



March 2018

**Re: Freedom of Speech in Schools**

Dear Administrator:

Across the country, students have been engaging in school walkouts and protests in support of school safety and in opposition to gun violence. Some schools and school districts have punished or threatened to punish these students with suspensions or other forms of discipline. Students, parents, and community members in a number of Texas school districts have reached out to us with concern, asking questions about their rights in school, including their right to freedom of expression.

When campus or district administrators punish or threaten to punish students who protest, two main constitutional problems are raised, which could chill protected speech in school. First, threats and punishments suggest that students cannot participate in any form of political expression at school. Second, they suggest that students participating in walkouts may be subject to harsher punishments than they would otherwise receive for departures from campus without permission.

Schools are the place where students learn the things they need to be vibrant and engaged members of our society, and districts like yours have an important role to play in upholding our constitutional values and fostering productive dialogue. We hope that this letter helps simplify the constitutional rights at issue, and we ask that your District immediately clarify the applicable policy.

**The Right to Expression in Schools is Protected by the First Amendment**

The First Amendment of the United States Constitution protects a person's right to express her opinion. "Expression" under the First Amendment includes spoken words, made verbally or in writing through petitions and printed materials—but it also encompasses all symbolic acts intended to convey a message, including wearing buttons, armbands, and t-shirts. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

This holds true even in school. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. And this makes sense given the educational purpose of our school system: "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

This principle is especially important in circumstances like the one at issue, where students are expressing views about matters concerning political issues at the forefront of our national consciousness. “Political speech, of course, is at the core of what the First Amendment is designed to protect.” *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quotation marks omitted). Our country is enmeshed in a political and social debate about gun violence in schools and appropriate ways to redress that violence. Students across the country have also been engaging in political expression concerning immigration policy and police brutality.<sup>1</sup> Students have a constitutional right to express their views on those issues, even at school.

Although a school can limit student speech that materially disrupts the functioning of the school, is lewd, or promotes drug use, and can implement some content-neutral restrictions, like a complete prohibition of messages on shirts, a school cannot otherwise impose content-based restrictions on student speech. *See, e.g., Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 509 (5th Cir. 2009).

Indeed, a student’s political expression cannot be censored just because it “could fit under some definition of ‘offensive.’” After all, much political and religious speech might be perceived as offensive to some.” *Id.* at 409. Only “plainly offensive” speech that is sexually explicit or profane can be restricted. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001).

Nor can a school censor expression under the guise of labeling that speech disruptive. “Officials must base their decisions ‘on fact, not intuition, that . . . disruption would probably result from the exercise of the constitutional right,’” and “be able to show that [their] action[s] [were] caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 221–22 (5th Cir. 2009) (quoting *Butts v. Dallas Indep. Sch. Dist.*, 436 F.2d 728, 731 (5th Cir.1971), and *Tinker*, 393 U.S. at 508)). School officials may not ban speech “based on the officials’ mere expectation that the speech will cause . . . a disruption.” *Id.* at 221.

Under this standard, courts have upheld student expression taking positions on various political and social issues. For example, courts have upheld the rights of middle schoolers to wear breast cancer awareness bracelets that read, “I ♥ boobies! (KEEP A BREAST),” *Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 320 (3d Cir. 2013); the rights of high schoolers to wear t-shirts, armbands, stickers, or buttons with symbols or phrases expressing support and equal treatment of LGBTQ students, including slogans like, “Equal, Not Special Rights,” “Gay? Fine by Me,” “Gay Pride,” “I Support My Gay Friends,” and “Sexual Orientation is Not a Voice, Religion, However, Is,” *Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cnty.*, 567 F. Supp. 2d 1359, 1362, 1375, 1379 (N.D. Fla. 2008); and the right of a high schooler to wear a t-shirt that displayed an image of George W. Bush surrounded by dollar signs, oil rigs, lines of cocaine, and alcohol. *Guiles v. Marineau*, 461 F.3d 320, 322, 331 (2d Cir. 2006).

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<sup>1</sup> *E.g.*, Grace Guarnieri, *Students Walk Out of Texas High School After Classmate Detained by ICE*, NEWSWEEK, Feb. 14, 2018, <http://www.newsweek.com/students-high-school-protest-detained-ice-807400>; Chelsea Trahan, *Texas*

Accordingly, students who are protesting and raising awareness in school in non-disruptive ways are protected by the First Amendment. We ask that you clarify to students that they have every right to engage in such speech.

### **Consequences for School Disruptions and Walkouts Must Be Constitutional**

Numerous concerns are raised when administrators threaten or impose automatic suspensions or other punishments in response to student expression. First, the Constitution does not permit an administrator to punish a student more harshly than it otherwise would for conduct that is associated with political speech. *See, e.g., Rolf v. City of San Antonio*, 77 F.3d 823, 827 (5th Cir. 1996) (“It is clear that state action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.”); *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006) (explaining that a school official is liable for First Amendment retaliation if students would not have been similarly punished if they had not engaged in the protected speech); *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). If participating in a demonstration by leaving class or school grounds (with or without permission) would for another reason be subject to a lesser consequence, any automatic suspension for expressing political views about any issue raises constitutional problems.<sup>2</sup>

Moreover, to punish a student with an out-of-school suspension, the Constitution, state law, and Student Codes of Conduct require an administrator to make an individualized determination relating to the circumstances of the conduct, including whether the student was engaging in self-defense, whether the student had the requisite intent at the time of the conduct, and the student’s disciplinary history. *See Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961); *Sullivan v. Hous. Indep. Sch. Dist.*, 307 F. Supp. 1328, 1342 (S.D. Tex. 1969) (holding that when disciplinary actions can substantially injure an individual, such acts must comply with minimal procedural requirements of due process of law), *supplemented*, 333 F. Supp. 1149 (S.D. Tex. 1971), *vacated on other grounds*, 475 F.3d 1071 (5th Cir. 1973); TEX. EDUC. CODE § 37.001(a)(4).<sup>3</sup> Often, Student Codes of Conduct also require that an administrator have an informal conference with that student before making a disciplinary decision. Threats or actual impositions of automatic punishments against students participating in student demonstrations during school hours ignore due process requirements.

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<sup>2</sup> Many school districts’ Student Codes of Conduct address two categories of behavior and accompanying consequences relevant here: (1) leaving school grounds without permission, and (2) engaging in actions or demonstrations that substantially disrupt or materially interfere with school activities. Often, Codes of Conduct identify those behaviors as general conduct offenses, for which a student can be disciplined. Most Codes of Conduct identify a host of applicable discipline management techniques, ranging from verbal correction, demerits, behavioral contracts, and counseling to detention, in-school suspension, withdrawal of privileges, assignments of school duties, and out-of-school suspension.

<sup>3</sup> The language in Student Codes of Conduct must mirror state law requirements set out in the Texas Education Code related to the consideration of mitigating factors that must be considered before students can be punished for any offense, including 1. Self-defense, 2. Intent or lack of intent at the time the student engaged in the conduct, and 3. The student’s disciplinary history.

We encourage you to rethink the decision to suspend students from school in these circumstances. Data show that schools that rely heavily on exclusionary discipline like suspensions have lower school climate ratings and lower rates of student achievement.<sup>4</sup> Creating a negative and punitive climate in schools could be particularly harmful now, at a time when students need safe and supportive environments as they grapple with feelings of discomfort and fear and try to determine how to best express themselves and support their teachers and peers. In this spirit, other Texas districts confronted with these circumstances have treated class missed for walkouts as unexcused absences, but have declined to take further disciplinary action.

Moments like these are important opportunities for students to learn about civic engagement and put their education into practice. As the Supreme Court has explained, public schools are the mechanism by which we prepare “individuals for participation as citizens” and preserve “the values on which our society rests.” *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). We encourage every educator and administrator in your district to foster productive dialogue about the First Amendment and its limits so that students can make informed choices about civic engagement over the course of their lives.

We hope that you will support the rights of students in your district and we invite you to access and share our Know Your Rights pamphlet, in the event it is a useful resource for your students or administrators. We are happy to set-up a conversation to discuss the contents of this letter in more detail.

Sincerely,



Kali Cohn  
Staff Attorney  
ACLU of Texas  
214-346-6577  
kcohn@aclutx.org



Morgan Craven  
Director  
School-to-Prison Pipeline Project  
Texas Appleseed  
512-473-2800, ext. 110  
mcraven@texasappleseed.net



Natalia M. Cornelio  
Criminal Justice Reform Director  
Texas Civil Rights Project  
832-767-3650, ext. 160  
natalia@texascivilrightsproject.org

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<sup>4</sup> See American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools?: An Evidentiary Review and Recommendations*, AM. PSYCHOLOGIST 854 (DEC. 2008).