

The First Amendment's Impact on New Jersey's Anti-Bullying Bill of Rights

by Luanne Peterpaul and Michael Ansell

Are there culture wars occurring in the nation's public schools? Is positive change really being created in the educational climate? Are students learning civility and respect for the rights of others? These are questions that arise every day in schools throughout the nation. And it is no different in New Jersey.

New Jersey prohibits discrimination, including discrimination based upon sexual orientation, gender expression and gender identity.¹ As a result of the New Jersey Supreme Court's decision in the landmark case *L.W. ex rel. L.G. v. Toms River Regional Schools Board of Education*, these protections are applicable to New Jersey's public educational institutions.² The *L.W.* Court recognized that it is the responsibility of school districts to take effective steps to end harassment and bullying in schools.³ It is with this background that New Jersey enacted one of the country's strongest anti-bullying statutes—the Anti-Bullying Bill of Rights Act (ABR).⁴ The ABR, which became effective in Sept. 2011, underscores New Jersey's strong advocacy on behalf of students, including LGBT youth.

Since Sept. 2011, two cases have made their way to the New Jersey commissioner of education challenging findings by school boards that substantiated incidents of bullying. The commissioner upheld the finding of bullying in both cases.⁵ One of the cases involved a sixth-grade student in East Brunswick who bullied another student by, among other conduct, calling him “gay” and taunting that “he danced like a girl.”⁶

In March 2012, the Anti-Bullying Task Force (ABTF) was created to: 1) provide guidance to school districts on available resources to assist in the implementation of the ABR; 2) examine the implementation of the ABR; 3) draft model regulations and submit them to the commissioner of education for use in promulgating regulations to implement provisions of the ABR; 4) present any recommendations regarding the ABR

deemed to be necessary and appropriate; and 5) prepare a report within 180 days of its organizational meeting and annually for the following three years on the effectiveness of the ABR in addressing bullying in schools.⁷

On Jan. 26, 2013, the ABTF issued its interim report,⁸ which included data from the surveys it conducted⁹ and data from the electronic violence and vandalism reporting system (EVVRS).¹⁰ One of the key elements of the report involved defining conduct that constitutes “harassment, intimidation and bullying” (HIB).¹¹ This was critical because there was significant disagreement over what could and could not be said or done by students, teachers, administrators and staff in public schools. While the confusion over what constitutes HIB seems to be easing slightly in New Jersey, nationwide there is an escalation in rhetoric. This rhetoric can be emotionally and physically damaging to students.

In July 2011, CNN aired a segment called “War Over Homosexuality in the Classroom.”¹⁴ Nine children had committed suicide in the Anoka, Minnesota School District within two years. One common thread appeared to link some of the suicides—bullying of students who were gay or were perceived to be gay. Exacerbating the problem was the district's policy mandating that teachers must remain “neutral” with regard to any references to homosexuality. In essence, the policy barred teachers from referencing homosexuality in the classroom, creating a safe environment for students who were bullied, or taking any position on homosexuality. In March 2012, the district entered into a consent decree with the U.S. Department of Justice and the U.S. Department of Education, through its Office for Civil Rights, that required rescission of the ‘neutral’ policy, along with other affirmative steps to address the problem.¹⁵

In a similar vein, Tennessee is considering enactment of a law known as the “Don’t Say Gay” bill, which would ban any discussion of homosexuality by elementary and middle

school teachers and would require school officials to tell parents when students are—or might be—gay.¹⁶

Most often these earnest, but highly offensive actions and measures are rooted in religious beliefs and First Amendment expression.

The First Amendment to the United States Constitution prohibits the making of any law impeding the free exercise of religion, abridging the freedom of speech, or interfering with the right to peaceably assemble.¹⁷ The First Amendment applies to each state through the due process clause of the 14th Amendment.¹⁸

Free speech for students in public schools was recognized in *Tinker v. Des Moines Independent Community School District*.¹⁹ In *Tinker*, the U.S. Supreme Court held that schools could not restrict symbolic speech that did not cause substantial interruptions of school activities or the rights of other students.²⁰

Nonetheless, courts have recognized that there are some limitations on the protection of free speech in the school environment. In *Bethel School District No. 403 v. Fraser*,²¹ the Supreme Court held that a student could be punished for a speech before a school assembly that was laden with sexual innuendo. Following *Fraser*, the Supreme Court in *Hazelwood School District v. Kuhlmeier*²² held that school newspapers were subject to censorship. The Third Circuit has issued two important rulings that involved speech in public schools. The first case, *Saxe v. State College Area School District*,²³ struck down an anti-harassment policy because the policy failed to distinguish speech that “would substantially disrupt or interfere with the work of the school or the rights of other students.”²⁴ The court emphasized that for a school to prohibit speech or to discipline a student there must be a well-founded belief that the speech “would substantially disrupt or interfere with the work of the school or the rights of

other students.”²⁵

In the second case, *Sypniewski v. Warren Hills Regional Board of Education*,²⁶ the Third Circuit acknowledged the authority and responsibility of public school administrators to maintain order and provide a safe educational environment, “consistent with fundamental constitutional safeguards...”²⁷ *Sypniewski* noted that for purposes of the *Tinker* analysis, the disruption caused or reasonably believed will be caused must be more than “the discomfort and unpleasantness that always accompany an unpopular viewpoint.”²⁸

In *Morse v. Frederick*,²⁹ the U.S. Supreme Court found that, consistent with the First Amendment, schools could restrict student speech at school-sponsored events, even events off school grounds, where students promoted illegal activity such as drug use.

As a result of this case law, when the ABR was drafted, careful consideration was given to the proper balance between protecting free speech and protecting students from HIB. Likewise, when implementing anti-bullying policies, school officials must be mindful of that balance so as not to impinge upon constitutionally protected speech or activity, while at the same time encouraging students to voice their opinions. This can often be a delicate and difficult balancing act for school administrators.

Students who attend public schools must feel free to share their views and feel safe to engage in discussions about religious and political differences. The balance between feeling safe to express oneself and feeling safe in school is not static. There are several factors that school officials must take into account, such as the age and developmental level of the students involved. This was recognized in *Bethel v. School District No. 403 v. Fraser*³⁰ and applied in *Walker-Serrano ex rel. Walker v. Leonard*.³¹ In *Walker-Serrano*, the Third Circuit reasoned that “any analysis of the students’ rights to

expression on the one hand, and of the schools’ need to control behavior and foster an environment conducive to learning on the other, must necessarily take into account the age and maturity of the student.”³² In *L.W.*, the New Jersey Supreme Court also acknowledged pertinent factors, “[t]he factfinder, therefore, should consider all relevant circumstances, including...the students’ ages, developmental and maturity levels; school culture and atmosphere; rareness or frequency of the conduct; duration of harassment; extent and severity of the conduct; whether violence was involved; history of harassment within the school district, the school, and among individual participants.”³³

School officials must be mindful that a student may not be punished for merely expressing views, unless there is a reasonable basis to believe the speech or expression will “substantially interfere with the work of the school or impinge upon the rights of other students.”³⁴

It is important that students are taught about the value of free speech in a free society, and that on occasion speech may be offensive. Students must learn that words that express ideas are one thing; words used as a weapon are another. For example, what if one student voices support for same-sex marriage and another student feels that student’s expression of support is a challenge to deeply held religious beliefs? Or what if one student expresses a religious belief that homosexuality is sinful behavior and another considers that opinion hurtful and discriminatory? Each expression may be protected by the First Amendment, even though highly offensive and hurtful to the listener. In similar situations, where *Tinker* is not applicable (*i.e.*, there is no substantial disruption, etc.), discipline or punishment should not be imposed. Ultimately, school administrators must

distinguish between speech that expresses an idea, and speech that is intended to cause, or is reasonably believed to cause, substantial disruption or interference with the workings of the school or inflict emotional or psychological harm upon the listener.

What administrators can do is to create an environment where there is freedom to speak about the impact words and actions have on other students. Generally, offensiveness of content alone, without showing that the speech is, or is likely to be, substantially disruptive, is not a basis for silencing speech. It is appropriate to explain, on an age appropriate basis, that disagreement is not necessarily a personal attack, but that expressing a message in a manner that offends another can be hurtful and counterproductive.

Public schools should encourage all students to communicate with others in a respectful manner. This can be accomplished in a civil way without violating the First Amendment. Everyone can take a lesson from what occurred in the Anoka-Hannepin School District—neutrality is not always the best educational policy.

Prevention of HIB is key to changing the climate and culture in educational institutions, but this must be done while being mindful of the constitutional right of students to freedom of speech. There must be a balance between free speech and maintaining a safe learning environment for all students. ❧

Endnotes

1. N.J.S.A. 10:5-1 *et seq.*
2. *L.W. ex rel. L.G. v. Toms River Regional Schools Board of Education*, 189 N.J. 381 (2007).
3. *Id.* at 406-407
4. N.J.S.A. 18A:37-13.2 *et seq.* www.njleg.state.nj.us/2010/Bills/PL/10/122_.PDF, (last accessed, Feb. 27, 2013).
5. www.phillipsburgea.org/_Articles/12-13/A02/BullyingDecisions.htm, (last accessed Feb. 27, 2013).
6. *Id.*
7. N.J.S.A. 18A:37-28.
8. www.njpsa.org/documents/pdf/InterimReportoftheAntiBullying-TaskForce12013.pdf (last accessed March 10, 2013). "Collectively, focus group feedback, survey responses and EVVRS data revealed a positive response to the intent of the ABR, particularly related to promoting respectful behavior and a positive school climate." *Id.* at 10.
9. *Id.* at 9.
10. homeroom.state.nj.us/index.htm, (last accessed Feb. 27, 2013) EVVRS is the system maintained by the New Jersey Department of Education for information relative to reports of incidents of violence, vandalism, weapons and substance abuse that occur in New Jersey public schools.
11. N.J.S.A. 18A:37-14.
12. N.J.A.C. 6A:7-1, *et seq.*
13. N.J.S.A. 18A:37-15b(6).
14. www.youtube.com/watch?v=1N45LaUTA0A (last accessed Feb. 27, 2013).
15. www.splcenter.org/sites/default/files/downloads/resource/Anoka_Hennepin_ConsentDecree.pdf (last accessed Feb. 27, 2013).
16. williamsinstitute.law.ucla.edu/press/tennessee-dont-say-gay-bill-could-require-schools-to-out-their-students/ (last accessed Feb. 28, 2013).
17. U.S. Const. amend. I.
18. *Gitlow v. New York*, 268 U.S. 652 (1925).
19. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
20. *Id.*
21. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).
22. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).
23. *Saxe v. State College Area School District*, 240 F. 3d 200 (3d Cir. 2001).
24. *Id.* at 216.
25. *Id.* at 211.
26. *Sypniewski v. Warren Hills Regional Board of Education*, 307 F. 3d 243 (3d Cir. 2002).
27. *Id.* at 252-253.
28. *Id.* at 264.
29. *Morse v. Frederick*, 551 U.S. 393 (2007).
30. *Bethel v. School District No. 403 v. Fraser*, 478 U.S. at 683-684.
31. *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412 (3d Cir. 2003).
32. *Id.* at 416.
33. *L.W. ex rel. L.G. v. Toms River Regional Schools Board of Education*, 189 N.J. *supra.* at 409.
34. *Tinker v. Des Moines Independent Community School District*, 393 U.S. *supra.* at 510-511.

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