LESSONS IN LIBERTY

A Guide to Civil Liberties and Constitutional Law in North Carolina Schools

Dedicated to Natalie Fiess

This booklet is dedicated in loving memory to Natalie Zilboorg Fiess (pictured above with her granddaughter Lydia), with a special thanks to the late Shirley and Doug Johnson of Oberlin, Ohio, longtime ACLU members whose support created the Natalie Fiess Fund for the Preservation of Civil Liberties and Religious Freedom (the "Fiess Fund"). The Fiess Fund has supported the publication and dissemination of four informational booklets to North Carolina government officials, school board members, and the attorneys who advise them.

Please note: The information provided in this booklet is current as of May 2013. This booklet is designed as a reference tool on a variety of civil liberties issues. It is not intended to be a substitute for legal advice from an attorney.

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FREEDOM OF SPEECH

POLITICAL EXPRESSION

SCENARIO: *Two sophomores, Kenny and Bobby, are called to the principal's office and told to turn their T-shirts inside out. Kenny is wearing a Planned Parenthood T-shirt and Bobby is wearing a National Rifle Association T-shirt.*

Question: *Can the school prohibit the students from wearing the T-shirts?*

Quick Answer: *Probably not.*

EXPLANATION:

In *Tinker v. Des Moines Independent Community School District,* the Supreme Court ruled that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] However, a school may prohibit students from wearing clothing that is considered plainly offensive, vulgar, intimidating, or threatening, or that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[2] In *Newsom ex rel. Newsom v. Albemarle County School Board*,[3] the Fourth Circuit Court of Appeals concluded that a student's T-shirt, which depicted three silhouettes of men with guns superimposed over the letters "NRA" and above the phrase "Shooting Sports Camp," was non-violent and non-threatening.[4] Therefore, absent some evidence of a substantial disruption of school operations or interference with other students' rights, the school could not prohibit the student from wearing the NRA T-shirt.[5]

In light of these cases, unless there was a substantial risk that either Kenny's or Bobby's T-shirt would cause a substantial disruption or interfere with other students' rights, it would be improper for the school to order the boys to turn their T-shirts inside out. As the Supreme Court cautioned in *Tinker*, in order for a school to constitutionally ban student expression, it must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[6]

NOTE: In light of the Supreme Court's decision in *Morse v. Frederick*,[7] the general rule set forth above may not apply in cases where students could reasonably be regarded as encouraging illegal drug use.

SCENARIO: *A student comes to school wearing a T-shirt with a Confederate flag on it.*

Question: *Can the principal tell the student to change his shirt?*

Quick Answer: *The school may require the student to change his shirt only if there is a well-founded expectation that the shirt will cause a material and substantial disruption.*

EXPLANATION:

As previously mentioned, students' expressive conduct that causes a substantial and material disruption is not constitutionally protected.[8] At the same time, in order for a school to restrict student expression, it must be able to point to a well-founded expectation that the conduct "would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[9]

A mere apprehension of a disturbance is not enough to overcome students' First Amendment rights.[10] Several federal courts have held that if there is a history of racial tension involving the Confederate flag, the school can prohibit the display of the Confederate flag at school.[11] However, if there is no such history of problems, courts are likely to find that the mere fear of disruption is insufficient to support banning the display of the Confederate flag.[12]

FREEDOM OF SPEECH, Cont.

DRESS CODES AND UNIFORM POLICIES

SCENARIO: *A school is revising its dress code and includes a new prohibition on baggy and excessively tight clothes.*

Question: *Are these restrictions permissible?*
Quick Answer: *Probably.*

In North Carolina, mandatory uniform policies are generally permissible.

EXPLANATION:

School dress codes are permissible as long as they do not violate a student's right of free expression. The Supreme Court has held that a wide variety of expressive activity (in this case, choice of clothing) is considered First Amendment "speech," as long as there is an intent to convey a particularized message and the likelihood is high that the message will be understood by those who view the clothing.[13] While students have a right to express themselves in their dress, courts balance that right against a school's right to establish rules and regulations that are necessary to carry out its educational mission.[14] If the relationship between the restriction and a legitimate school interest (e.g., health, safety, decorum, decency) outweighs students' rights to govern their appearance, the dress code regulation is valid and enforceable.

Mandatory uniform policies are generally permissible although they are subject to strict scrutiny when they fail to include an opt-out for sincerely-held religious beliefs and implicate free exercise and parental autonomy in child-rearing.[15]

SCENARIO: *At a local high school, Tom was suspended for violating the school's policy that prohibits wearing "gang-related attire" after Tom came to school wearing a blue baseball cap. The policy does not provide a list of items considered to be "gang-related attire."*

Question: *Is the policy constitutional?*

Quick Answer: *Probably not.*

EXPLANATION:

In handling the daily problems that arise in public school districts, school disciplinary rules need not be as detailed as a criminal code because school officials need flexibility.[16] However, where, as here, a policy "reaches First Amendment free speech and free exercise rights, 'the doctrine demands a greater degree of specificity than in other contexts.'"[17] Where First Amendment rights are implicated, courts have found that gang policies must provide "a definite list of prohibited items."[18] Further, courts have held that school policies should adequately define the terms "gang," "gang-related activities," and "gang-related apparel" so that school officials are not given unfettered discretion to define those terms themselves.[19] Here, if the policy failed to provide a list of prohibited items, it likely cannot be enforced against Tom without violating his constitutional rights.

FREEDOM OF SPEECH, Cont.

DRESS CODES AND UNIFORM POLICIES, CONT.

SCENARIO: *Sally, a senior at a public high school in North Carolina, wants to wear pants to graduation underneath her gown. Her school's graduation dress code requires that girls wear dresses or skirts.*

Question: *Is the dress code constitutional?*

Quick Answer: *Probably not.*

EXPLANATION:

A student's high school graduation is "the one school event most important for [a] student to attend."[20] A high school policy prohibiting young women from wearing long pants to their graduation probably constitutes impermissible gender discrimination and violates female students' constitutional rights under the First Amendment. The freedom to wear what one wants to wear to graduation under one's graduation gown is protected by the right of free expression guaranteed by the First Amendment to the United States Constitution.[21]

Additionally, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a public school from engaging in this type of arbitrary gender discrimination. The high school may impose a requirement of proper, or even formal, attire for its graduation ceremony, provided that such a requirement does not create an Equal Protection violation. However, to mandate that young women wear dresses or skirts and high heels, based on outdated notions regarding appropriate attire for young women, is impermissible.[22] Equal Protection claims based on gender discrimination are subject to heightened scrutiny and will prevail unless the restriction at issue "serve[s] important governmental objectives and [is] substantially related to achievement of those objectives."[23] It seems impossible to think of any "important governmental objectives" that would be served by requiring young women to wear skirts, dresses, or high heels.

Finally, a requirement that all female students wear a dress or skirt may also violate Title IX of the Education Amendments of 1972 ("Title IX").[24] Title IX prohibits discrimination on the basis of sex in educational institutions that receive federal funding, and a student may sue when her rights under this statute are violated.[25] Federal courts have consistently recognized in other contexts that discriminating against a person for failure to conform to the norms of her gender constitutes illegal sex stereotyping, and several recent school cases recognize such a claim.[26]

SCHOOL NEWSPAPERS

SCENARIO: *Kelly, a senior in high school, writes an editorial column for the school newspaper. This month, Kelly writes about the benefits of having a sex education program that includes information on abstinence, birth control, and other forms of family planning. The principal censors Kelly's column because it discusses birth control.*

Question: *Is this an appropriate reason to censor Kelly's speech?*

Quick Answer: *Probably not.*

EXPLANATION:

A school may exercise editorial control over the content of student speech in school-sponsored activities such as student newspapers, assemblies, athletic events, and school plays, if the school's action is reasonably related to legitimate pedagogical concerns.[27] Legitimate educational concerns may include assuring that (1) students "learn whatever lessons the activity is designed to teach;" (2) the material is not inappropriate for the maturity level of the students; and (3) "the views of the individual speaker are not erroneously attributed to the school."[28] In addition, a school may refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," or to associate the school with any position other than neutrality on matters of political controversy.[29]

Hazelwood School District v. Kuhlmeier[30] is the leading Supreme Court case addressing the ability of schools to regulate student expression that occurs in connection with official curricular activities. There, the principal deleted two student articles on pregnancy and divorce from the school newspaper.[31] The Court upheld the principal's decision, finding that the school's pedagogical concerns of protecting students' anonymity and allowing the subject of a critical article the chance to respond were legitimate.[32]

In this case, Kelly's article should not be censored simply because it discusses birth control. If the school believes the content is inappropriate for freshman high school students, the school should prohibit articles on all sex-ed-related information and not single out birth control.[33]

If the newspaper was not sponsored by the school, but rather was a student-run publication that was merely distributed in school, the administration could only censor the speech if it was lewd, vulgar, obscene, had a strong likelihood of creating a substantial disruption of or material interference with school activities, or violated the rights of others.[34]

FREEDOM OF SPEECH, Cont.

PLEDGE OF ALLEGIANCE

SCENARIO: *Timmy is uncomfortable saying the Pledge of Allegiance and chooses to sit quietly in his seat during the Pledge. The principal wants to call Timmy's mother to discuss his concern about Timmy's decision.*

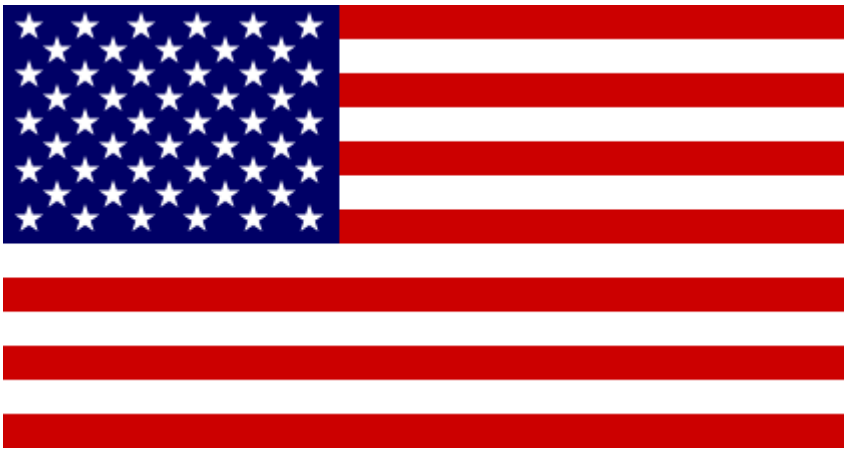
Question: *Should the principal call Timmy's mother?*

Quick Answer: *No.*

EXPLANATION:

In addition to imposing limitations on the government's ability to regulate speech, the First Amendment restricts governmental efforts to compel speech. Thus, schools may not force students to recite the Pledge of Allegiance or to salute the flag.[35] One court has gone even further, reasoning that because singing the National Anthem could be considered "saluting the flag," students also have a First Amendment right to opt out of singing the National Anthem.[36]

N.C. Gen. Stat. § 115C-47(29a) provides that local boards of education shall "require that recitation of the Pledge of Allegiance be scheduled on a daily basis."[37] However, the statute also clearly states that "[t]hese policies shall not compel any person to stand, salute the flag, or recite the Pledge of Allegiance."[38] In choosing not to recite the Pledge, the student is exercising his or her First Amendment right not to speak. A requirement to notify a student's parents may chill that student's right to free speech and would probably be unconstitutional.[39]



SCHOOL LIBRARY BOOKS

SCENARIO: *After complaints from several parents, the school board ordered the removal of the novel* The Color Purple *from all high school libraries.*

Question: *Does the school board have the authority to censor this book?*

Quick Answer: *No.*

The Supreme Court has placed limitations on a school's ability to remove books from its library that are not part of the regular curriculum.

EXPLANATION:

While school boards have broad discretion in the management of school affairs, the Supreme Court has placed limitations on a school's ability to remove books from its library that are not part of the regular curriculum.[40] Unlike curriculum material, which is required for students, library resources are not required reading and are viewed voluntarily by students.[41] The Supreme Court has stressed that, "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding" and that the school library serves as "the principal locus of such freedom."[42]

Schools are prohibited from removing books from the library "simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[43] However, school boards do have greater discretion in deciding what books to purchase for the libraries, but that discretion may not be used in a "partisan or political manner."[44] The school or school board may be able to remove non-fiction books if they contain substantial inaccuracies or misrepresentations.[45] For example, a book that omits factual information that relates to the hardships of life in another country is not a "political viewpoint entitled to protection."[46]

EQUAL ACCESS

SCHOOLS AS PLATFORMS FOR NON-STUDENT SPEECH

SCENARIO: *A peace activist organization seeks access to local high schools to provide students with information about alternatives to military service. The organization seeks access equal to that given to military recruiters.*

Question: *Is the school district required to provide this group such access?*
Quick answer: *Probably.*

EXPLANATION:

High schools are typically considered non-public forums.[47] However, even in non-public forums, some courts have held that restrictions on speech must be "reasonable in light of the purposes served by the forum and ... viewpoint neutral,"[48] while other courts do not include the requirement that the speech be viewpoint neutral.[49] The Fourth Circuit Court of Appeals, the federal appellate court with jurisdiction over North Carolina, has not rendered an opinion on this issue. Courts have found the following with regard to restrictions on peace activist access to students to provide Career Day information:

- It is unreasonable to require that a Career Day presenter have "jobs in hand" and thus be able to offer immediate employment.[50]
- It is reasonable for a school to require that presenters have direct knowledge of the career opportunities they present in order to ensure that speakers present credible information and are positive role models; however, it is unreasonable to require that a presenter have present affiliation with the career field.[51]
- It is reasonable for a school to deny access to a group whose sole purpose is to criticize or denigrate a career opportunity offered by another, as such a purpose "clearly detracts from the motivational purpose of the forum."[52] However, it is unreasonable for a school simply to ban a group from a Career Day event because of its criticism, rather than limiting what the group can say about the opportunities presented by an employer.[53] One court explained that "since the main purpose of Career Day is to allow students to evaluate their opportunities for the future, presenting only positive information directly conflicts with the educational purpose of the forum. ... This applies with special force when one is making a decision about a career in the military because unlike other dissatisfied employees, a soldier cannot quit."[54]
- It is reasonable for a school to prohibit discussion of controversial social issues (e.g. the morality of war, defense spending, and racism and sexism in the military) to ensure that a forum is used for its intended purpose – conveying information about jobs and other opportunities.[55] However, it is not reasonable for a school to prohibit discussion of "bona fide negative facts which are relevant to the requirements or benefits of a specific job, including one in the military."[56] Moreover, "[a school] could not allow speakers to point out the advantages of a particular career but ban any speaker from pointing out the disadvantages of the same career. That amounts to viewpoint-based discrimination."[57]

Importantly, in addition to being reasonable, many courts have held that a school district's policy on opening a non-public forum to outside groups such as recruiters must be viewpoint neutral.[58] "[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[59] In a non-public forum, "the government may limit the subject matter discussed by all speakers in a forum but it may not distinguish between particular speakers based on their view of the approved subject matter."[60] If a school decides that students should learn about career opportunities, it cannot exclude a group merely because the school disagrees with that group's views about student career choice, and it certainly cannot exclude a group simply because it disagrees with that group's views concerning the military.[61] Furthermore, "[t]he existence of reasonable grounds for limiting access to a nonpublic forum ... will not save a regulation that is in reality a façade for viewpoint-based discrimination."[62]

SCENARIO: *A student wants to form a Gay-Straight Alliance extracurricular club at the local high school. The school allows other extracurricular clubs.*

Question: *Must the principal allow the club to be formed?*
Quick Answer: *Yes.*

The Equal Access Act requires schools to grant equal access to student groups regardless of 'religious, political, philosophical, or other content of the speech at such meetings.'

EXPLANATION:

The federal Equal Access Act[63] requires schools to grant equal access to student groups regardless of "religious, political, philosophical, or other content of the speech at such meetings."[64] If a school provides an opportunity for meetings held outside of instructional hours that have a "noncurriculum related" purpose, these meetings are considered limited open forums for purposes of the Equal Access Act.[65] In other words, if the principal allows other clubs to meet in school facilities before or after school or during lunch, then the principal must allow the Gay-Straight Alliance (GSA) to meet. Schools may not pick and choose among clubs based on what they think students should or should not discuss.[66]

Furthermore, it would be impermissible for the principal to place any additional rules or conditions on the group's existence. For example, if an avenue of communication such as posting flyers or using the school's PA system is available to other "noncurriculum related student groups,"[67] then the school must permit the GSA to have access to those same avenues of communication.[68] Further, a school cannot force a GSA to change its name.[69] The question of whether a group is considered "noncurriculum related" must be interpreted narrowly, such that only groups related to a course currently taught at the school or a course that will be taught in the foreseeable future can be considered curriculum related.[70]

EQUAL PROTECTION & EQUAL ACCESS

SCENARIO: *Angie is in tenth grade and is openly gay. Other students begin harassing Angie by calling her names, taping derogatory signs on her locker, shoving her in the hallway, and groping her breasts during gym class. Angie complains to the principal.*

Question: *Does the principal have an obligation to discipline the students harassing Angie?*

Quick Answer: *Yes.*

EXPLANATION:

Section 1 of the Fourteenth Amendment provides that "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."[71] This constitutional provision, known as the Equal Protection Clause, guarantees the "right to be free from invidious discrimination in statutory classifications and other governmental activity."[72] In the context of schools, discrimination means that the school is either treating similarly situated students differently or treating students who are not similarly situated the same, without having a legitimate reason for doing so.

Here, the Equal Protection Clause requires that the principal enforce the school's policies in cases of peer harassment of homosexual students in the same way the principal enforces those policies in cases of peer harassment of heterosexual students. If the school has an anti-harassment policy and enforces it except when the harassment is perpetrated against lesbian, gay, bisexual, and transgender (LGBT) students, the school is treating LGBT students differently from other students. Without a valid reason to justify the differential enforcement of the anti-harassment policies, the principal is violating Angie's right to be free from discrimination on the basis of sexual orientation. As one court stated, "[w]e are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation."[73] Accordingly, courts have consistently held that school officials have an obligation under the Equal Protection Clause to respond to harassment and discrimination based on sexual orientation.[74]

Furthermore, in 2009, the North Carolina General Assembly passed the School Violence Prevention Act.[75] This law protects students from bullying and harassing behavior by school employees and other students. Every school is required to implement an anti-bullying policy and a bullying prevention strategy. The law also specifically prohibits harassment based on certain enumerated personal characteristics, including race, religion, disability, sexual orientation and gender identity, and it requires that teachers and administrators be informed of the policy and, where possible, trained to appropriately identify and respond to bullying.

SCENARIO: *The school board is concerned about illegal immigration in the state and creates a policy permitting schools to require documentation of citizenship if they suspect a student is an undocumented immigrant.*

Question: *Does this policy pass constitutional muster?*
Quick Answer: *No.*

EXPLANATION:

This policy violates the principle of equal protection because it seeks documentation only from those students suspected of being undocumented immigrants.[76] On numerous occasions, the Supreme Court has recognized that immigrants, even those who reside in the country unlawfully, are guaranteed due process of law and that certain kinds of discrimination against undocumented immigrants by the state or federal government violate the Constitution.[77] In *Plyler v. Doe*, for example, the Court declared unconstitutional a Texas law that provided free public education for documented immigrants but required undocumented immigrants to pay for their schooling.[78] While education is not a fundamental right under the United States Constitution,[79] it is a violation of the Equal Protection Clause for a state to deny undocumented immigrant children the free public education that it provides to other children.[80]

DUE PROCESS

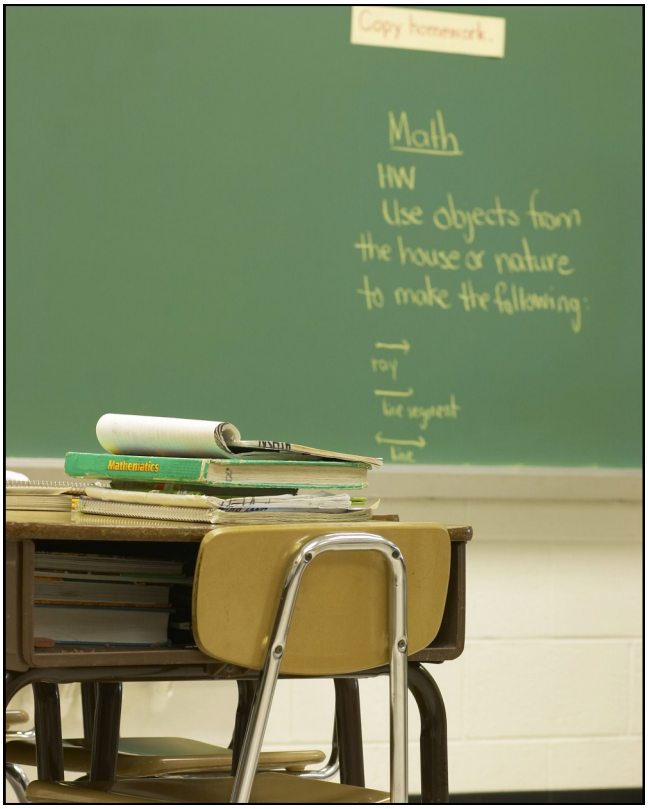
SCENARIO: *A teacher observed Kimberly, a fourteen-year-old ninth-grader, throw her math book at Christina, who suffered a black eye.*

Question: *Can Kimberly be suspended from school long-term?*

Quick Answer: *Yes, Kimberly can be given a long-term suspension for physically assaulting another student, but the school must follow specified procedures before doing so.*

EXPLANATION:

The Due Process Clause of the Fourteenth Amendment provides two types of protection: procedural due process and substantive due process. Procedural due process refers to the steps the government must follow before it deprives a person of life, liberty or property, while substantive due process looks at whether the government has an adequate reason for doing so. The right most commonly encountered in school is procedural due process. Schools cannot arbitrarily deprive students of an education unless they first go through proper procedures.



In *Goss v. Lopez*,[81] the Supreme Court held that procedural due process protections apply to suspensions and expulsions from school.[82] Generally, this means that prior to removal, schools must tell students they are being charged with an offense and give them an opportunity to defend themselves.

In North Carolina, students can be given a long-term suspension if the superintendent finds that the student has willfully engaged in conduct that the local school board has determined in its Code of Student Conduct authorizes long-term suspension. Indeed, a student can even be expelled if the student is at least fourteen years of age and the student's continued presence in school constitutes a clear threat to the safety of other students or employees.[83]

According to North Carolina law, for any suspension longer than 10 days or for any expulsion, the student and the student's parents have the following rights:

(1) The right to be represented at the hearing by an attorney or, in the discretion of the local board, a non-attorney advocate.
(2) The right to be present at the hearing, accompanied by his or her parents.
(3) The right to review before the hearing any audio or video recordings of the incident and, consistent with federal and state student records laws and regulations, the information supporting the suspension that may be presented as evidence at the hearing, including statements made by witnesses.
(4) The right to question witnesses appearing at the hearing.
(5) The right to present evidence on his or her own behalf, which may include written statements or oral testimony, relating to the incident leading to the suspension, as well as other factors.
(6) The right to have a record made of the hearing.
(7) The right to make his or her own audio recording of the hearing.
(8) The right to a written decision, based on substantial evidence presented at the hearing, either upholding, modifying, or rejecting the principal's recommendation of suspension and containing at least the following information:
    a. The basis for the decision, including a reference to any policy or rule that the student is determined to have violated.
    b. Notice of what information will be included in the student's official record.
    c. The student's right to appeal the decision and notice of the procedures for such appeal.[84]

A school must provide written notice of any proposed long-term (more than 10 days) suspension preferably by the end of the workday on which the suspension is proposed, or as soon as practicable thereafter, to the student's parents or legal guardian.[85] The written notice must contain at least:

(1) A description of the incident in question;

(2) The specific rule the student is accused of violating;

(3) The specific process by which the parent may request a hearing to contest the decision, including the number of days within which the hearing must be requested;

(4) A description of the hearing process;

(5) Notice of the parents' right to retain an attorney;

(6) The school board's policy on the use of advocates other than attorneys at hearings;

(7) Notice of the parents' right to review and obtain copies of the student's educational records before the hearing, and

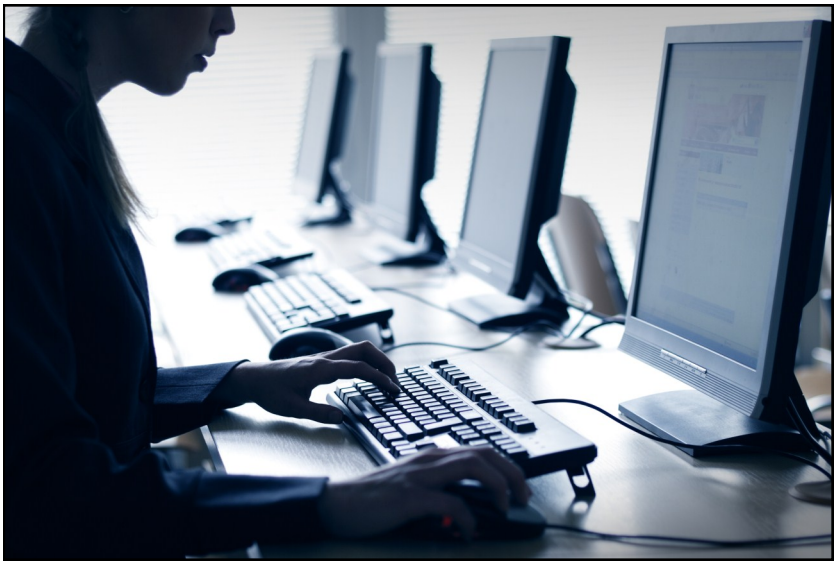
(8) A reference to the school board's policy on the expungement of discipline records.[86]

DUE PROCESS, Cont.

SCENARIO: *Mark is given a short-term suspension for accessing pornography websites on the library computers at school.*

Question: *Is there a process that the school must follow in order to make sure that Mark's rights are not violated?*

Quick Answer: Yes. *Generally, the school must follow a process for suspensions of up to 10 days.*



EXPLANATION:

In order to suspend a student for ten days or fewer, there is generally a process that the school must follow. The school must provide notice to the student that he or she has the right to be present, to be informed of the charges and the basis for the accusations, and to make statements in defense or mitigation of the charges. The notice to the student of the charges may be oral or written, and the hearing may be held immediately after the notice is given.[87] (Students are not entitled to appeal short-term suspensions, and short-term suspensions are not subject to judicial review.)[88]

SCENARIO: *Peter consistently disrupts class by throwing spitballs at the blackboard. Mr. Jennings warned Peter that he would rap his knuckles with a ruler if Peter threw another spitball.*

Question: *Can Mr. Jennings rap Peter's knuckles for throwing spitballs?*

Quick Answer: *Maybe.*

EXPLANATION:

While the Fourteenth Amendment embraces the right of parents to control the means by which their children are disciplined, "state[s have] a countervailing interest in the maintenance of order in the schools ... sufficient to sustain the right of teachers and school officials to administer reasonable corporal punishment for disciplinary purposes."[89]

Under North Carolina law, corporal punishment is permissible in limited circumstances. Pursuant to North Carolina Gen. Stat. § 115C-390.4(a), "[e]ach local board of education shall determine whether corporal punishment will be permitted in its school administrative unit." To the extent that corporal punishment is permitted, the law sets six additional conditions that must be met when administering corporal punishment. First, corporal punishment cannot be carried out in a classroom in the presence of other students.[90] Second, only a teacher, principal, or assistant principal in the presence of another teacher, principal, or assistant principal, who has been informed beforehand and in the student's presence of the reason for the punishment, may inflict the punishment.[91] Third, a school official must notify the student's parents that such punishment has been administered and of the details surrounding the punishment.[92] Fourth, the school must maintain records of each use of corporal punishment and the reasons for such use.[93] Fifth, excessive force is not permitted.[94] And finally, corporal punishment must not be administered to a student whose parents have completed a form, provided by the school, opting their child out of corporal punishment.[95]

A school board may decide to prohibit the use of corporal punishment. "Notwithstanding [this prohibition], school personnel may use physical restraint in accordance with federal law and G.S. 115C-391.1 and reasonable force pursuant to G.S. 115C-390.3."[96] Reasonable force may be used to manage the behavior of a student or to remove the student from a situation when necessary for the following reasons: (1) to correct students; (2) to quell a disturbance threatening injury to others; (3) to obtain possession of weapons or other dangerous objects on the person, or within the control, of a student; (4) for self-defense; (5) for the protection of persons or property; and (6) to maintain order on school property, in the classroom, or at a school-related activity on or off educational property.[97]

Physically restraining students is deemed a reasonable use of force by school personnel only under the following circumstances: to obtain a weapon controlled by a student, to maintain order or break up a fight, as needed for self-defense, as needed to ensure the safety of the student being restrained or another person, to escort a student safely from one area to another, if used as provided for in a student's IEP or Section 504 plan or behavior intervention plan, and as reasonably needed to prevent imminent destruction to the school or another person's property. When physical restraint is used solely for disciplinary purposes, it is not reasonable force.

The North Carolina Court of Appeals has ruled that if a teacher inflicts serious injury on a student, liability may be imposed if he or she should have reasonably foreseen that serious or permanent injury of some kind would naturally or probably result from such an act.[98]

SEARCH AND SEIZURE

SCENARIO: *Bobby, a seventh grader, has been in trouble several times for fighting in school. A guidance counselor hears a rumor that Bobby is carrying marijuana.*

Question: *Does the school have "reasonable suspicion" to search Bobby?*

Quick Answer: *No, the school must be able to point to specific facts giving rise to reasonable suspicion that a student is violating the law or the school's rules before conducting a search.*

Students have the same guarantees against "unreasonable searches and seizures" by law enforcement on school grounds as other citizens have outside of school; however, students have a reduced expectation of privacy while at school.

EXPLANATION:

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[99]

Students have the same guarantees against "unreasonable searches and seizures" by law enforcement on school grounds as other citizens have outside of school; however, students have a reduced expectation of privacy while at school. When law enforcement is involved, generally both a warrant and probable cause are required before authorities can undertake a search. However, in *New Jersey v. T.L.O.*,[100] the Supreme Court allowed a school to search a student's purse for cigarettes and marijuana without a warrant and without probable cause to suspect that the purse contained contraband.[101] In this context, school officials need only demonstrate "reasonable suspicion" that the student is violating school rules/disciplinary standards to conduct a search of a student's effects.[102] While "reasonable suspicion" is not always clear under the law, it is must be a suspicion based on facts and not on a mere hunch, rumor, or curiosity.[103]

Thus, it would be improper for the school to search Bobby for marijuana based on a mere rumor.

SCENARIO: *A school administrator gets a reliable tip that someone might be storing drugs in a locker, but the tip does not name a particular student.*

Question: *The administrator wants to search all student lockers to find the drugs. May he do so?*

Quick Answer: *Maybe.*

EXPLANATION:

The Supreme Court's decision in *T.L.O.* specifically excluded lockers from its holding, leaving open the question of whether or not students had "a legitimate expectation of privacy in lockers."[104] North Carolina courts have not ruled on whether or not a school official needs reasonable suspicion in order to search a student's locker, but the issue has arisen in other states. Many courts have found that students do have a reasonable expectation of privacy in their lockers. For example, the Mississippi Supreme Court said that students often keep "nondisruptive yet highly personal items such as photographs, letters, and diaries" in their lockers.[105] Another court called a student's locker a "home away from home," noting that students keep in it items protected by the Fourth Amendment prohibition against unreasonable searches and seizures.[106] The New Mexico Supreme Court applied the *T.L.O.* standard to require that the school official must have reasonable suspicion before searching a locker.[107] Thus, under the standard applied in New Mexico, the school administrator would not be able to search all students' lockers to look for the drugs.

However, if the school has a policy regarding the contents of lockers, the courts have interpreted that differently. In *In Interest of Isiah B.*[108], the Wisconsin Supreme Court found that because the Milwaukee public school system had informed students in a written policy that their lockers remained property of the school and could be searched without a warrant or reasonable suspicion, the students had no expectation of privacy in their lockers, and the school could enforce the policy as stated.[109]

On the other hand, the Massachusetts Supreme Court upheld a written policy pertaining to locker searches in *Commonwealth v. Snyder*.[110] There, because the school had promulgated a policy "that each student had the right '[n]ot to have his/her locker subjected to unreasonable search,'" the student had a reasonable expectation of privacy, and the school could not search the locker without at least reasonable suspicion.[111]

While the law is not completely clear on the issue of locker searches, if the administrator has reasonable suspicion that a particular student is storing contraband in his/her locker, then that administrator is probably within their rights to search that student's locker. Further, if the school has clearly informed students that they should consider their lockers public and not private and that their lockers may be searched at any time, the administrator may search the lockers without reasonable suspicion.[112]

SEARCH AND SEIZURE, Cont.

SCENARIO: *A school principal is told that Savana gave another student some over-the-counter pain medication that is banned under school rules. After Savana consents to a search of her belongings, the principal decides to require Savana to shake out her bra and underwear in the presence of school officials.*

Question: *Is this permissible?*

Quick Answer: *No.*

EXPLANATION:

This scenario is based on a search that the U.S. Supreme Court ruled unconstitutional in *Safford United Sch. Dist. #1 v. Redding*.[113] The Court noted that searches in which the "breasts and pelvic area" are "necessarily exposed ... to some degree" are distinct from other searches and must be treated as such.[114] While these degrading "strip searches" are not categorically outlawed by *Redding*, they may only be used in very specific circumstances.[115] In order to do a strip search, the principal would need an "indication of danger to the students from the power of the drugs or their quantity, and a reason to suppose that Savana was carrying pills in her underwear."[116] Without these elements, the strip search is unconstitutional.

SCENARIO: *The school board created a new policy mandating that in order for students to be admitted to the senior prom, they must take a breathalyzer test or be denied admission.*

Question: *Is this policy constitutional?*

Quick Answer: *Most likely, yes.*

EXPLANATION:

The Supreme Court has recognized that schools have an important interest in preventing and deterring drug use among students.[117] In *Vernonia Sch. Dist. 47J v. Acton*,[118] the Court upheld suspicionless drug testing of a school's athletes, reasoning that athletes frequently engage in dangerous activity and are thus more likely to injure themselves or others while playing under the influence.[119] The Court also stated that because school athletes are routinely subjected to mandatory physicals, they have a lower expectation of privacy than an average student.[120]

The Court later upheld random drug testing of students participating in extracurricular school activities in *Board of Education v. Earls*.[121] It is important to note, however, that the Court has not ruled on whether drug testing of *all* public school students is constitutionally permissible. So far, suspicionless drug testing has been limited to students participating in athletics or extracurricular activities, and the *Acton* court cautioned that the tests may not "readily pass constitutional muster in other contexts."[122]

STUDENT PRIVACY

SCENARIO: *A school district routinely releases student directory information to military recruiters without informing students and their parents of their right to opt out of having this information released.*

Question: *Is this practice permissible?*

Quick Answer: *No.*

EXPLANATION:

Under the "No Child Left Behind Act," parents and students have the right to request that students' contact information not be released to military recruiters and institutions of higher education without parental consent.[123] A school should ensure that parents and students receive adequate notice of this right. For example, simply including an opt-out form as the last page of the Student Code of Conduct, which is handed out to students at the beginning of the school year, does not appear to comply with 20 U.S.C. § 7908(a)(2), which *requires* the local educational agency to "notify *parents* of the option to make a request . . . ."

Second, any opt-out notice should explain that any secondary student (regardless of age) or the parent of the student may request that the student's information not be released without prior written parental consent.[124] Therefore, while records can only be released with parental consent after a request to opt out is made, the Act clearly provides that the initial request to opt out can be made either by the parent *or* the student, without regard to the student's age.[125]

END NOTES

1. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
2. *Tinker*, 393 U.S. at 513; *see also* Pyle v. South Hadley Sch. Comm., 861 F. Supp. 157, 159 (D. Mass. 1994) (finding that administrators "acted within reason" by prohibiting students from wearing shirts that read, "Coed Naked Band: Do It to the Rhythm" and "See Dick Drink. See Dick Drive. See Dick Die. Don't Be a Dick.").
3. 354 F.3d 249 (4th Cir. 2003).
4. *Id.* at 252, 259–60.
5. *Id.*
6. *Tinker*, 393 U.S. at 509. A school cannot ban student expression solely as a result of the existence of a "heckler's veto." Berger v. Battaglia, 779 F.2d 992, 1001 (4th Cir. 1985) ("Historically, one of the most persistent and insidious threats to first amendment rights has been that posed by the 'heckler's veto,' imposed by the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order."). That is, if the message on a T-shirt causes some students who are offended by the message to act out, the school has a duty to address those students and not censor the student who wishes to peacefully express her message.
7. 551 U.S. 393, 403 (2007) ("[A] principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.").
8. *See Fraser*, 478 U.S. at 685 (holding that "offensively lewd and indecent speech" is not protected in schools); *Tinker*, 393 U.S. at 513 (holding that conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not protected).
9. *Tinker*, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
10. *Id.* As noted above, a school cannot ban student expression solely as a result of the existence of a "heckler's veto."
11. A.M. *ex rel.* McAllum v. Cash, 585 F.3d 214, 223 (5th Cir. 2009); B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 739–40 (8th Cir. 2009); Barr v. Lafon, 538 F.3d 554, 573–75 (6th Cir. 2008); Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1248–50 (11th Cir. 2003); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1365–67 (10th Cir. 2000); Melton v. Young, 465 F.2d 1332, 1335 (6th Cir. 1972); Phillips v. Anderson Cnty. Sch. Dist. Five, 987 F. Supp. 488, 493 (D.S.C. 1997).
12. Bragg v. Swanson, 371 F. Supp. 2d 814, 826–29 (S.D. W. Va. 2005); Castorina *ex rel.* Rewt v. Madison Cnty. Sch. Bd., 246 F.3d 536, 542 (6th Cir. 2001).
13. *See* Spence v. Washington, 418 U.S. 405, 414–15 (1974) (finding that displaying a U.S. flag with a peace sign to protest the killing of students at Kent State University was speech protected by the First Amendment); *see also* Texas v. Johnson, 491 U.S. 397, 404, 420 (1989) (holding that flag burning was protected by the First Amendment).
14. Wallace v. Ford, 346 F. Supp. 156, 161–62 (E.D. Ark. 1972).
15. Hicks *ex rel.* Hicks v. Halifax Cnty. Bd. of Educ., 93 F. Supp. 2d 649, 657–63 (E.D.N.C. 1999).
16. Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 668 (S.D. Tex. 1997) (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986)).
17. *Chalifoux*, 976 F. Supp. at 668 (quoting Smith v. Goguen, 415 U.S. 566, 573 (1974)); *see also* Stephenson v. Davenport Comm. Sch. Dist., 110 F.3d 1303, 1308–09 (8th Cir. 1997).
18. *See Chalifoux*, 976 F. Supp. at 668; Copper *ex rel.* Copper v. Denlinger, 667 S.E.2d 470, 494 (N.C. Ct. App. 2008) (stressing the importance of a list), *rev'd in non-relevant part by* Copper *ex rel.* Copper v. Denlinger, 363 N.C. 784 (N.C. 2010). *Cf.* Long v. Bd. of Educ. of Jefferson Cnty., Ky., 121 F. Supp. 2d 621, 623 (W.D. Ky. 2000) (court described a school dress code it upheld, which specifically prohibited "shorts; cargo pants; jeans; and other specified fabrics," as "quite comprehensive").
19. *Stephenson*, 110 F.3d at 1305, 1311. In *Stephenson*, the court noted:

> Sadly, gang activity is not relegated to signs and symbols otherwise indecipherable to the uninitiated. In fact, gang symbols include common, seemingly benign jewelry, words and clothing. . . . A male student wearing an earring, or allowing a shoelace to go untied, is engaging in actions considered gang related. Even a student who innocently refers to classmates as "folks" or "people" is unwittingly speaking in the parlance of the Midwestern gangs "Vice Lords" and "Black Gangster Disciples." In short, a male student walking the halls of a District School with untied shoelaces, a Duke University baseball cap and a cross earring potentially violates the District regulation in four ways.

Id. at 1311 (internal citations omitted).
20. Lee v. Weisman, 505 U.S. 577, 597 (1992).
21. *See e.g.*, Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *3-4, 8 (Mass. Super. 2000) (relying on First Amendment and granting a preliminary injunction that enjoined school from punishing male plaintiff for wearing girl's clothes or accessories), *aff'd sub nom.*, Doe v. Brockton Sch. Committee, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000); *see also* Bear v. Fleming, 714 F. Supp. 2d 972, 984 (D.S.D. 2010) (holding that "wearing traditional Lakota clothing as [a student] receives his diploma . . . [is] the type of expressive speech that falls under the umbrella of the Free Speech Clause of the First Amendment").
22. *See* Knussman v. Maryland, 272 F.3d 625, 635–36 (4th Cir. 2001) (classifications that reinforce stereotyped ideas about the roles and capabilities of women are invalid).
23. *Knussman*, 272 F.3d at 635 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).
24. 20 U.S.C. § 1681.
25. *See* Cannon v. University of Chicago, 441 U.S. 677, 717 (1979).
26. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 250, 258 (1989) (holding as impermissible the denial of promotion for female associate of accounting firm because she, among other things, failed to dress in a feminine manner), *superseded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76, *as*

recognized in Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994). Increasingly, courts are recognizing Title IX claims for discrimination and harassment based on non-conformity with sex stereotypes. *See, e.g.*, Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011); Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 822–23 (C.D. Ill. 2008); Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 226 (D. Conn. 2006); Theno v. Tonganoxie Unified Sch. Dist No. 464, 377 F. Supp. 2d 952, 965 (D. Kan. 2005); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1092–93 (D. Minn. 2000).

27. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–73 (1988), *superseded in part by statute*, MASS. GEN. LAWS ANN. ch. 71, § 82, *as recognized in* Pyle *ex rel.* Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 167 (D. Mass. 1994).

28. *Id.* at 271.

29. *Id.* at 272 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

30. 484 U.S. 260 (1988).

31. *Id.* at 263–64.

32. *Id.* at 274–76.

33. N.C. Gen. Stat. § 115C-81(e1) (4)–(11).

34. *See Fraser*, 478 U.S. 675; Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 509 (1969).

35. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

36. Circle Schs. v. Phillips, 270 F. Supp. 2d 616, 622 (E.D. Pa. 2003), *aff'd sub nom.*, Circle Schs. v. Pappert, 381 F.3d 172, 174 (3d Cir. 2004).

37. N.C. GEN. STAT. § 115C-47(29a) (2010).

38. *Id.*

39. *Pappert*, 381 F.3d at 180. *But see* Frazier *ex rel.* Frazier v. Winn, 535 F.3d 1279, 1285 (11th Cir. 2008).

40. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864–72 (1982); *see also id.* at 879–80 (Blackmun, J., concurring). *See also* Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 190–91 (5th Cir. 1995).

41. Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723 (2d Cir. 1994).

42. *Pico*, 457 U.S. at 868–69 (1982).

43. *Id.* at 872 (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)); *see also* Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 875–76 (D. Kan. 1995) (finding that a school board's removal of a novel depicting a romantic relationship between two teenage girls was unconstitutional as the removal was due to board members' personal disapproval of the ideas contained in the book).

44. *Pico*, 457 U.S. at 870.

45. Am. Civil Liberties Union of Fla. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1221–22 (11th Cir. 2009).

46. *Id.* at 1222.

47. *Cf.* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 –14 (1969); Searcey v. Crim, 642 F. Supp. 313, 314–15 (N.D. Ga. 1986), *aff'd in part, vacated in part, and remanded*, 815 F.2d 1389 (11th Cir. 1987)*, and on remand,* 681 F. Supp. 821 (N.D. Ga. 1988), *aff'd sub nom.*, Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989); Clergy and Laity Concerned v. Chicago Bd. of Educ., 586 F. Supp. 1408, 1413 (N.D. Ill. 1984).

48. *Harris*, 888 F.2d at 1318–19 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)). *See also* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 633 (2d Cir. 2005); Nat'l Socialist White People's Party v. Ringers, 473 F.2d 1010, 1017 (4th Cir. 1973) (requiring a content-neutral policy when a school rents out its auditorium).

49. Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 928–29 (10th Cir. 2002); C.H. v. Oliva, 195 F.3d 167, 172–73 (3d Cir. 1999), *reh'g en banc granted, opinion vacated*, 197 F.3d 63 (3d Cir. 1999), *on reh'g en banc*, 226 F.3d 198 (3d Cir. 2000); Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993).

50. Crim, 815 F.2d at 1394 (citing Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37 (1983)).

51. Harris, 888 F.2d at 1321.

52. *Id.* at 1322.

53. *Id.*

54. *Id.* at 1322–23.

55. *Id.* at 1323.

56. *Id.*

57. *Id*. at 1324. *See also* Clergy and Laity Concerned v. Chicago Bd. of Educ., 586 F. Supp. 1408, 1414 (N.D. Ill. 1984) (noting that while a peace activist organization may present "legal alternatives to the draft and military service," it might not be allowed to "disseminate any information about the moral and social evils of war").

58. *See Harris*, 888 F.2d at 1324–25; *see also Clergy*, 586 F. Supp. at 1413–14; Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1010–12 (9th Cir. 2000); Nat'l Socialist White People's Party v. Ringers, 473 F.2d 1010, 1017 (4th Cir. 1973). *But see* Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 928–29 (10th Cir. 2002); C.H. v. Oliva, 195 F.3d 167, 172–73 (3d Cir. 1999), *reh'g en banc granted, opinion vacated*, 197 F.3d 63 (3d Cir. 1999), *on reh'g en banc*, 226 F.3d 198 (3d Cir. 2000); Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993); Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993).

59. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

60. *Harris*, 888 F.2d at 1324.

61. Id. at 1325; San Diego Comm. Against Registration & Draft (CARD) v. Governing Bd. of Grossmont Union High Sch. Dist., 790 F.2d 1471, 1478 (9th Cir. 1986).

62. Harris, 888 F.2d at 1324 (quoting Cornelius, 473 U.S. at 811).

63. Equal Access Act, 20 U.S.C. §§ 4071–74 (2009).

64. *Id.* § 4071(a).

65. *Id.* § 4071(b).

66. *See, e.g.*, Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd. of Nassau Cnty., 602 F. Supp. 2d 1233, 1237–38 (M.D. Fla. 2009); Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty., 483 F. Supp. 2d 1224, 1227–28, 1231 (S.D. Fla. 2007); White Cnty. High Sch. Peers Rising in Diverse Educ. v. White Cnty. Sch. Dist., No. 2:06-CV-29-WCO, 2006 WL 1991990, at *12 (N.D. Ga. Jul.

14, 2006); Boyd Cnty. High Sch. Gay/Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003); Franklin Cent. Gay/Straight Alliance v. Franklin Twp Cmty. Sch. Corp., No. IP01–1518 C –M/S, 2002 WL 32097530, at *19 (S.D. Ind. Aug. 22, 2002); Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1143–46 (C.D. Cal. 2000); East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166, 1187 (D. Utah 1999).

67. 20 U.S.C. § 4071(b).

68. Straights and Gays for Equality (SAGE) v. Osseo Area Schs. – Dist. No. 279, 471 F.3d 908, 912 (8th Cir. 2006).

69. *Yulee*, 602 F. Supp. 2d at 1238; *Colin*, 83 F. Supp. 2d at 1147–48.

70. *Sage*, 471 F.3d at 911 (citing Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 240 (1990)).

71. U.S. CONST. amend. XIV, § 1.

72. Harris v. McRae, 448 U.S. 297, 322 (1980) (interpreting the nearly identical Fifth Amendment Due Process Clause, U.S. CONST. amend V).

73. Nabozny v. Podlesny, 92 F.3d 446, 458 (7th Cir. 1996).

74. *Id.*; Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1135–37 (9th Cir. 2003); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1089 (D. Minn. 2000).

75. N.C. GEN. STAT. § 115C-407.15–17 (2009).

76. *Cf.* Plyler v. Doe, 457 U.S. 202, 240 n.4 (Powell, J., concurring).

77. *Id.* at 210 (majority opinion); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Wong Yang Sung v. McGrath, 339 U.S. 33, 48–51 (1950), *superseded by statute*, Supplemental Appropriation Act of 1951, Pub. L. No. 81-843, ch. 1052, § 3, 64 Stat. 1044, 1048, *as recognized in* Ardestani v. INS, 502 U.S. 129, 133–34 (1991); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

78. *Plyler*, 457 U.S. at 230.

79. In contrast, the North Carolina Constitution does create a fundamental right to the privilege of education and mandates that "every child" attend school. N.C. Const. art. IX, § 3.

80. *Plyler*, 457 U.S. at 228–30.

81. 419 U.S. 565 (1975).

82. *Id.* at 573–74.

83. N.C. GEN. STAT. § 115C-390.11(a) (2011).

84. *Id.* § 115C-390.8(e).

85. *Id.* § 115C-390.8(a).

86. *Id.*

87. *See id.* § 115C-390.6(a).

88. *Id.* § 115C-390.6(e).

89. Baker v. Owen, 395 F. Supp. 294, 296 (M.D.N.C. 1975), *aff'd*, 423 U.S. 907 (1975).

90. N.C. GEN. STAT. § 115C-390.4(b)(1) (2011).

91. *Id.* § 115C-390.4(b)(2).

92. *Id.* § 115C-390.4(b)(3).

93. *Id.* § 115C-390.4(b)(4).

94. *Id.* § 115C-390.4(b)(5).

95. *Id.* § 115C-390.4(b)(6).

96. *Id.* § 115C-390.4.

97. *Id.* § 115C-390.3.

98. Gaspersohn v. Harnett Cnty. Bd. of Educ., 75 N.C. App. 23, 27–28, 330 S.E.2d 489, 492–93 (1985).

99. U.S. CONST. amend. IV.

100. 469 U.S. 325 (1985).

101. *Id.* at 347–48.

102. *Id.* at 347.

103. *Id.* at 345–46; State v. Michael G., 748 P.2d 17, 19–20 (N.M. 1987).

104. *T.L.O.*, 469 U.S. at 337 n.5.

105. S.C. v. State, 583 So.2d 188, 191 (Miss. 1991) (quoting *T.L.O.*, 469 U.S. at 339)).

106. *In re* Dumas, 515 A.2d 984, 987 (Pa. Super. Ct. 1986) (Kelly, J., concurring).

107. *Michael G*, 748 P.2d at 19–20.

108. 500 N.W.2d 637 (Wis. 1993).

109. *Id.* at 649.

110. 597 N.E.2d 1363 (Mass. 1992).

111. *Id*. at 1366.

112. *Isiah B.*, 500 N.W.2d at 638–41; *see also* United States Department of Education, Creating Safe and Drug-Free Schools: An Action Guide – Searches for Weapons or Drugs, http://www.ed.gov/offices/OSDFS/actguid/searches.html (last visited May 6, 2009).

113. 557 U.S. 364 (2009).

114. *Id.* at 374.

115. *Id.* at 375–77.

116. *Id.* at 376–77.

117. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. 47J. v. Acton, 515 U.S. 646 (1995).

118. 515 U.S. 646 (1995).

119. *Id.* at 661–65.

120. *Id.* at 656–57.

121. 536 U.S. 822 (2002).

122. *Acton*, 515 U.S. at 665.

123. "No Child Left Behind" Act, 20 U.S.C § 7908(a)(2).

124. *Id.*

125. *Id.* Language set forth in the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA), further underscores the need to adequately inform *parents* of students under 18 of the right to opt out under No Child Left Behind. Under FERPA, the requirement that a local educational agency effectively notify parents of their rights remains in effect until the student reaches the age of 18. Only at that point does an educational agency satisfy FERPA by effectively notifying the student only.

The Covenant
WITH NORTH CAROLINA'S CHILDREN

ACLU
AMERICAN CIVIL LIBERTIES UNION of NORTH CAROLINA
FOUNDATION

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
NAACP
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Action for Children
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JUSTICE CENTER

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This booklet is sponsored by the above organizations and intended for public school officials in North Carolina and others who wish to learn about existing constitutional law related to the rights of students in state public schools.