

Censorship at the Schoolhouse Gate: Dress Code and First Amendment Implications

March 10, 2020

Imagine a student comes to school wearing a t-shirt that depicts a firearm or other weapons, in violation of the school's dress code. Can you require the student to remove or cover the t-shirt? Is the student subject to discipline if he or she refuses? Does it make a difference what specifically is written and/or depicted on the t-shirt? Can you take recent national events, such as school shootings, into account when making a decision? These are just a few of the questions that schools and the courts have been faced with.

Recently, at least two Wisconsin school districts have been sued in federal court for allegedly prohibiting students from wearing t-shirts that depicted guns. In one of the lawsuits, the shirt promoted firearms in a non-violent, non-threatening manner. The complainant alleges that the district violated the student's First Amendment rights by requiring him to cover up his shirt.

"SUBSTANTIAL DISRUPTION" TEST: TINKER V. DES MOINES

Tinker is a landmark United States Supreme Court case involving students who planned to wear black wristbands as a form of protest against the Vietnam War. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). The school district created a policy indicating any student wearing an armband would be asked to remove it, and refusal to do so would result in a suspension. The Supreme Court held that the armbands represented "pure speech" and that students did not lose their First Amendment rights to freedom of speech or expression when they stepped onto school property.

Most importantly, the Court established what is known as the "substantial disruption test." In order to justify the suppression of student speech, school officials must be able to show that the conduct in question would "materially and substantially interfere" with the school environment.

HOW COURTS HAVE APPLIED TINKER TO DRESS CODE ISSUES INVOLVING WEAPONS

A recent case in the United States Eastern District of Wisconsin has given us an idea of how courts in Wisconsin may apply the *Tinker* standard to dress code issues involving weapons. In *Schoenecker v. Koopman*, 349 F. Supp. 3d 745 (E.D. Wis. 2018), the District Court held that the student's wearing of shirts depicting weapons was a form of expression protected by the First Amendment, and that the "substantial disruption test" was not met.

The student in *Schoenecker* wore three different shirts: 1) a t-shirt that said "Celebrate Diversity" with different types of guns on it; 2) a t-shirt that had "Love" spelled out with different types of weapons like knives, guns, and

even a grenade and; 3) a t-shirt that had no images of weapons but said “IF GUNS KILL PEOPLE, I GUESS PENCILS misspell words CARS drive drunk & SPOONS make people fat.” The Court concluded that the wearing of each shirt was a protected expression.

Although the administrator provided reasons for his belief as to why the shirts would likely cause substantial disruption, the Court found no evidence that students were induced with anxiety or that staff members could not provide instruction. The court also found that the staff members’ reactions to the shirts “seem[ed] unreasonable, as none of the shirts promote gun violence.” Essentially, the Court found the administrator did not show a reasonable belief that the student’s wearing of the shirts would create a threat of substantial disruption, i.e., a threat of a decline in test scores, an upsurge in truancy or other symptoms of a “sick school.”

KEY TAKEWAYS

- Overall, a school’s decision to regulate student speech, including choice of apparel, should be made on a case-by-case basis, with careful consideration of the specific facts in each situation.
- A blanket restriction on any apparel depicting a weapon or promoting gun rights, without further analysis of the specific facts or circumstances, is not recommended at this time.
- A dress code policy prohibiting the depiction of violence on clothing will not unilaterally violate a student’s First Amendment rights, but rather, it is how the policy is applied that may raise issues under the First Amendment.
- It is worth noting that the specific facts required and the exact level of disruption to satisfy this test has not been clearly settled by the courts. Overall, a school will want to avoid censoring student speech and apparel unless the speech or apparel conveys threats, promotes violence (gun violence or otherwise) and/or promotes other illegal conduct, and that there are facts to establish a substantial disruption to the school environment, such as expressed fear by other students, the likelihood of increased truancy rates, etc.

RECOMMENDATIONS

- Review policies and dress codes in your student handbook.
- Consider the following factors in determining whether to prohibit certain student apparel with weapons:
 - The slogan and imagery;
 - Does the wording or images reasonably convey threats, promote violence or promote illegal conduct;
 - The grade level (age) of the student wearing the clothing;
 - What other messages/depictions the school has allowed or disallowed in the past;
 - The language contained in your student handbooks; and
 - Reactions by staff, students and parents.
- Encourage building administrators to consult with a central office administrator and legal counsel, as appropriate.

As you can see, these instances will require a case-by-case, fact-specific analysis. It is not necessary to make a determination within the first hour of the student arriving at school. First Amendment issues, in and of themselves, are very fact-specific, especially in the school environment. In addition, the case law in this area is continuously developing. We will continue to closely monitor the case law in this area, including any recent lawsuits, in order to keep you up-to-date on legal developments and guidance from the courts.

If you need assistance reviewing dress code policies or responding to individual student situations, or if you have questions about this legal update, please contact Saveon Grenell at sgrenell@buelowvetter.com or 262-364-0313, or your Buelow Vetter attorney.

This Legal Update is intended to provide information only on general compliance issues and should not be construed as legal advice. Please consult an attorney if you have any questions concerning the information discussed in this Legal Update.

In order to comply with Treasury Circular 230, we are required to inform you that any advice we provide in this Legal Update concerning federal tax issues is not intended or written to be used, and cannot be used, to avoid federal tax penalties or to promote, market, or recommend to another person any tax advice addressed herein.

Buelow Vetter Buikema Olson & Vliet, LLC
20855 Watertown Road, Suite 200
Waukesha, WI 53186
Phone: 262-364-0300
Fax: 262-364-0320
Email: info@buelowvetter.com
Website: www.buelowvetter.com