ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Texas

Know Your Rights: Resistance in Texas Public Schools

Your Free Speech Rights:

The **First Amendment** of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of press; or the right of the people peaceable to assemble . . . ."[1]

The **Texas Constitution** in Article I, Sections 8 and 27 protect the "liberty to speak, write or publish his opinions on any subject," and "the right, in a peaceable manner, to assemble together for their common good . . . ."[2]

What kinds of expression are protected by the First Amendment and the Texas Constitution?

- Pure speech
- Images and symbols
- Acts with an intelligible message
- Petitioning the government
- Forming groups (association)
- Peaceful gatherings (assembly)
- Mass media (press)

Students' Free Speech Rights

Can schools restrict the content of student speech?

Schools **cannot** forbid speech solely because it is a "controversial topic" or because school officials disagree with the ideas expressed. Schools cannot discipline students for their speech unless they can "reasonably forecast" that the speech will be so disruptive that it prevents ordinary school activities from taking place. Furthermore, this "reasonable forecast" must be based on actual evidence rather than mere anticipation or fear that a disturbance *may* occur.

- Examples of speech that courts have said schools must allow:
  - Wearing armbands in school to protest a war.[3]
  - Publishing and distributing an independent newspaper near school property, created on the students' own time and with their own materials.[4]
  - Wearing empty holsters to protest laws and school policies which limited carrying concealed firearms.[5]
- Examples of speech that courts have said schools can restrict for being too disruptive:
  - Displaying the Confederate flag in school following pervasive incidents of racial hostility in the school, including waving Confederate flags against an opposing school's predominantly black volleyball team, Confederate flags

[1] U.S. Const. amend. I.
[2] Tex. Const. art. I, §§ 8, 27.
[3] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
[4] *Shanley v. Indep. Sch. Dist., Bexar Cty., Tex.*, 462 F.2d 960 (5th Cir. 1972).
[5] *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010).

flown over the flagpole on Martin Luther King Jr. Day, and a white student simulating a lynching of a black student.[6]

Schools can restrict speech that is offensively lewd and indecent or speech that includes grave and unique threats to the physical safety of students, without proving that it would be too disruptive.

Finally, schools can put some restrictions on speech that the school itself sponsors. School-sponsored speech can be limited only when the school shows a valid educational purpose for the restriction, and that the restriction is not intended to silence one particular viewpoint at the expense of others. For example:

- School officials retained the right to restrict school-sponsored student newspaper stories about students' parents divorcing and student pregnancies because of legitimate concerns of students' privacy and apparent endorsement of teen pregnancy.[7]
- Schools officials could punish unauthorized display of a pro-drug banner at a school-sanctioned and school-supervised event.[8]

Can schools restrict when and where students speak?

Schools **can** place restrictions on the time, place, and manner of expression so long as the restriction is **content-neutral**, limited to serving a legitimate educational interest, and leaves open ample opportunity for speech to occur at another time. The schools' rules cannot effectively shut down speech, and the rules cannot sweep more broadly than the educational interest they are meant to serve.

- A public university's regulation requiring students to make a reservation 48-hours in advance to hold a demonstration in a designated area was upheld.[9]

However, a school's approval of demonstrations **cannot** be based on the content of the speech, unless the speech falls under the content-based exceptions of being obscene, threatening, or sponsored by the school.

- A public university's policy limiting administrative approval of student demonstrations to those of a "wholesome" nature was held to be an unconstitutional regulation of content and unconstitutionally vague.[10,11]

What consequences can a school impose on student?

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[6] *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214 (5th Cir. 2009).
[7] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).
[8] *Morse v. Frederick*, 55 U.S. 393 (2007).
[9] *Bayless v. Martine*, 430 F.2d 873 (5th Cir. 1970).
[10] *Shamloo v. Miss. State Bd. of Tr. of Inst. of Higher Learning*, 620 F.2d 516 (5th Cir. 1980).
[11] Any regulation of expression at demonstrations cannot be unconstitutionally vague. A regulation is unconstitutionally vague if someone of common intelligence must guess at its meaning and can come to different interpretations of its application. *Shamloo*, 620 F.2d at 523.

Students have a constitutionally protected interest in their equal access to a public education, subject to state and federal due process protections. This means a school may not automatically suspend a student or prevent them from attending school without first giving them written or oral notice of the charge, and then holding a hearing to allow the student to present their side.

Generally, schools must present the notice and hearing prior to a student's removal from school. Only circumstances where a "student's presence endangers persons or property or threatens disruptions of the academic process" could justify immediate removal, but due process still requires notice and a hearing immediately following the removal.[12]

Teachers' Free Speech Rights

Public schools **cannot** restrict teachers' speech when they speak as a citizen on a matter of public concern, even when teachers identify themselves as school employees. However, expression in furtherance of one's official employment duties is not protected by the First Amendment.

A public school cannot take any adverse action against their employee unless the school's **legitimate** need for limiting the speech (such as ensuring employees perform their job duties or for confidentiality reasons) outweighs the employee's interest in engaging in the protected speech. The school cannot punish an employee simply because they disapprove of the subject matter of the speech.

A teacher's expression is more likely to be protected if it:

- Takes place outside the classroom
- Is made in a public forum or directed to elected officials
- Is to a person outside the teacher's chain of command
- Does not assist with job duties
- Is the type of expression that would be made by teachers

Public employee speech that has been protected under the First Amendment include:

- A teacher writing a letter to the editor of a newspaper about the school's budget.[13]
- A police officer making a Facebook post from her home identifying her position, while off duty, complaining that government officials did not attend a funeral.[14]
- A systems analyst emailing Texas legislators, who had no supervisory control over him, about racial discrimination in his workplace.[15]

Public employee speech not protected because it pertained to their job duties include:

- A teacher's use of a supplemental reading list without first seeking school approval.[16]
- A high school football coach sending a memo to his principal about mishandling of school athletic funds.[17]

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[12] *Goss v. Lopez*, 419 U.S. 565 (1975).
[13] *Pickering v. Bd. of Ed. Of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563 (1968).
[14] *Graziosi v. City of Greenville Miss.*, 775 F.3d 731 (5th Cir. 2015).
[15] *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008).
[16] *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989).

- A water district plant manager advising customers to oppose the district's annexation of more property.[18]

Right to Use Public School Facilities

If a school opens its facilities for limited public use (i.e., using classrooms for community meetings after hours), the First Amendment protects the public's right of access to that space. Any limitations on public access must be **reasonable** and **viewpoint neutral**. Furthermore, a regulation with seemingly reasonable grounds for limiting use is not permitted if it is actually a façade for viewpoint-based discrimination.

- A school board meeting's comment session rule which prohibited discussion of employee disputes and disclosure of teachers' names was a viewpoint neutral and reasonable restriction, intended to serve the board's legitimate interest of protecting teachers' privacy and preventing the comment session from becoming a dispute resolution forum when a robust grievance process already existed.[19]
- However, a school's exclusion of a Christian children's club's use of school-premises based on its religious nature constituted unconstitutional viewpoint discrimination.[20]

Student and Teacher Rights Related to Law Enforcement

What are students' and parents' rights under SB4?

SB4's provisions **do not** apply to public grade schools or open enrollment charter schools, and police officers employed or contracted by schools should not ask about students' or parents' immigration status. However, SB4 may still affect students and parents anywhere outside school property, including on the way to and from school. If students or parents are subject to any interaction with law enforcement, you retain these rights listed below, even under SB4. Generally, non-citizens have the same constitutional rights as U.S. Citizens.

- You have the right to remain silent, and can decline to answer any officer's questions with the exception of identifying yourself (name, address, and date of birth) only if you are under arrest. You do not have to answer any questions about your immigration status on school property and can choose to remain silent, or even walk away from an officer unless you are being detained. However, you should never make any false claims about your immigration status or make any other false representations.
- You have the right to refuse consent to a search, and are never obligated to say "yes" if an officer asks to search your things or asks you to show anything you may have concealed. If an officer searches your things without permission, state "I do not consent to this search."

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[17] *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007).
[18] *Hardesty v. Cochran*, 621 F. App'x 771 (5th Cir. 2015).
[19] *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747 (5th Cir. 2010).
[20] *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

- Even if an officer violates your rights, it is a crime to physically resist, even if they are in the wrong. You can be charged with a crime if you pull away from an officer who is searching or arresting you. If you believe your rights are being violated, remember everything about the interaction, and consult with a lawyer about it later.
- You have the right to an attorney if you are arrested. If you cannot afford an attorney, the government will provide one. You should consult with an immigration lawyer before you answer any questions from any law or immigration enforcement agent about your immigration status, and before you sign anything.

How does the First Amendment protect against retaliation?

As outlined earlier, schools **cannot** discipline students and teachers for their protected speech. This includes threatening arrest and criminal prosecution when students and teachers are not otherwise violating the law. In instances where criminal prosecutions are brought with the purpose of suppressing certain speech—and succeeds in that suppression—courts have ruled these prosecutions as unconstitutional.[21]

[21] *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969).