

## STUDENT RIGHTS TO FREE SPEECH & EXPRESSION IN PUBLIC SCHOOLS

August 2022

The First Amendment protects the rights of students to express themselves in public schools.<sup>1</sup> Students are entitled to speak out, write articles, form groups, hand out flyers, and petition school officials. There are some important limits, however. Schools can prohibit certain forms of expression, including speech that substantially disrupts the school environment, violates the rights of others, or is lewd or vulgar.

### DO STUDENTS HAVE FIRST AMENDMENT RIGHTS IN SCHOOL?

Yes. Students have the right to share their opinions and ideas – known as “freedom of expression.” This includes all forms of “speech” and communication, like speaking aloud, writing on paper or in online chat platforms, wearing T-shirts with messages or protest armbands, expressing yourself through hair style, as well as gathering in protest and petitioning officials.<sup>2</sup>

Students also have the right to refuse to say the Pledge of Allegiance or refuse to salute the flag. If they do refuse, their school may not tell their parents.<sup>3</sup>

### ARE THERE LIMITS TO STUDENT FREE SPEECH & EXPRESSION?

Yes. Students have the right to express themselves in school, within certain limits. A school may restrict expression that:

- causes or is reasonably forecasted to cause a “substantial and material disruption;”
- threatens serious harm to the school or community;
- encourages illegal actions;
- contains lewd, vulgar, or profane language; or
- would violate someone else’s rights.<sup>4</sup>

### WHAT CONSTITUTES A “SUBSTANTIAL AND MATERIAL DISRUPTION”?

This is a high standard. Schools must show that speech was more than just uncomfortable, unpleasant, or unpopular – that it reasonably can be forecasted to interfere with the school’s work and discipline, or the rights of others.<sup>5</sup> That standard may also apply to online communications, depending on the circumstances.<sup>6</sup>

## CAN SCHOOLS PUNISH STUDENT EXPRESSION MADE OUTSIDE OF SCHOOL? WHAT ABOUT SOCIAL MEDIA AND INTERNET SPEECH?

Sometimes. Unfortunately, there is no bright line rule indicating when schools may regulate “off-campus” speech. Recently, the U.S. Supreme Court found that a student could not be punished for saying “F\* school ... F\* cheer” in her social media story because it occurred outside of school, school hours, and school-sponsored activities. The post did not identify the school directly, did not target any student or school staff with vulgar or abusive language, and was transmitted through a personal device to a limited circle of contacts.<sup>7</sup> However, the court indicated that certain types of “off-campus” speech may justify a school response. They include “serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices.”<sup>8</sup> Whether a school can punish off-campus speech will depend on the situation.

Beyond those certain types of speech, students have the right to speak outside of school or in social media content, even if their speech is vulgar, crude, or offensive. Finally, remember that the First Amendment only protects against the actions of “state actors,” like public schools. There can be non-school consequences for speech, such as harassment lawsuits, removal of social media accounts, or retaliation by employers and others.

## ARE STUDENT EXPRESSION RIGHTS DIFFERENT IN A VIRTUAL SCHOOL?

This issue is new and still evolving, but the Supreme Court has indicated that schools may regulate some student speech that takes place off-campus during virtual school activities, although precisely when this is authorized remains unclear.<sup>9</sup> A student who makes lewd comments in a chat box while attending online school is likely to be subject to discipline.

## WHAT IF THE SCHOOL PROVIDES A COMPUTER FOR A STUDENT TO USE FOR VIRTUAL SCHOOL AT HOME?

Check the school’s computer-use policy and any agreement students or parents are required to sign. If the school district provided a student’s computer for virtual instruction, not using that school computer for personal activity is safest. For more information on a student’s right to privacy in virtual learning, see federal guidance on student privacy rights.<sup>10</sup>

## IS STUDENT CLOTHING AND HAIR CONSIDERED “EXPRESSION”?

Yes. A public school may require a uniform or establish a dress code.<sup>11</sup> But the uniform or code may not conflict with a student’s constitutional rights. This applies to all public schools, including charters.<sup>12</sup> If a school does not have a uniform or dress code, students have the right to wear clothing containing controversial messages, subject to student speech limitations described on the first page of this fact sheet.<sup>13</sup>

Students have the right to wear political messages, such as Black Lives Matter shirts, armbands, or buttons, unless those items are plainly lewd or cause a substantial disruption at

school.<sup>14</sup> Finally, students have the right to wear their hair and facial hair in any style or length they want, except when a substantial government interest unrelated to length or style requires otherwise.<sup>15</sup>

### **AS A BLACK STUDENT, DO I HAVE A RIGHT TO WEAR MY HAIR IN LOCS AS AN EXPRESSION OF MY IDENTITY, CULTURE, AND HERITAGE?**

Yes. Affirming school dress codes are necessary for students to thrive. School policies that prohibit hair styles, such as natural hair, Afros, locs, braids, twists, knots, puffs, braided extensions, weaves, and wigs, have been determined racially and sexually discriminatory, and in violation of the right to expression.<sup>16</sup>

However, the law is still developing in this area, and the specific rights that students have to cultural expression through hair and dress at school are not always clear. Review school dress codes for clarification and consider advocating for more affirming policies. ELC advocates against racist school grooming policies that target dress-based forms of cultural expression beyond one's hairstyle to include wearing a bonnet or scarf.

The [CROWN Act](#) (Creating a Respectful and Open World for Natural Hair Act of 2022), federal legislation recently passed in the House of Representatives, seeks to extend statutory protections to hair styles and textures, such as locs, braids, twists, and knots, to protect against race-based discrimination in public schools and workplaces.<sup>17</sup> The law has not yet passed the Senate, but 17 states have adopted their own CROWN Act laws, and many others have legislation pending.<sup>18</sup>

### **DO STUDENTS HAVE THE RIGHT TO MEET AND TO PROTEST?**

Yes. They have the right to “assemble” (to meet) with other students about non-school issues if their school allows other groups to meet about non-school issues. If a chess club is allowed to meet, a Gay Straight Alliance or Black student organization must also be allowed to meet.<sup>19</sup>

Students can, however, be punished for meeting or attending a protest if doing so means missing class without permission.<sup>20</sup> Some schools have policies allowing students to protest. Before attending a protest, a student should check their school's policies to see if the absence would be excused and under what conditions (e.g., bring a signed permission note from a guardian explaining that the protest is educational).

### **CAN STUDENTS PUBLISH AND DISTRIBUTE WRITTEN SPEECH?**

Yes. Students have the right to publish articles in a school newspaper, even if they criticize the school or its officials, unless the material is false and hurts someone's reputation, encourages unlawful activity, interferes with another individual's rights, or materially and substantially interferes with the educational process.<sup>21</sup>

Students have the right to hand out materials at school, including on bulletin boards or posting online through a chat box or school portal, so long as the school generally allows posting of student materials in those places, unless the materials are inappropriate, are likely to cause a serious disruption, or advocate illegal drug use.<sup>22</sup> Outside of school, students have

the same free speech rights as anyone else to hand out materials to peers and others subject to the restrictions described on off-campus speech outlined above on page 2.

### I WAS SUSPENDED FOR MAKING A THREAT, BUT I WAS JUST JOKING. CAN MY SCHOOL DO THAT?

True threats are not protected by the First Amendment, and school officials take them very seriously.<sup>23</sup> Even if an alleged threat does not disrupt or infringe upon the rights of others, school officials may punish you if you intended your statement to be a serious expression of intent to harm.<sup>24</sup> But if you were clearly joking, they may not.<sup>25</sup>

If your school does try to exclude you because of something you said or posted, you do have a due process right to challenge that discipline before it is imposed. See ELC's fact sheets on [suspensions](#) and [expulsions](#).

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The Education Law Center-PA (ELC) is a nonprofit, legal advocacy organization with offices in Philadelphia and Pittsburgh, dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through legal representation, impact litigation, community engagement, and policy advocacy, ELC advances the rights of underserved children, including children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, multilingual learners, LGBTQ students, and children experiencing homelessness.

ELC's publications provide a general statement of the law. But every situation is different. For information and advice about how the law applies to a particular situation, please contact ELC's Helpline — visit [www.elc-pa.org/contact](http://www.elc-pa.org/contact) or call 215-238-6970 (Eastern and Central PA) or 412-258-2120 (Western PA) — or an attorney of your choice.

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<sup>1</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

<sup>2</sup> *Id.*; U.S. CONST. amend. I; 22 Pa. Code § 12.9(c) (“Students may use publications, handbills, announcements, assemblies, group meetings, buttons, armbands and any other means of common communication, provided that the use of public school communications facilities shall be in accordance with the regulations of the authority in charge of those facilities.”).

<sup>3</sup> 22 Pa. Code § 12.10; *Circle Sch. v. Pappert*, 381 F.3d 172, 174 (3d Cir. 2004) (holding that state law requiring school officials to notify guardians of students who declined to recite the pledge of allegiance or salute the flag violated the students’ First Amendment right to free speech).

<sup>4</sup> See 22 Pa. Code § 12.9(b) (“Students shall have the right to express themselves unless the expression materially and substantially interferes with the educational process, threatens serious harm to the school or community, encourages unlawful activity or interferes with another individual’s rights.”); *Tinker*, 393 U.S. at 514 (speech that might be reasonably be forecasted to or does substantially disrupt not protected); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 675 (1986) (use of sexual or extremely inappropriate language may be considered disruptive); *Sypniewski v. Warren Hills Reg’l Bd. Of Ed.*, 307 F.3d 243, 253 (3d Cir. 2002) (school could not ban shirt with the word “redneck” in a school with racial tensions because it had not caused a disruption).

<sup>5</sup> *Tinker*, 393 U.S. at 513-14.

<sup>6</sup> See, e.g., *J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (student created internet profile of her middle school principal; court ruled that while vulgar and offensive, this did not cause the type of “substantial disruption” that justified student’s suspension); *Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011) (district violated free-speech rights of high school senior by suspending him for 10 days for creating a parody of principal).

<sup>7</sup> *Mahanoy Area Sch. Dist. v. B.L. by & through Levy*, 141 S. Ct. 2038, 2043 (2021).

<sup>8</sup> *Id.* at 2045

<sup>9</sup> *Id.* at 2045-46.

<sup>10</sup> Student Privacy Policy Office's *FERPA and Virtual Learning Related Resources* (March 2020) available at [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/FERPA%20%20Virtual%20Learning%20032020\\_FINAL.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20%20Virtual%20Learning%20032020_FINAL.pdf). See also letter of concern from ACLU to Gov. Wolf, *Re: Ensuring Privacy Protections in Remote Learning for All Students During COVID-19 School Closures* (May 11, 2020) available at [https://www.aclupa.org/sites/default/files/wysiwyg/aclupa\\_online\\_learning\\_letter\\_5-11-2020.pdf](https://www.aclupa.org/sites/default/files/wysiwyg/aclupa_online_learning_letter_5-11-2020.pdf).

<sup>11</sup> 22 Pa. Code § 12.11(a).

<sup>12</sup> *Peltier v. Charter Day Sch., Inc.*, 37 F.4<sup>th</sup> 104, 130-31 (4th Cir. 2022) (finding that school's requirement that girls wear skirts was "based on blatant gender stereotypes" in clear violation of the Equal Protection Clause and Title IX).

<sup>13</sup> *B.H. ex rel. Hawk v. Easton Area Sch. Dist.* 725 F.3d 293 (3rd Cir. 2013).

<sup>14</sup> *Id.*; *Tinker*, 393 U.S. at 509; 22 Pa. Code § 12.9(h) ("The wearing of buttons, badges or armbands shall be permitted as another form of expression within the restrictions listed in [22 Pa. Code § 12.9(c)]").

<sup>15</sup> 22 Pa. Code § 12.11(b) ("Students have the right to govern the length or style of their hair, including facial hair. Any limitation of this right must include evidence that the style causes disruption or constitutes a health or safety hazard. If a health or safety hazard is presented, a covering shall be used."); *Arnold v. Barbers Hill Indep. Sch. Distr.*, 479 F.Supp.3d 511, 528-29 (S.D. Tx. 2020).

<sup>16</sup> See *Arnold*, 479 F.Supp.3d at 519-31 (S.D. Tex. 2020) (granting injunction to prevent enforcement of school policy requiring a Black male student to cut his locs or be prohibited from participating in regular classes and school activities). Read about the case here: <https://www.naacpldf.org/case-issue/arnold-family-v-barbers-hill-independent-school-district/>.

<sup>17</sup> For more on the CROWN Act, see <https://www.thecrownact.com/home>.

<sup>18</sup> A map of those states can be found here: <https://www.thecrownact.com/about>.

<sup>19</sup> See, e.g., *Straights & Gays for Equality v. Osseo Area Sch. Dist. No. 279*, 540 F.3d 911 (8th Cir. 2008) (finding Equal Access Act prohibited school from denying meeting of non-curricular gay equality group when other noncurricular groups were permitted to meet); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003) (school could not deny a Bible Club permission to meet during non-instructional time when other non-curricular related clubs met).

<sup>20</sup> 24 Pa. Code § 13-1327.

<sup>21</sup> 22 Pa. Code § 12.9(b) and (g); See also *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>22</sup> 22 Pa. Code § 12.9(c); 22 Pa. Code § 12.9(f) (explaining the standards to which bulletin boards in schools must conform). See *Morse v. Frederick*, 551 U.S. at 393.

<sup>23</sup> *Watts v. United States*, 394 U.S. 705, 708 (1969).

<sup>24</sup> *J.S. by M.S. v. Manheim Twp. Sch. Dist.*, 263 A.3d 295, 316 (Pa. 2021).

<sup>25</sup> *Id.* at 317.