

No. Schools can also regulate speech when the school reasonably forecasts material disruption.

Because courts most frequently apply the *Tinker* standard when deciding whether a public school violated student free speech rights, it is helpful for school officials to be familiar with the type of circumstances that courts have identified as constituting "material and substantial disruption" or "impingement" of the rights of others.

One court decided that a school district's action banning a student from wearing clothing that displayed the Confederate flag at school³ was permissible. Citing examples of past racial incidents that had occurred in the school, the court concluded that school officials could have reasonably foreseen that allowing students to wear clothing that displayed the Confederate flag at school would materially and substantially disrupt the work and discipline of the school.⁴ In another case, a court ruled that administrators did not violate a student's First Amendment right to freedom of speech when they prohibited him from expressing support for a friend accused of shooting a police officer, because of its potential to incite gang violence.⁵ In that case, the court explained that "past incidents of gang violence and increased tension caused by intimidation from gang members served as justification for the ban of a slogan clearly associated with a gang."⁶ In yet another case, a court held that a school could regulate student speech if it had reason to think that the speech would lead to a decline in student test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms, therefore, of substantial disruption.⁷

Far fewer courts have addressed the extent to which schools may regulate student speech based on its impingement on the rights of others.⁸ In a case where a student wrote a string of increasingly violent and threatening instant messages bragging about his weapons and threatening to shoot specific classmates, a court did not hesitate to rule that this type of violent threat impinges on the rights of others.⁹ At least one court¹⁰ has suggested that protecting students from harassment under Title

*Throughout this guide, "schools" refers to K-12 public schools, as First Amendment principles apply to action by government.

“But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”

—Tinker v. Des Moines Ind. Comm. Sch. Dist. (1969)

IX would satisfy “the interference with the rights of others” requirement,¹¹ while another has permitted school officials to prohibit students from wearing shirts with messages that condemn and denigrate other students on the basis of their sexual orientation.¹²

Since *Tinker*, the Supreme Court has expanded the areas in which schools may regulate student speech to include lewd speech, school-sponsored speech (as in school newspapers) and speech that promotes illegal drug use or criminal activity.

3 Is protest a form of protected student speech?

Yes. Protest is a recognized form of protected student speech. In *Tinker*, the student speech/expression in question involved students wearing black arm bands in protest of the U.S. government’s military involvement in Vietnam.¹⁶ Courts, including the Ninth Circuit Court of Appeals, have noted that the First Amendment applies with “particular force” to protest activities.¹⁷ The Supreme Court has also observed that speech protesting “racial discrimination is essential political speech lying at the core of the First Amendment.”¹⁸

Because the law favors protecting political speech, courts generally will require a critical examination of the stated reasons for restricting it. An example is the case involving “I Heart Boobies” bracelets,¹⁹ in which middle school students wore bracelets imprinted with the phrase to school for several weeks to promote cancer awareness and the need for research funds. When some teachers complained that the message on the bracelets was lewd, the school forbade the students from wearing them. Some students refused to remove the bracelets on breast cancer awareness day, and the school imposed in-house suspension. The parents sued, alleging that the school had

***Tinker* and Beyond—School officials may regulate student speech that:**

- materially disrupts the school setting or interferes with the right of others;
- is lewd, vulgar or obscene on the ground that such speech undermines “the school’s basic educational mission;”¹³
- is school-sponsored speech, provided their actions are reasonably related to legitimate pedagogical concerns;¹⁴ or
- promotes activities that are illegal, such as illegal drug use.¹⁵

violated their students' First Amendment rights. The Third Circuit Court of Appeals ruled in favor of the students, finding that the bracelets were not lewd, as they commented on social issues, and that wearing them did not result in a disruptive school environment. The court went to great lengths to explain the reasoning for its decision, which illustrates how the law favors protection of political speech: if student speech is only ambiguously (not plainly) lewd, school officials cannot restrict it, if it can plausibly be interpreted as political or social speech.²⁰

4) Can a student refuse to stand for the Pledge of Allegiance or National Anthem?

Yes. Students can refuse to stand for the Pledge of Allegiance. In 1943, the Supreme Court ruled in *West Virginia State Bd. of Educ. v. Barnette* that a West Virginia school board's mandatory flag salute regulation violated students' First Amendment right to freedom of speech.²¹ "If there is any fixed star in our constitutional constellation," the Court said, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."²²

5) What if my state's law *requires* students to stand for the Pledge or Anthem?

Lower courts that have addressed the issue have ruled that state laws requiring students to stand for the Pledge of Allegiance or National Anthem are unenforceable. To meet constitutional standards, participation in the exercises must be voluntary.²³

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— *West Virginia State Bd. of Educ. v. Barnette* (1943)

6) What if a student wants to "take a knee" during the National Anthem?

Based on the Court's rulings in *Barnette* (see Q.4 above) and *Tinker*, students likely have a protected First Amendment right to engage in protest by "taking a knee" while the National Anthem is being played, unless such speech would substantially disrupt school operations. Some courts, including the U.S. Supreme Court, have suggested that student athletes and other participants in extracurricular activities may subject themselves to a higher level of regulation than non-participants, however.²⁴ Even so, when weighing the balance between curtailing a First Amendment

right and school policy, at least one recent decision suggests the scales tip in favor of protecting student expression. In *V.A. v. San Pasqual Valley Unified School District*, a federal district court ruled in favor a varsity football player who knelt during the playing of the National Anthem to protest racial injustice. In response to parental concerns about the potential for violence, the superintendent had prohibited students from engaging in certain forms of protest including kneeling during the National Anthem at athletic events at any home or away games, under penalty of removal from the team and subsequent teams during the school year. The court specifically found the student's kneeling to constitute the kind of speech that the school could not prohibit unless it demonstrated the kneeling would cause a substantial disruption or interfere with the rights of others.²⁵

As public school students mirror protests by professional athletes who have “taken a knee” during the playing of the National Anthem, situations like *San Pasqual Valley* are sure to arise more often. The following examples highlight the varying approaches of school districts across the country to this socio-political phenomenon.

Texas. One school board president in Texas defended members of the girls' volleyball team and cheerleading squad who refused to stand during the National Anthem at games in protest of recent shootings of African-American men by the police. “Yes, there are possibly greater ways to get that message across; however, we are sitting here in 2016 and the messages that were brought forth in the ‘60s were somehow lost in translation,” explained the board president. “Yeah, we can criticize the method but we have to listen to the message.”²⁶

Minnesota. A Minnesota school district issued a similar statement of support after an entire high school volleyball team knelt in a line before a home match and seven members of a high school football team did the same at their game. The school district's statement said administrators “respect our students' right to freedom of speech as long as their actions do not threaten the safety and security of others.”²⁷

But not all school districts agree that student-athletes “taking a knee” during the Anthem should be allowed.

Louisiana. The superintendent of schools in a Louisiana school district issued a letter stating that student athletes were expected to stand for the Anthem. “It is a choice for students to participate in extracurricular activities, not a right, and we at Bossier Schools feel strongly that our teams and organizations should stand in unity to honor our nation's military and veterans.” A high school principal in the district sent a letter to athletes and parents, saying athletes were required to stand “in a respectful manner” during the Anthem. “Failure to comply will result in loss of playing time and/or participation as directed by the head coach and principal. Continued failure to comply will result in removal from the team.”²⁸

School leaders should consider carefully any requests by students wishing to “take a knee” during the National Anthem, or to protest in some other non-disruptive manner. Work with your NSBA Council of School Attorneys member and your state school boards association to arrive at policy decisions that balance a student’s right to free speech or expression with the school’s interest in maintaining a safe environment free from disruption, and make sure to implement the policy even-handedly. Lastly, consider the benefits of the teachable moment in minimizing the risks of litigation, while conveying important civics lessons where students can discuss the value of political expression, its implications, and the importance of selecting the forum in which the message is conveyed.

7 Can a school require a student to remain in a locker room or other alternative area in lieu of protesting until the National Anthem or Pledge of Allegiance is over?

Likely not, unless school officials have reasonably forecasted disruption or interference with the rights of others. For reasons explained in Q.5 and Q.6 above, a school in most cases cannot require students who wish to protest during the Pledge of Allegiance or National Anthem to remain in a locker room or remove themselves from a setting such as a classroom to a hallway or other alternative area until the Pledge or Anthem is completed.

As the Supreme Court noted in *Tinker*, a protest is a form of political speech that cannot be curtailed or regulated unless it is disruptive or impinges on the rights of others. In order to avoid a constitutional violation, schools must generally show that the potential for disruption and the harm to the rights of others is real, likely, and more than speculative.

8 Can a school regulate student speech at a school-sponsored activity, like a football game?

Yes, school-sponsored activities are still considered to be within the school setting.

9 May an athletic association require in its “code of conduct” or rulebook that students refrain from protesting as a condition of participating in extracurricular athletics?

It depends on whether the athletic association is considered a “state actor.” The provisions of the First Amendment only apply to public entities. If an athletic association is private, it could require students to adhere to a code of conduct that prohibits protesting as a condition of participating in extracurricular athletics. However, if the athletic association were considered to be an arm of the state, it would need to adhere to the same First Amendment requirements as any other public entity.

This specific issue was addressed in *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass’n*, in which a school sued a not-for-profit statewide interscholastic athletic organization regulating competition among public and private schools in Tennessee for violating its First Amendment rights. The United States Supreme Court found that the close nexus between the

state and the athletic association (State officials were pervasively entwined in the athletic association's structure.) meant the association was a state actor for First Amendment purposes. Therefore, when the athletic association restricted the school's speech, it did so as a state actor and violated the school's First Amendment rights.²⁹

10 Can a school discipline or bar a student from participating in an extracurricular activity for failing to comply with school rules that regulate expression?

Participating in extracurricular athletics or other activities is a privilege. Courts have held that although students have a constitutional right to engage in educational activities, they do not have a similar right to participate in extracurricular activities.³⁰ And, the Supreme Court has indicated that students who voluntarily submit themselves for participation in extracurricular activities like athletics, can also be held to higher standards of conduct and greater regulation.³¹ However, no legal precedent expressly holds that a student can be disciplined or barred from participating in an extracurricular activity for failing to comply with school rules that regulate speech or expression.

One federal appellate court has issued a decision on this issue. In *Doe v. Silsbee Indep. Sch. Dist.*, the Fifth Circuit Court of Appeals rejected a high school cheerleader's claim that school officials violated her free speech rights when they dismissed her from the cheerleading squad after she refused to cheer for a member of the boys' basketball team, whom she had accused of sexually assaulting her.³² The court stated that even assuming that the student's refusal to cheer was protected speech, the First Amendment did not require the school district to promote the student's message by allowing her to cheer as she saw fit. The court further stated that her refusal to cheer constituted a substantial interference with the work of the school that could be regulated by the school. Caution should be taken when relying on *Doe*, however, because as an unpublished decision, the ruling may have limited precedential value.³³ School districts would do well to confer with their NSBA Council of School Attorneys member and state school boards association when setting conditions for student participation in extracurricular activities that may implicate freedom of speech.

11 Doesn't wearing a school or team uniform mean the student represents the school, and if so, shouldn't a school get to say what a student can or cannot do while representing the school?

Yes, a student is generally considered to be representing a school when the student is a member of a team or involved in an activity that is sponsored by the school. Only one federal appellate court appears to have ruled on the issue of whether a school gets to say what a student can or cannot do while the student is representing the school.

According to the Sixth Circuit Court of Appeals, in *Lowery v. Euverard*,³⁴ "[r]estrictions that would be inappropriate for the student body at large may be appropriate in the context of vol-

untary athletic programs.”³⁵ Even so, schools will likely have to show that restricting the student athlete’s speech or behavior is appropriate, because it will reasonably result in disruption.³⁶

As a general rule, a school can regulate the conduct of students who represent it at sporting events or other off-campus events. However, even though a school can regulate student behavior, it should be cautious about attempting to regulate expressive behavior, such as peaceful protests, which could be looked upon as pure political speech or expression. Courts protect the right to speak on political and social issues more than other types of expression, despite school officials’ significant authority to regulate the conduct of extracurricular participants.

12) May a school discipline a student for inciting other students to protest?

A school could, in some circumstances, constitutionally discipline a student for inciting other students to protest and for planning a mass protest in advance. The key issue is whether the school’s regulation of the student’s speech meets the *Tinker* standard. If the school reasonably could forecast that the mass protest, e.g., walkout, sit-in, would result in substantial disruption, then school officials would be able to discipline that student without violating his/her First Amendment speech rights. One federal appellate court upheld school officials’ decision to discipline a student—by restricting her from participation in student government—who had encouraged other students to deluge the district office with complaints about the cancellation of a popular event.³⁷

13) Is there a difference between religious speech and political speech?

From a First Amendment Free Speech Clause standpoint, religious speech and political speech are protected similarly. Schools should note, however, that the First Amendment religion clauses give individuals the right of free exercise of religion, and prohibit government from establishing religion. Schools must permit students to exercise their religion, but may not endorse or promote one religion over another.³⁸

14) What is a sincerely held religious belief, and are expressions of such beliefs protected by the United States Constitution?

Yes, the Constitution protects expression of sincerely held religious beliefs, with some limitations. According to the U.S. Supreme Court in *U.S. v. Seeger*, a sincerely held religious belief is “a conviction based upon religious training and belief.”³⁹ The Supreme Court added in *Welsh v. U.S.* that for expression of such beliefs to be protected by the United States Constitution they must be “held with the strength of traditional religious convictions.”⁴⁰

15) What if a student doesn’t label his speech religious or political?

As a general rule, students are not required to signal the type of speech/expression in which they are engaging to enjoy First Amendment protection.

16 Can schools place restrictions on speech that is otherwise protected by the Constitution?

Yes, under certain circumstances. Schools can place reasonable time, place and manner restrictions on the exercise of free speech in order to avoid disruption.⁴¹ In such situations, courts will consider to what extent the school has an “open” or “closed” forum, or something in-between. In closed forums, schools have a large degree of control over the kinds of expression they can exclude. Most schools create limited open forums, in which they allow expression of a variety of points of view not endorsed by the school, but place certain recognized time, place and manner limitations on that expression. Schools often create a limited open forum when creating policies for student-led extracurricular clubs and distribution of literature of non-school sponsored groups. Schools may consider criteria like appropriateness to the school setting for regulating expression in these limited public forums, but when schools begin restricting expression based on viewpoint, courts will generally rule against them in the absence of a legitimate reason for the regulation. A complete discussion of limited public forums is beyond the scope of this publication, but schools would be well-served by conferring with an NSBA Council of School Attorneys member and state school boards association when determining school board policies and practices in this area.

17 Can schools discipline students for protests that result in harm to public/school property?

Yes. Vandalism and other criminal activity is not protected by the First Amendment. Schools can punish students for protests or other actions that result in harm to school or other public property.

ENDNOTES

- ¹ *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969).
- ² *Id.*
- ³ *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426 (4th Cir. 2013).
- ⁴ *Id.* at 438.
- ⁵ *Brown v. Cabell Cnty. Bd. of Educ.*, 714 F. Supp.2d 587 (S.D. W.Va. 2010).
- ⁶ *Id.* at 597.
- ⁷ *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 674 (7th Cir. 2008).
- ⁸ *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1071 (9th Cir. 2013).
- ⁹ *Id.* at 1072.
- ¹⁰ *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 322-23 (fn. 25) (3d Cir. 2013).
- ¹¹ *Id.* at 322-23.
- ¹² *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006), *cert. granted and judgment vacated*, 549 U.S. 1262 (2007) (on the grounds of mootness).
- ¹³ *Bethel Sch. Dist. No. 405 v. Fraser*, 478 U.S. 675 (1986).
- ¹⁴ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).
- ¹⁵ *Morse v. Frederick*, 551 U.S. 393 (2007).
- ¹⁶ *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969).
- ¹⁷ *U.S. v. Baugh*, 187 F.3d 1037, 1042 (9th Cir. 1999).
- ¹⁸ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982).
- ¹⁹ *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293 (3rd Cir. 2013).
- ²⁰ *Id.* at 308-09.
- ²¹ *West Virginia State Bd. of Educ v. Barnette*, 319 U.S. 624 (1943).
- ²² *Id.* at 642.
- ²³ *Lipp v. Morris*, 579 F.2d 834, 836 (3rd Cir. 1978); *Sherman v. Comm. Consol. Sch. Dist. 21 of Wheeling Tw'p*, 980 F.2d 437, 442 (7th Cir. 1992).
- ²⁴ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).
- ²⁵ *V.A. v. San Pasqual Valley Unified Sch. Dist.*, No. 17-2471 (S.D. Cal. Dec. 21, 2017).
- ²⁶ Jason Whitely, School board president defends students kneeling during anthem, WFFA (Oct. 2, 2016), <http://www.wfaa.com/news/local/education/school-board-president-defends-students-kneeling-during-anthem/328389124>.
- ²⁷ Paul Walsh and Liz Sawyer, *Edina, Minneapolis athletes take a knee at games, join national anthem protest*, Star Tribune (Sept. 21, 2016), <http://www.startribune.com/athletes-at-two-minneapolis-high-schools-take-knee-during-national-anthem/394120041/>.
- ²⁸ Christine Hauser, *High Schools Threaten to Punish Students Who Kneel During Anthem*, The New York Times (Sept. 29, 2017), <https://www.nytimes.com/2017/09/29/us/high-school-anthem-protest.html>.
- ²⁹ *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001).
- ³⁰ *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007).
- ³¹ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).
- ³² *Doe v. Silsbee Indep. Sch. Dist.*, 402 Fed. Appx. 852 (5th Cir. 2010).
- ³³ *Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-00251, 2017 WL 4319908, *3 fn. 4 (Ct. App. Tex. Sept. 28, 2017).
- ³⁴ *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007).
- ³⁵ *Id.* at 597.
- ³⁶ *Id.* at 596.
- ³⁷ *Doninger v. Niehoff*, 527 F.3d 41, 50-53 (2d Cir. 2008); 642 F.3d 334, 346-347 (2d Cir. 2011).
- ³⁸ See *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).
- ³⁹ *U.S. v. Seeger*, 380 U.S. 163, 176 (1965).
- ⁴⁰ *Welsh v. United States*, 398 U.S. 333, 340 (1970).
- ⁴¹ *Walz v. Egg Harbor Tp. Bd. of Educ.*, 342 F.3d 1295 (7th Cir. 1993); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740 (5th Cir. 2009).

How Free is My Speech?

Guidance for California Public School Students



Most students know they have a right to “free speech” under the U.S. Constitution, but students also know they can get in trouble at school for certain speech, including bullying other students. This pamphlet is intended to help students understand the rules in regard to speech at school and speech that impacts the school environment.

How Free is My Speech?



Q. What laws protect free speech of students in California?

A. The First Amendment to the U.S. Constitution and Article 1, Section 2 of the California Constitution prohibit the government from abridging (diminishing) the freedom of speech. This protection is reiterated in California Education Code section 48950. However, this does not mean students may say anything they want without consequence. Under California Education Code Section 48907, students may not engage in speech that is obscene, libelous, or slanderous. Speech that is false (not a matter of opinion) and exposes a person to hatred, contempt or ridicule is unprotected. Speech that is likely to cause substantial disruption at school also may be cause for discipline.



Q. *What if a student threatens another student with harm? Is that protected "free speech"?*

A. "True threats" are not protected speech. A "true threat" exists when a reasonable person who is the object of the statement would feel threatened. It is not necessary in all cases that the



threat is made directly to the victim; it is expected that speech sent electronically will be forwarded to other people.

Students may be suspended or expelled for (1) threatening to cause injury to another person, and (2) intentionally engaging in harassment, threats, or intimidation directed against students or school employees that is sufficiently severe or pervasive as to materially disrupt classwork, create substantial disorder, and invade the rights of students or school employees by creating an intimidating or hostile educational environment. Some threats will violate criminal laws as well.

Q. *When can bullying be cause for suspension or expulsion from school?*

A. To support a suspension or expulsion, bullying is any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act ... that has or can be reasonably predicted to have the effect of one or more of the following:

- placing a reasonable pupil in fear of harm to the pupil's person or property
- causing a reasonable pupil to experience a substantially detrimental effect on his physical or mental health
- causing a reasonable pupil to experience substantial interference with academic performance or the ability to participate in or benefit from the services, activities, or privileges provided by the school.

Note: Pupils can be suspended or expelled for acts related to school activity or attendance that occur at any time

Q. Does my free speech right protect me if I sexually harass someone at school?

A. No. Students are not permitted to engage in “sexual harassment,” which means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature when such conduct has a negative impact upon the other person’s work or academic performance, or creates an intimidating, hostile, or offensive work or educational environment.

Q. What characteristics are protected under the laws prohibiting discrimination, harassment, intimidation and bullying?

A. Students are protected from discrimination, harassment, intimidation and bullying based on actual or perceived disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics. The free speech laws do not provide a valid defense for a student found to have engaged in discrimination, harassment, intimidation or bullying.



Q. Do I need to be concerned that my Facebook posts or other electronic communications might violate any criminal laws?

A. Yes. Several California criminal laws relate to electronic communications. Examples include:



- Penal Code 653m: It is a misdemeanor to engage in an electronic communication with another person, with intent to annoy, if you make a threat to inflict injury to the person or the property of the person.
- Penal Code 653.2: It is a misdemeanor to electronically distribute or post personal identifying information (including a photo) of another person if the message is of a harassing nature and would be likely to incite others to harass the person.
- Penal Code 528.5: It is a misdemeanor to knowingly and without consent credibly impersonate another person, through electronic means, for purposes of harming, intimidating, threatening or defrauding the person.



KNOW YOUR RIGHTS

Students' Rights

The Supreme Court ruled in 1969 that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." This is true for other fundamental rights, as well.



Do I have First Amendment rights in school?

- You have the right to speak out, hand out flyers and petitions, and wear expressive clothing in school — as long as you don't disrupt the functioning of the school or violate school policies that don't hinge on the message expressed.
- What counts as "disruptive" will vary by context, but a school disagreeing with your position or thinking your speech is controversial or in "bad taste" is not enough to qualify. Courts have upheld students' rights to wear things like an anti-war armband, an armband opposing the right to get an abortion, and a shirt supporting the LGBTQ community.
- Schools can have rules that have nothing to do with the message expressed, like dress codes. So, for example, a school can prohibit you from wearing hats — because that rule is not based on what the hats say — but it can't prohibit you from wearing only pink pussycat hats or pro-NRA hats.
- Outside of school, you enjoy essentially the same rights to protest and speak out as anyone else. This means you're likely to be most protected if you organize, protest, and advocate for your views off campus and outside of school hours.

- You have the right to speak your mind on social media, and your school cannot punish you for content you post off campus and outside of school hours that does not relate to school.

For more information on Free Speech in schools and the First Amendment, please visit <https://ocde.us/LegalServices/Documents/Chapter-X-Student-First-Amendment-Rights-May-2016.pdf>.