



THE FAMILY
POLICY COUNCIL
OF WEST VIRGINIA

Legislative Testimony of

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Legislative Testimony

Delegate Poling, Senator Plymale, Delegate Craig, Senator Laird, members of the committee, thank you for your invitation to speak, once again, to the important issues of religious liberty and reducing harassment in our public schools.

By way of introduction, my name is Jeremy Dys and I serve as president and general counsel to the Family Policy Council of West Virginia. Our mission is to advocate for policies that embrace the sanctity of human life, enrich marriage, and safeguard religious freedom. Our passion is to advance, defend, and equip West Virginia's families through policy, politics, and preparation.

I am grateful that the committee has kindly extended its interest to this meeting by continuing to look at ways in which we might ensure that the rules governing harassment within our schools may apply equally and fairly to all students.

This afternoon, as several of the members of the committee have requested, I would like to continue the conversation we had in November by explaining some proposed solutions that would ensure that the West Virginia state code would apply equally and fairly to all of the students of this state and support the important first freedoms articulated in the First Amendment.

You may recall that, when last we met, we suggested that the West Virginia Department of Education has granted permission to its administrators, teachers, and staff to, "limit vulgar or offensive speech inconsistent with the school's responsibility for teaching students the boundaries of socially appropriate behavior." As we explained, that is dangerous and, in all likelihood, unconstitutional because what one person finds offensive, another does not and, therefore, good speech is caught up along with the bad – this, the Supreme Court of the United States says, the State cannot do without violating our country's commitment to both free speech, as well as religious liberty.

While my presentation in November was more general, today, I would like to be a bit more technical. In presenting to you the proposed legislation already in your hands, I hope to walk

you through some of the important judicial decisions that have informed the proposed legislation you now hold. If you would allow me to walk through it, I would be happy to answer any of your questions at the end.

If you can remember back to when you were a teenager at school, whether that is recent or ancient history, my hunch is you will remember at least two feelings. First, a rebellious streak. Whether large or small, controlled or not, with the onset of puberty each of us seem to develop a disposition that says whatever mom and dad say, do the opposite. And so, we spend most of our teen years learning just how smart our parents actually are by pushing back against their warnings, hopefully not committing to great a stir and leaving no long-term damage in the process.

But, along with that, the second feeling you are likely to remember is doing what mom and dad said you had to do because they said you had to do it. And, since I have now used the infamous, “because I said so,” phrase with my children, I agree along with Mark Twain who once observed, “My father was an amazing man. The older I got, the smarter he got.”

It may have been those two feelings that led one of the most influential supreme court cases in history.

Paul, Hope, Mary Beth, and John were siblings ranging in age from 8 to 15. They were the children of an unemployed Methodist minister. The four of them were half of the 8 students in a school district of over 18,000 who, whether to be a little rebellious or just because their father said so, showed up to the Des Moines Independent School District one morning during the Vietnam Conflict wearing an armband, a symbol of protest that the school district had previously banned.

The last name of Paul, Hope, Mary Beth, and John was, “Tinker” and they became the plaintiffs in the landmark case, *Tinker v. Des Moines Independent Community School District*. In that case, Justice Fortas writing for the majority penned these famous words:

In our system, state-operated schools may not be enclaves of 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 expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Whatever else those words have come to mean, it is inarguable that Justice Fortas appealed to the rebellious notions of every teenager, giving some sanction to their claims to the "freedom of expression" whenever a youthful exuberance exceeded the bounds of common decency. But, it was not just an appeal to rebellious teenagers. What *Tinker* established was a genuine guarantee that students – like their parents – were not wards of the state while at school. Rather, they were individuals and children of parents who entrusted the public education system with a limited role.

Within that limited role, the court went on to explain, students were to be afforded the freedom of speech balanced with the educational offerings of the schools. Said Justice Fortas:

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we

do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

And, since the court determined that the wearing of armbands to protest a war did not cause a substantial or material disruption to the school, the schools were not permitted to censor speech some might find offensive or mildly distracting. Absent that substantial and material disruption to the education opportunities of the school, the Court would not permit the State to act through its schools to restrict a student's right to the freedom of speech and expression.

Since *Tinker* was decided in 1969, it has been quoted in numerous First Amendment cases, yet its central principle remains unchanged, namely: that students reserve First Amendment rights at school, so long as the expression of the same does not cause a substantial or material disruption to the school's operation.

Nonetheless, people, and especially teenagers, tend to say and do stupid things. As a result, school boards and administrators since 1969 have attempted to limit the effects of such speech, while working to stay within the bounds of *Tinker's* "substantial or material disruption" standard.

The Supreme Court of the United States revisited *Tinker* in 1999 in the case of *Davis v. Monroe County Bd. of Educ.* There, the Court was presented with a Title IX claim related to student-on-student sexual harassment. Though the court limited its central holding related to Title IX to the specific (and heartbreaking) facts of the case at bar, it nonetheless upheld the *Tinker* standard, qualifying it to now include conduct that is, "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education" that had been guaranteed by Title IX.

Two years later, in the United States Circuit Court of Appeals for the Third Circuit, then Circuit-Judge Alito, authored the opinion in *Saxe v. State College Area School District*. In that district, the schools had crafted a policy that defined "harassment" to include:

“verbal or physical conduct based on one’s actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student’s educational performance or creating an intimidating, hostile or offensive environment.”

The policy also included examples of unwelcome conduct, including such “verbal, written or physical conduct which offends, denigrates or belittles an individuals because of any such characteristics described” in the definition of harassment as I just read a moment ago.

The *Saxe* court determined that policy to be unconstitutional, a violation of the First Amendment, and invalid under the *Tinker* standard. Justice Alito expressed the court’s concern that the policy swept up good speech along with bad in an effort to combat harassment in school. He said,

This formulation, by focusing on the speaker’s motive rather than the effect of speech on the learning environment, appears to sweep in those “simple acts of teasing and name-calling” that the *Davis* Court explicitly held were insufficient for liability.”

Justice Alito then went on to apply the *Tinker* standard to any policy that seeks to limit harassment in the public schools. He said:

Under *Tinker*, then, regulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students. As subsequent federal cases have made clear, *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance.

In other words, school policies that give the state vague, unlimited, and undefined authority to censor a student's speech or expression that has the potential to offend someone are insufficient. Instead, to avoid censoring good speech along with bad speech, the courts have consistently appealed to *Tinker* to suggest that a substantial or material disruption of the educational environment must be present before the State is permitted to act through its schools and limit speech.

Importantly, Justice Alito observed that at least two exceptions had been carved out since the *Tinker* standard was introduced in 1969. First, it is permissible for schools to regulate "vulgar or profane language," as well as school-sponsored speech that has a legitimate teaching function. "Speech falling outside of these categories," said then-Judge Alito, "is subject to *Tinker's* general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others."

Following the Court's decision in *Saxe*, the 3rd Circuit was again asked to review a claim arising from the application of a harassment policy in the *DeJohn v. Temple University* case handed down in 2008. The *DeJohn* court, once again, affirmed both *Tinker's* substantial or material disruption standard, as upheld under *Saxe*, but added that to ensure good speech is not incidentally censored along with bad speech, the offending conduct had to be "severe or pervasive" to avoid suppressing, "core protected speech." 317-18

More recently, schools have been working to limit harassing conduct brought into the school by way of technology. H.B. 3225, the bill in 2011 that eventually amended West Virginia Code § 18-2C-2 and led to the new Department of Education policy 129 C.S.R. 99 about which we are now concerned, that bill was intended to extend the state's rules on harassment to the new world of, "cyberbullying."

And yet, the Department, through the regulatory process, has done much, much more than it appears the legislature suggested by its minor change in the law.

By including in its new regulations the unbridled authority to “limit offensive speech” and then requiring its teachers and administrators to watch for a list of student characteristics that may be targeted for harassment, the new regulation permit school officials to target speech for censorship and punishment – even speech that is protected by the First Amendment.

Before I explain our proposal, let me quickly point out how the courts seem to be handling cyberbullying. It is pretty simple, actually, because the standard still has not changed. What the Federal Circuit courts are trying to balance is speech that may be inputted into the cyberworld away from campus, but that, through the technological grapevine, makes its way into the classroom. Even in this connected age, however, *Tinker’s* insistence on a “substantial or material disruption” still rules.

Even a case decided in 2011 that originated in Berkely County, West Virginia, *Kowalski v. Berkeley County Schools*, partially upheld a harassment policy only because the conduct in that case clearly demonstrated a substantial connection with, and material disruption to, the educational environment.

Courts in the Federal 2nd, 3rd, 5th, 6th, 9th, and 11th circuits asked to consider the issue of cyberbullying have continued to uphold the *Tinker* standard, along with the holdings of *Davis* and *Saxe*, to reach their narrow decisions.

In other words, the ongoing standard – whether the speech is offered in school or through the internet – is that students retain their First Amendment freedoms. When the state acts through its schools to limit speech, the state violates the First Amendment, *unless* the policy regulates only that speech causing a substantial or material disruption to the school, depriving students from the access to education.

So, what of West Virginia’s law?

Well, let's work backwards. First, at the regulatory level, 126 C.S.R. 99 permits schools to "limit vulgar or offensive speech inconsistent with the school's responsibility for teaching students the boundaries of socially appropriate behavior," including, as the policy goes on to say, "disruptive and hateful conduct."

After walking so long with me through the evolution of the *Tinker* standard, you should quickly see that the regulation on its face is constitutionally problematic. There is no requirement that the "offensive speech" be severe or pervasive. There is no indication that *only* that speech that denies students the access to an education will be limited. Vulgar speech is appropriately limited, as the court held in *Saxe*, but by failing to define "offensive speech" and just what the "boundaries of socially appropriate behavior," this policy is violating the First Amendment.

Unfortunately, this committee cannot cure this problem by altering the regulation directly. The legislature is confined to evaluating West Virginia code and insuring that the same provides the correct framework to which the regulatory process may adhere.

Currently, West Virginia Code § 18-2C-2 defines harassment much like the school did in the *Saxe* case. The law says, it includes "any intentional gesture, or any intentional electronic, written, verbal or physical act, communication, transmission or threat that" as the law goes on to say, may cause physical harm, damage property, put a student or his property in reasonable fear of harm, and is sufficiently severe and pervasive to create a hostile environment that disrupts the orderly operation of the school."

That definition is a good start and it even has *some* of the elements of *Tinker*, but on the whole, it is constitutionally suspect. To cure this problem, we have proposed the following alterations.

First, you will note on the copy distributed to you in advance, that on page 2, lines 2-4 we have added the severe, persistent, continuous, pervasive requirements of the *DeJohn* case. This makes clear that it is not just "any" intentional act, but only those acts of such severity that will deprive others from educational opportunities.

Second, we added an important conjunction at line 13. In this manner, claims for harassment must meet the *Tinker*, *Saxe*, and *DeJohn* standards, not just part of it. As it was before, either an intentional act or a sufficiently severe environment was sufficient to merit harassment and, in the process, censor good speech along with bad speech. This proposal connects the two more akin to the *Tinker* standard on which this law was originally based.

Third, in lines 16-19, we add the important qualification that the *Tinker* jurisprudence has given us, that the harassment materially and substantially interfere with a student's access to education.

Fourth, having stated it better above, we eliminate old subsection (3) in lines 20-22.

Finally, for this section, in lines 5-8 on page 3, we added a positive statement in support of the First Amendment. When laws might interfere with protected speech, it is the better course of wisdom to expressly state that the law is not intended to affect permissible speech. Not only is this good drafting, but it directs the regulatory process as well. Rather than have the mistake repeated from H.B. 3225 wherein the legislature tried to do one thing and the Department did that and a whole lot more that it had not been legislatively instructed to do, this paragraph expressly protects what the First Amendment affirms.

And, you will see that throughout the document, we have been careful to respect the local control of schools, as in line 11 on page 3 and continued to protect speech, as you can see in lines 1 and 2 on page 4.

Of course, the Department of Education handles more than student speech. To protect and respect the private speech of teachers, we include lines 15-18 on page 6 to ensure that teachers are permitted to fully express themselves even within their administrative training.

Finally, some members expressed to me their concern that when a law leaves this body, it is difficult to explain what their intentions were at the time they considered and passed the legislation. While we would have a separation of powers problem were we to give lawmakers a say in the administrative regulations that will flow from this law, we can include a section that would give a group of lawmakers the right to intervene in any lawsuit brought under this statute. In other words, once a law is passed, lawmakers – unless they are a direct party to the litigation – do not have permission to present any arguments to the court as to the purpose of the law. As a result, sometimes the legislative intentions are mangled, even though the courts appreciate knowing the legislative history of a law as they consider the arguments. The new section 7, beginning on page 6, line 20, solves that by giving a group of lawmakers the right to provide that information directly to the court by the legal concept of intervention.

In summary, then, the language presented by the West Virginia Board of Education is overbroad by *Saxe* standards, fails to support the *DeJohn* standard of severity and pervasiveness, and stops short of the *Davis* requirement that the conduct deprive students from the educational purposes of the school.

Thus, in drafting these proposed changes, we have attempted to do so in a way that would regulate the inappropriate behavior of bullying and while adequately defending student speech. We summarized, in law, the important protections that *Tinker*, and its legal descendants, articulated, namely harassment at school must be, "severe, pervasive, ongoing" and "have the effect of causing a material disruption to the work of the school."

Combined with these necessary safeguards, and the proactive protections afforded by the First Amendment also included in our proposal, work to balance the restrictions on the inappropriate behavior of bullying with the need to protect student (as well as teacher) speech.

To that end, these safeguards will serve to spare our state's school districts from lawsuits for needless constitutional violations. This proposed legislation would ensure that the West Virginia state code would apply equally and fairly to all of the students of this state and support the im-

portant first freedoms articulated in the First Amendment and interpreted by the Court since *Tinker*.

We hope that this information is helpful and will, if adopted, not only protect our first freedoms, but will also assist the schools of this state in combatting the problems of harassment.

With the time remaining, I am pleased to answer any of your questions, but am always available to you now and during the legislative session should the Family Policy Council of West Virginia prove helpful to you.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeremiah G. Dys". The signature is fluid and cursive, with a long horizontal stroke at the end.

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President and General Counsel