



Students' Legal Standing for Literature Distribution

Students' First Amendment rights include the right to distribute Gospel tracts during non-instructional time, the right to wear shirts with overtly Christian messages and symbols, and the right to pray and discuss matters of religion with others. Further, schools may not prevent students from bringing their Bibles to school. In fact, school officials must allow students to read their Bibles during free time, even if that free time occurs during class. The standard that must be applied by the school is: Does the activity "materially or substantially disrupt school discipline?" Unless a student is participating in activities that are disruptive, the school must allow them to continue.

As a preliminary matter, it is a constitutional axiom that the distribution of free religious literature is a form of expression protected by the First Amendment. Religious and political speech are protected by the First Amendment. [FN16] Furthermore, "advocacy and persuasive speech are included within the First Amendment guarantee if the speech is otherwise protected.[FN17]

The United States Supreme Court's consistent jurisprudence, for over 50 years, recognizes the free distribution of literature as a form of expression protected by the United States Constitution.[FN18] In *Lovell*, the United States Supreme Court put the case for constitutional protection of leaflets and pamphlets quite clearly:

- *The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated.[FN19]*

Of course, the constitutional value of leaflets and pamphlets is not lessened by the fact that they address matters of religion. The materials at issue in *Lovell* were "a pamphlet and magazine in the nature of religious tracts. . . ."[FN20] Just five years after *Lovell*, in *Murdock v. Pennsylvania*, the United States Supreme Court said:

- *The hand distribution of religious tracts is an age old form of missionary evangelism -- as old as the history of printing presses. It has been a potent force in various religious movements down through the years. . . . It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. [FN21]*

School officials may not lump a student's right to distribute free literature together with more disruptive forms of expression, such as solicitation. In a recent decision, a plurality of the Supreme Court noted the experience of thousands of "residents of metropolitan areas [who] know from daily experience [that] confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information." [FN22] In fact, distribution of literature is, inherently, even less disruptive than spoken expression. As the Supreme Court stated, "[o]ne need not ponder the

contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide and act in order to respond to a solicitation." [FN23]

The applicable standard - material and substantial disruption - is not met by an undifferentiated fear or apprehension of disruption. In other words, it is not enough for school officials to fear that allowing religious speech will offend some members of the community. As the Supreme Court said, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." [FN24] Where a student wishes to peacefully distribute free literature on school grounds during non-instructional time, there simply is nothing which "might reasonably [lead] school authorities to forecast substantial disruption or material interference with school activities. . . ." [FN25]

In fact, several courts have held that the distribution of religious literature by high school students is protected speech under the First Amendment and Fourteenth Amendment. [FN26] Note that in *Hemry* school officials ultimately conceded that students had the right to distribute the religious material on campus both inside and outside the school building. [FN27]

As the Supreme Court clearly held in *Tinker*:

- *In our system, state-operated schools may not be enclaves for totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are persons under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state. In our system, students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expressions of those sentiments that are officially approved.* [FN28]

While school officials may seek to distinguish *Tinker* as inapplicable by arguing that a public school is not a traditional public forum, such assertions are unavailing because "[t]he holding in *Tinker* did not depend upon a finding that the school was a public forum." [FN29] As the *Tinker* Court noted, when a student "is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions. . . ." [FN30]

Further, as the *Rivera* court noted, "whether or not a school campus is available as the public forum to others, it is clear that the students, who of course are required to be in school, have the protection of the First Amendment while they are lawfully in attendance." [FN31] The *Tinker* Court also recognized that "personal intercommunication among students" in high schools is an activity to which schools are dedicated. [FN32]

Certainly, it is necessary to acknowledge that school officials have "important, delicate and highly discretionary functions" to perform. [FN33] These functions, however, must be performed "within the limits of the Bill of Rights." [FN34] "The vigilant protection of constitutional freedoms is nowhere more vital than in a community of American schools." [FN35]

School officials need not fear that distribution activities of students may be imputed to them, and that the Establishment Clause would thereby be violated. This very argument has been reviewed and rejected by the United States Supreme Court. In *Mergens*, the Supreme Court stated, as a general proposition, that the activities of student evangelists in a public school do not present any Establishment Clause problem:

- *Petitioner's principal contention is that the Act has the primary effect of advancing religion. Specifically, petitioners urge that, because the student religious meetings are held under school aegis, and because the state's compulsory attendance laws bring the students together (and thereby provide a readymade audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings. . . . We disagree.* [FN36]

Of course, *Mergens* merely reflects the Establishment Clause's intended limitation - not on the rights of individual students - but on the power of governments (including school officials). As the *Mergens* Court stated, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." [FN37]

ENDNOTES for KNOWING YOUR RIGHTS Sections



1. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969).
2. *Westside Community Schools v. Mergens*, 867 F.2d 1076 (1989),
3. *Tinker* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).
4. *Tinker*, at 506.
5. *Id.*, at 512-13.
6. *Tinker*, at 511 (quoting *Burnside*, at 749).
7. *Id.*, at 509.
8. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Niemotko v. Maryland*, 340 U.S. 268 (1951); and *Saia v. New York*, 334 U.S. 558 (1948).
9. *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (emphasis added)
10. *Widmar*, 454 U.S. 263 (1981)
11. *Garnett v. Renton School Dist. No. 403*, 987 F.2d 641 (9th Cir. 1993)
12. *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990)
13. *Id.*, at 239-40.
14. *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)).
15. *Id.*, at 247.
16. *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Widmar*, 454 U.S. 263, 269 (1981).
17. *Rivera v. East Otero School District R-1*, 721 F. Supp. 1189, 1194 (D.Colo. 1989) (citation omitted).
18. *Lovell*, 303 U.S. 444; *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).
19. *Lovell*, 303 U.S. at 452 (emphasis added) (citations omitted).
20. *Lovell*, 303 U.S. at 448.
21. *Murdock*, 319 U.S. at 108-09 (1943) (footnotes omitted).
22. *United States v. Kokinda*, 497 U.S. 720, 734 (1990) (plurality).
23. *Id.*
24. *Tinker*, 393 U.S. 508.
25. *Id.*, at 514.
26. See *Rivera v. East Otero School District R-1*, 721 F. Supp. 1189 (D. Colo. 1989); *Thompson v. Waynesboro Area School District*, 673 F. Supp. 1379 (N.D. Pa. 1987); *Nelson v. Moline School District No. 40*, 725 F. Supp. 965 (C.D. Ill. 1989); *Hemry v. School Board of Colorado Springs School District 11*, 760 F. Supp. 856 (D. Colo. 1991).
27. *Hemry v. School Board of Colorado Springs*, No.90-S-2188, Stipulation for Dismissal (D. Colo. Sept. 1991) (unpublished). *Accord Harden v. School Board of Pinellas County*, No. 901544-CIV-T-15A, Consent Decree and Order (M.D. Fla. 1991) (students permitted to distribute religious newspaper on campus).
28. *Tinker*, 393 U.S. at 511.
29. *Rivera*, 721 F. Supp. at 1193.
30. *Tinker*, 393 U.S. at 512-13.
31. *Rivera*, at 1197.
32. See *Tinker*, 393 U.S. at 512. Also, *Hemry* does not contravene this proposition. The *Hemry* court clearly stated that the facts of the case before it were distinguishable from the facts in *Rivera*. *Hemry* at 859. Because the school in *Hemry* did not ban literature, but only enforced reasonable time, place, and manner restrictions, the court did apply a forum analysis. Nonetheless, *Tinker* and *Rivera* still stand for the proposition that literature distribution cannot be banned in public schools, regardless of what type of forum they constitute. As noted above, the final disposition of *Hemry* resulted in a Stipulation for Dismissal which allowed unregulated personal distribution of literature and mass distribution subject only

to reasonable time, place, and manner restrictions. Stipulation for Dismissal (D. Colo. Nov. 12, 1991) (unpublished).

33. *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943).

34. *Id.*, at 637.

35. *Shelton v. Tucker*, 364 U.S. 479, 487 (1967).

36. *Mergens*, at 249-50 (citation omitted) (emphasis added).

37. *Mergens*, at 250 (emphasis in original).