

## The Breakfast Club

### Constitutional Minute for 4 October 2022

#### What Rights Do Public School Students Have?

After complaining about Tuesday's walkout in opposition to the Governor's new LGBTQ policy, the email I got from the President of the YCSD Board, clearly a canned response composed by the Division's legal counsel, cited *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) as the precedent which requires school districts to allow student-led protests. Let's take a look at that case and then we'll examine the larger question of what rights public school students enjoy.

According to Wikipedia: "In 1965, five students in Des Moines, Iowa, decided to wear black armbands to school in protest of American involvement in the Vietnam War and supporting the Christmas Truce that was called for by Senator Robert F. Kennedy. ... The students wore the armbands to several schools in the Des Moines Independent Community School District ...."

"The Tinker family had been involved in civil rights activism before the student protest. The Tinker children's mother, Lorena, was a leader of the Peace Organization in Des Moines. Christopher Eckhardt and John Tinker attended a protest the previous month against the Vietnam War in Washington, D.C."

In other words, four brothers and sisters raised by anti-war parents, plus one of their friends, made it all the way to the U.S. Supreme Court! They obviously didn't do so by themselves; they had a lot of legal help and financing along the way.

The school district had heard of the family's intent and passed a resolution to try to ban the armbands before they were worn. They suspended the students when the kids wore the armbands anyway. The local ACLU branch took up the cause and it was argued as an infringement of the students free speech rights. "But wait, the students were not speaking," you say. Awhile back I spoke about "symbolic speech," a concept the Supreme Court created out of whole cloth. All sorts of non-speaking activities are now protected as "speech," including [nude dancing](#). In 1969, wearing black arm bands in public schools was added to the list. But there were some caveats.

In perhaps the opinion's most famous statement: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

The Court found that the Tinker kids' armbands did not cause disruption and held that their activity represented constitutionally protected symbolic speech. The majority believed that the speech regulation the Board passed to prohibit the arm bands was "based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam." Two points stand out here: the court found the arm bands to "not cause disruption" to the educational environment at the schools and that they comprised a "silent symbol."

This is not what happened at Grafton High School on 27 September 2022. The protest, which student organizers promised would only involve 15-20 students ended up involving, in the words of the principal, "150 students." All 150 students obviously missed about 20 minutes of third block instruction. The students were allowed to chant and shout, disrupting the ability of students taking tests in nearby

classrooms to focus. For the YCSD lawyer to cite *Tinker* as precedent for allowing a disruptive demonstration involving significantly more students than the number approved was disingenuous at best. These and other points will be argued at the next Board meeting on 24 October.

**What other rights to public school students enjoy? Here's a partial list:**

Students have the right to "speak" freely as long as doing so is not disruptive to the educational process. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Although students can be compelled to attend school, they cannot be compelled to profess belief in what they are taught. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)

Students cannot be required to pledge to the U.S. flag. *West Virginia v. Barnette* (1943)

Requiring public school students to listen to a non-denominational prayer at the start of the school day is not permitted. *Engel v. Vitale* (1962).

Students cannot be suspending unless the school follows due process (*Goss v. Lopez*, 419 U.S. 565 (1975)).

**School administrators have rights as well, and restrictions:**

A school system cannot have racially-segregated schools. *Brown v. Board of Education* (1954)

While a state may require compulsory education, it cannot prohibit attendance at a religious school. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Compulsory education laws must allow parents to withdraw their students after age 14 for religious reasons. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

A state cannot provide financial support for teacher salaries and textbooks in parochial schools. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But they can reimburse parents for the cost of using public transportation to get their kids to parochial schools. *Everson v. Board of Education*, 330 U.S. 1 (1947).

States cannot discriminate against private school students when reimbursing parents for the cost of private schools when public schools are not provided in the area. *Carson v. Makin*, 596 U.S. \_\_\_\_ (2022).

Schools can regulate the content of school-sponsored newspapers. *Hazelwood School District et al. v. Kuhlmeier et al.*, 484 U.S. 260 (1988).

A student can be disciplined for delivering a sexually suggestive speech at a school assembly. *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

School administrators may search a student's purse or backpack without a warrant or probable cause as long as the search seems reasonable. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

School administrators can require students submit to a drug test to engage in school sports. *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

School administrators can prohibit students from wearing U.S. flag apparel during a Cinco de Mayo Day at the school when allowing it the previous year proved disruptive. *Dariano v. Morgan Hill Unified School District*.

Schools may impose reasonable clothing and hair restrictions. *New Rider v Board* (414 US 1097 [1973])

A public school football coach cannot be fired for publicly praying on the field after a game. *Kennedy v. Bremerton School District*, 2022

Many more school-related cases have been decided at the state and federal court of appeals level.

And so the fight goes on: administrators fighting to retain control of their classrooms, students fighting to do and say what they want in those classrooms, and parents fighting to retain the right to direct their child's education. If you have questions, fire away.

See you at the YCSD Board meeting on 24 October, 7pm, York Hall.

Prepared by: Gary R. Porter, Executive Director, Constitution Leadership Initiative, Inc. for The Breakfast Club.

Contact: [gary@constitutionleadership.org](mailto:gary@constitutionleadership.org); 757-817-1216