

## ***Be Cautious When Regulating Student Clothing Depicting Firearms***

BRIAN P. GOODMAN | 07.26.22

The Seventh Circuit Court of Appeals, which covers Wisconsin, issued a decision clarifying the limitations on public schools' ability to regulate student clothing depicting firearms under the First Amendment to the U.S. Constitution. The court clarified that schools cannot categorically prohibit students from wearing such clothing at school. As a general rule, student dress that expresses an idea is protected by the First Amendment. This applies to students who are wearing clothing depicting firearms that expresses an idea, such as promoting gun ownership or advocating against school gun violence. Whether a district can regulate such student expression must be decided on an individualized basis consistent with applicable law.

### **The *Tinker* Standard and Subsequent Case Law**

The United States Supreme Court has held that students do not shed their First Amendment rights when they enter the schoolyard gates. However, this right is not absolute. *Tinker v. Des Moines Independent Community School District* established the general standard governing student expression in schools. In *Tinker*, the Court held that school officials may restrict protected student expression if they can reasonably forecast that the expressive activity will materially interfere with or substantially disrupt a student activity, or if the expression intrudes on the rights of other students.

Subsequent case law provided three situations where school officials can categorically restrict student expression without having to apply *Tinker*. School officials can categorically restrict expression:

- That is indecent, vulgar, or lewd;

- That encourages illegal drug use;
- That is within the context of a school-sponsored and controlled curriculum, such as the contents of a student newspaper prepared by a journalism class.

Additionally, school officials can regulate any student expression that falls outside the protection of the First Amendment, such as speech that constitutes a specific “true threat” as that term is defined by case law. Any student expression that falls outside these specific situations cannot be categorically prohibited and must be analyzed on an individualized basis using the broader *Tinker* standard.

### ***N.J. v. Sonnabend***

This recent Seventh Circuit Court case concerned students wearing clothing depicting firearms at school. Principals in two different school districts interpreted their school’s dress code as prohibiting all clothing depicting firearms. Students that wore clothing depicting firearms in violation of the principals’ interpretation were directed to cover up the clothing, but they were not otherwise disciplined.

Nevertheless, the students sued their principals and their school districts, and the federal trial court consolidated the lawsuits into one case, which was eventually appealed.

The students argued that the categorical prohibition on clothing depicting firearms was unconstitutional because school officials could not meet the *Tinker* standard. The court agreed and held that if student expression falls outside of the specific categories stated above, then school officials must apply *Tinker* and show the court that school officials could reasonably forecast a substantial disruption or material interference of a school activity, or an intrusion on the rights of other students. The court sent the case back down to the trial court for the trial judge to apply the *Tinker* standard and determine if the facts of the case meet that standard.

### **Takeaways for Administrators**

School districts should review their dress codes to ensure they are drafted consistently with this decision. Additionally, administrators should be sure that they are applying the *Tinker* standard when deciding whether clothing depicting firearms should be prohibited. Caution is warranted in the application of the *Tinker* standard because, standing alone, a depiction of a firearm is unlikely to result in a substantial disruption or material interference with a school activity. Administrators do not need to wait for a substantial disruption or material interference to occur; they only need to reasonably forecast that such a disruption or interference will occur. That being said, it may be prudent for administrators to wait for some amount of disruption or interference to develop prior to taking action to restrict the clothing (or have evidence that similar student expressions caused substantial disruptions or material

interferences with a school activity in the past). This would provide the school district with evidence that can be used to defend against a potential First Amendment challenge.

Finally, regardless of whether administrators decide to enforce the student dress code in any specific situation, educators can use these situations as teachable moments for students. The First Amendment does not preclude an educator from talking to students about how their clothing might cause distress to other students or how the student might be perceived by others as a result of wearing the clothing. However, administrators should be cautious not to order students to change clothes or cover-up except when permitted by law, because such an order, even without additional discipline, can constitute a violation of the First Amendment. Additionally, educators can educate other students and the community about students' First Amendment rights if the community questions why a student is permitted to wear a specific article of clothing.

Given the complex and ever-evolving nature of student First Amendment rights, districts are encouraged to reach out to legal counsel in these sensitive situations. If you have any questions, please contact the author of this article or a member of the Boardman Clark School Law Practice Group.

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