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Substantive Track – Session 5

Civil Liberties in School

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About the Presenter...

Claire E. Hartley is currently the Vice President of Human Resources and In-House Counsel for Divine Savior Holy Angels High School, a prominent all-girls private high school in Milwaukee, WI. She also currently is an Adjunct Professor of Law at Marquette University Law School, where she is teaching an "Education Law" course this semester. Claire has been a practicing attorney since 2009, first as a judicial clerk in Milwaukee County Courts before serving as an Assistant District Attorney in the Milwaukee County District Attorney's office handling juvenile sensitive crimes cases, domestic violence cases, and Children in Need of Protection and Services (CHIPS) cases. During her time in the District Attorney's office, she was trained in forensic interviewing techniques for young victims. After transitioning to private practice, a decade ago, Claire represented public and private schools, advising schools on matters related to many areas of the law including student rights, student discipline, human resources, labor and employment law, contract review, and regulatory compliance. In her time representing school districts, she was involved in numerous student and employee internal investigations related to allegations of civil rights violations by public entities and schools, as well as litigating civil rights-related claims before the EEOC, ERD, and state and federal courts.

CIVIL LIBERTIES IN SCHOOLS

WSSFC 2022

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I. Curriculum & Parent Rights

a. Parental Rights re: Education

i. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

1. "The power of the state to compel attendance at school and to make reasonable regulations for all schools, including the requirement that they shall give instruction in English is not questioned. Nor has challenge been made of the state's power to prescribe curriculum for institutions which it supports."

ii. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)

1. The USSC recognized that the due process clause of the Fourteenth Amendment encompasses a liberty interest in the rearing and education of one's children.

2. In *Pierce*, the USSC struck down an Oregon law that required students to attend public schools. Parents have the choice as to what type of school to send their children.

3. Though children are subject to compulsory education, courts have recognized a constitutional protection to parental decisions regarding whether to choose homeschool or send their children to private schools instead of public schools, but there are still minimum standards for education that must be met.

iii. *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

1. "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to

the religious upbringing of their children so long as they, in the words of *Pierce*, 'prepare [them] for additional obligations.'"

2. Compulsory education may conflict with parent fundamental rights protected by the Free Exercise Clause of the First Amendment with respect to religious freedom.

3. In *Yoder*, state's interest in compulsory education was outweighed by the Amish parent's fundamental religious rights in that case. The Amish Parent was not required to send their child to the public school high school to age 16.

4. Strict scrutiny standard applied to determine if the state has a compelling interest and the means used are narrowly tailored to achieve the compelling interest, given the fundamental interests of the parent to guide the religious future and education of their children.

5. The outcome that the Amish Parent was not required to send their child to a formal high school was due to the unique religious history of the Amish and specific to attendance at high school. The argument has been rejected for other religious groups and beliefs.

iv. The *Meye*r and *Pierce* cases have been used by parents to attempt to support due process claims related to their liberty interest in directing the educational upbringing of their children when parents disagree with curriculum content.

v. However, courts have often concluded that, while parents may have a fundamental right to decide whether to send their child to a public school and religious rights may trump compulsory education in very limited circumstances (i.e., the Amish with respect to high school education), parents do not have the right generally to direct how a public school teaches their child. Whether it is the curriculum, hours of the school day, school discipline, the individuals hired to teach or the extra-curriculum offerings, these issues are generally committed to the control of the state and local authorities. *See Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F. 3d 381, 395-96 (6th Cir. 2005).

vi. Essentially, parents' liberty interests in directing the education and upbringing of their children are balanced against the state's strong interest and obligation to educate children.

vii. To allow parents a level of control, school districts often allow parents to opt their student out of certain curriculum.

b. Who Sets Curriculum?

i. The primary responsibility for education rests with the state and local governments.

ii. States have constitutions, statutes and administrative codes governing the required ages for which public education must be provided, and the required content for curriculum and hours of instruction. For Wisconsin educational standards, see Wis. Stat. Chapter 118 and Wis. Admin. Code. PI 8 & 18.

iii. Local school districts then have some flexibility in the courses that are developed and offered to students, but they must meet the standards set by state statute and administrative regulations.

iv. Every Student Succeed Act (ESSA), which replaced the No Child Left Behind Act, plays a role in the curriculum decisions by conditioning federal funds on states developing content and achievement standards in areas like language arts, math and science, along with testing requirements. These requirements then influence the state standards and the local school board, to determine what is actual taught at the local school level.

v. School boards may also require, through policy, that teachers obtain approval for the types of teaching materials, or supplementary materials, used in a classroom.

vi. Often school districts provide mechanisms for individuals to object or challenge use of certain instructional materials or ways for individuals to weigh in on curriculum decisions.

c. Access/Review Of Instructional Materials

i. State statutes and school board policies generally require parent access to curriculum content.

ii. Protection of Pupil Rights Amendment, or PPRA, is a federal law that provides certain rights for parents of students regarding the inspection of instructional materials, among other things.

1. **§98.3 Access to instructional material used in a research or experimentation program.**

   (a) All instructional material—including teachers' manuals, films, tapes, or other supplementary instructional material—which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project.
   (b) For the purpose of this part research or experimentation program or project means any program or project in any program under §98.1 (a) or (b) that is designed to explore or develop new or unproven teaching methods or techniques.
   (c) For the purpose of the section children means persons not above age 21 who are enrolled in a program under §98.1 (a) or (b) not above the elementary or secondary education level, as determined under State law.
   (Authority: 20 U.S.C. 1221e-3(a)(1), 1232h(a))

2. The PPRA also provides parents' notice and access to certain survey information about their child.

iii. The Family Educational Rights and Privacy Act (FERPA) is a federal law that protects the privacy of student education records. FERPA applies to any public or private elementary, secondary, or post-secondary school. It also applies to any state or local education agency that receives funds under an applicable program of the US Department of Education. The Act serves two primary purposes:

1. It gives parents or eligible students more control over their educational records (such as the ability to correct records) and access/right to review records, and

2. It prohibits educational institutions from disclosing "personally identifiable information in education records" without the written consent of an eligible student (18 years old), or if the student is a minor, the student's parents (20 U.S.C.S. § 1232g(b)).

iv. Schools need written permission from the parent or eligible student to release any information from a student's education record. Schools that do not comply with FERPA risk losing federal funding. Because parochial and private schools at the elementary and secondary levels generally do not receive funding under any program administered by the US Department of Education, they are not subject to FERPA. Private

postsecondary schools, however, generally do receive such funding and are subject to FERPA.

d. Curriculum Is Subject To Constitutional Mandates And Civil Rights Laws.

i. Civil Rights Laws

1. Title VI of the Civil Rights Act of 1964

a. *Lau v. Nichol*s, 414 U.S. 563 (1974)

i. Non-English-speaking Chinese students alleged violation of Title VI of the Civil Rights Act of 1964, due to insufficient instruction to teach students English and provide instruction the students could understand.
ii. Title VI bans discrimination "based on the ground of race, color, or national origin," in "any program or activity receiving Federal financial assistance." A school receiving federal funding is required to ensure students are not denied opportunity to obtain equal education based on their national origin.
iii. USSC said there was no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum because students who do not understand English are effectively foreclosed from any meaningful education. Basic English skills are at the core of what is taught in school.
iv. Schools must adopt programs that will offer them "a meaningful opportunity to participate in the educational program." *Lau*, 414 U.S. at 568.

2. Equal Educational Opportunities Act of 1974 (EEOA)

a. "Title II: Unlawful Practices - States that no State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by: (1) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools; (2) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with title IV of this Act, to remove the vestiges of a dual school

system; (3) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency that would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student; (4) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (5) below; (6) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or (7) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

b. *Horne v. Flores*, 557 U.S. 433 (2009) – state had to take appropriate action (within its curriculum) to overcome language barriers that impeded equal participation by its students in its instructional programs.

3. Title IX of the Education Amendments of 1972

a. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

b. If activities are provided for students of one sex, opportunities for reasonably comparable activities must be provided for students of the other sex.

ii. Constitutional Mandates

1. Equal Protection Clause

a. The Fourteenth Amendment provides, in part, that no state can "deny to any person within its jurisdiction the equal protection of the laws."

b. Segregation based on classifications or different educational opportunities based on individual classifications could result in a denial of equal access to educational opportunities and a denial of equal protection under the law in violation of the Fourteenth Amendment.

c. *Brown v. Board of Education (Brown I)*, 347 U.S. 483 (1954) – seminal case that declared that segregation based on race in public elementary and secondary schools is unconstitutional because it denies equal educational opportunities for students and therefore deprives students of equal protection of the laws under the Fourteenth Amendment. USSC overruled *Plessy v. Ferguson's* "separate but equal" holding.

2. First Amendment Rights Related To Curriculum

a. Under the First Amendment, students have the right to receive information, in conjunction with their freedom of speech. When parents, school officials and/or school board members have concerns about curriculum content, they may ban the content from being taught at school, which can result in challenges based on the First Amendment right of students to receive information.

i. However, case law often supports a school board's and educator's discretion in matters of curriculum by relying on the school's duty to inculcate community values. *See Board of Education v. Pico*, 457 U.S. 853, 869 (school board discretion in matters of curriculum); *Pratt v. Independent School District*, 670 F.2d 771, 775 (8th Cir. 1982) (school board's have the authority to determine the curriculum most suitable for students and teaching methods/tools to be used).

ii. Generally, regulation of curriculum or materials tied to curriculum (school newspapers, plays, etc.) is permissible so long as it is "reasonably related to legitimate pedagogical concerns." *Virgil v. School Board*, 862 F.2d 1517 (11th Cir. 1989).

b. Teachers also have First Amendment rights referred to as "Academic Freedom" to teach the information or use materials.

i. Academic Freedom refers to the teacher's freedom to discuss the subject matter discipline (meaning whatever the individual is actually assigned to teach) and then to determine the most appropriate instructional methodology.

ii. Academic Freedom is not without limits. Teachers do not have the right to determine the curriculum, the course content or select textbooks. That authority belongs to the school board and may be subject to other federal and state laws that require a certain number and type of courses in order to graduate.

iii. Teachers have limited freedom in determining the content of curriculum, but have greater freedom in choosing the strategies for teaching their content areas.

iv. "Controversial Topic" policies may limit teacher Academic Freedom or set procedural requirements for teachers.

1. For example: Teacher wants to play a video about a particularly thorny or violent issue for which they generally have academic freedom, but a controversial issues board policy may require the teacher to obtain permission before the video is used in a classroom, possibly notify parents and give parents the right to opt their student out of the lesson.

II. Book Challenges

a. Books In Curriculum

i. *Virgil v. School Board*, 862 F.2d 1517 (11th Cir. 1989)

1. The court concluded that a school board may, without violating the constitution take actions to remove books (*The Miller's Tale* and *Lysistrata*) from required reading for an elective high school class when the reason for the removal was alleged vulgarity and sexual explicitness, under the guise of "pedagogical concerns".

2. The court says the school board looked at the deferential standard in the recent *Hazelwood* case and the removal decision was "reasonably related to the legitimate pedagogical concern" of denying students access to potentially sensitive topics such as sexuality.

3. What factors does the court in *Hazelwood* look at?

    a. Whether the activity could be fairly characterized as part of the curriculum and bear the imprimatur of the school? Is it a course or activity that is school sponsored?

    b. Whether the Board's removal of the readings is of a legitimate pedagogical concern? For example, the appropriateness of potentially sensitive topics such as sex and vulgarity.

4. The court ultimately states that their role is not to second guess the wisdom of the board's action, but rather that the board's action of removing books from the curriculum did not violate the Constitution. While the court did not endorse the board's decision, it notes that different communities may have different sets of community values that play out in the elected school board officials' actions with regard to the curriculum.

ii. *Monteiro v. Tempe Union High School District*, 158 F.3d 1022 (9th Cir. 1998)

1. The case involves both equal protection claims and claims of a hostile racial environment as to the assignment of text using a racially derogatory term. Book at issue was *Huckelberry Finn*. Plaintiffs only sought to have it removed as a required text, but not from a voluntary reading list. Plaintiffs claim they suffered

psychological injuries and lost education opportunities due to the require reading of the literary works. *Monteiro* involves a third party seeking to limit the educational materials the school officials may furnish to students and require them to read.

2. The Court considers whether the school board's interest in exercising its broad discretion in assigning the literary works in question and students first Amendment interest in reading those are collectively outweighed by the constitutional and statutory interest of a student who asserts that they are injured by the mandatory assignments (essentially a balancing of rights and a determination of whether a court can ban books from school curricula based on their content). The court looked at the chilling effect if lawsuits were permitted due to the content of books and courts able to remove books from curriculum. The court considered the complaint which only complains of one word, not that the books are otherwise offensive or that the curriculum is racist.

3. The court determined it cannot ban books from school curricula based on their content, even when they are accused of being racist in whole or in part. It would severely restrict a student's right to receive material (First Amendment right) that his school board or other educational authority determines to be of legitimate educational value. Student has a right to receive information their school board identifies as being a useful part of the student's education. It is a violation of a student's First Amendment rights to remove mandatory reading that the district determined to have legitimate educational value because of disagreement with content or threat of damages, lawsuits, etc.

4. The court does look at other factors in its balancing of interests, such as Academic Freedom, how old a student is, and the student's intellectual abilities.

5. The court does recognize there could be situations when implementation of a curriculum could be discriminatory conduct for the purposes of Title VI, but concludes that it does not believe the "cause and effect" of reading books creates a hostile environment as there are no facts that support the allegations.

6. The court concludes "only that allegations that a school required that a book be read, and then refused to remove it from the curriculum, fails to provide the basis for a claim of discrimination

under the Equal Protection Clause or Title VI, as it's not the role of courts to serve as literary censors or to make judgments as to whether reading particular books does students more harm than good."

7. Essentially, it's the role of the school board to determine if the book has educational value, and if it does, the court will not force a books removal. Curriculum is determined appropriate based on community values and taking into account legitimate pedagogical concerns.

b. Library Books

i. School districts may allow parents to request a regular reporting of all of the materials their child has checked out. It can be provided if the parents request it, consistent with both FERPA and state law. Such access is required for students under the age of 16 upon request.

ii. The constitutional standards for removing books from curriculum involves a lesser burden than removing books from a library. Also, the removal of books from library or curriculum raises First Amendment concerns, whereas discretion is given to school boards and educators in the selection of appropriate books.

iii. The leading Supreme Court case on the removal of library books is *Board of Education v. Pico*, where the Court discussed the discretion to remove library books from public schools and stressed the "unique role of the school library" as a place of voluntary inquiry for students. 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982).

iv. Students have a First Amendment right of access to information and discourse. The Constitution does not permit the suppression of ideas. The First Amendment concerns are related to the motivation of the removal of books (not the additional of books) and the concern was about the suppression of ideas. *Pico* does not affect a Board adding books, merely the subtraction of books.

v. The Supreme Court in *Pico* first distinguished between the high level of deference afforded to the school directors with regard to curriculum and the lower level of deference afforded to school directors in noncurricular matters. As a result, there are more limitations on school directors' discretion with regard to library books than with regard to classroom curriculum.

vi. The *Pico* plurality held that if books were removed from libraries by school officials "simply because they dislike the ideas contained in those

books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,'" with that intention being the decisive factor in removal, the officials were acting in violation of the Constitution.

vii. While the School Board has a certain amount of discretion in setting policy on book selection criteria, the Fifth Circuit has continued the theme described in *Pico* that the context of a public school library is a different context than the discretion the Board has in setting curriculum because use of the library is voluntary.

viii. A legal principle that runs through all of these cases is that "school officials' legitimate exercise of control over pedagogical matters must be balanced [] with the recognition that students do not 'shed their constitutional right to freedom of speech or expression at the schoolhouse gate.'" *Campbell v. St. Tammany Parish School Bd*, 64 F.3d 184, 188 (5th Cir. 1995). However, as discussed by the Court in *Pico*, reasons that may not violate the Constitution included a determination that the books were pervasively vulgar or not educationally suitable.

ix. The federal district court for the District of Kansas heard a similar case in 1995 surrounding a book that included a fictional romantic relationship between two teenage girls. *Case v. Unified School Dist. No. 223*, 908 F.Supp. 864 (D. Kansas 1995). In *Case*, the Court found that while the official reason provided was "educational unsuitability," the testimony of school officials revealed that it was actually rooted in individual board members' personal disapproval of the ideas in the book. Further, the Court found that the board had failed to discuss less restrictive limitations on access to the novel. The Court considered the various rash irregularities in the school's own procedure, as well as the failure to consider less restrictive alternatives as persuasive evidence of improper motivations.

x. A federal district court in Arkansas heard a case in 2003 concerning requiring parental permission to check out the *Harry Potter* books due to religious and moral objections, including but not limited to the discussion of witchcraft. *Counts v. Cedarville Sch. Dist.*, 295 F.Supp.2d 996 (W. D. Ark 2003). The student in that case argued that while she had access based on her parent signing the permission slip, this was still a burden on her right to access the books, and increasingly so because the requirement of permission imposed a stigma on the books and on the children who chose to read them. The court in that case found that though these burdens were small, they did burden the access of the student to use the books. The question became whether the restrictions were justified in that case. Again, the motivations of the board members were examined and found to be tied to a concern that the books would

promote disobedience and disrespect for authority, and the fact that the books dealt with witchcraft and the occult. The court found that a limited exception exists allowing the school district to restrict First Amendment rights where "necessary to avoid material and substantial interference with school work or discipline." *Citing Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Because the board members voting on this basis could not provide any evidence of actual disrespect or disobedience related to the books, the concerns were deemed speculative and insufficient to overcome the right to freedom of expression. The witchcraft or religious objections were also considered improper and insufficient by the court. The court, therefore, found that the student's First Amendment rights were infringed by the requirement of parent permission slips to check out books and that there was not sufficient justification for that burden.

xi. Finally, a 2009 Eleventh Circuit case from Florida specifically addressed the unique case of factual inaccuracies in a library book representing Cuba in a way that a Cuban parent identified as inaccurate. *ACLU of Florida v. Miami-Dade County School Bd.*, 557 F.3d 1177 (11th Cir. 2009). There the Court held that the First Amendment does not forbid a school board from removing a book for factual inaccuracies. There is no constitutional right to a book containing either misstatements or omissions. However, in this case, the court painstakingly analyzed whether the removal was based on simple inaccuracies or on failure to represent the political position that the Board sought to advance, but ultimately found that it was removed for the legitimate reason of its various factual inaccuracies.

xii. Removal on the basis of vulgarity and indecency of language have also been identified as acceptable reasons to remove a book under the First Amendment, so long as they are examined objectively and not on the basis of political motivation or substantive objections of the Board members otherwise. *Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438 (2nd Cir. 1980). This case cautions against the application of board members' personal tastes and values to such a decision. Another older case discusses a book removed from the shelves of a school library based on obscenities, criminal violence, "normal and perverse" sex, and episodes of drug shooting graphically described. *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2nd Cir. 1972). The court found that the school district was justified in removing the book for its moral and psychological effect on middle school students and allowing it to remain in school libraries that already acquired it, but with access restricted to parents alone.

III. Student Free Speech Under The First Amendment

a. Generally, a student's right to free speech is balanced with the right to ensure safety and undisrupted learning within the school.

b. Schools can restrict speech depending on where the speech is taking place or the "forum" involved.

   i. Open Forum: a public place traditionally used as a place for speech and public discourse. Reasonable time, place and manner restrictions on expression are allowed even in open forums. Reasonable restrictions are justified to ensure that student expression and the distribution of student publications do not hinder the learning environment. The restriction must be reasonable and the school may not treat speech differently based on viewpoint.

   ii. Limited forum: public areas that have other purposes but have been made available for speech too. Typically, a school will create a limited forum by designating a bulletin board for announcements or having a public comment period at board meetings. Student expression in limited forums are subject to the *Tinker* and *Hazelwood* standards (below) and must be viewpoint neutral time, place and manner restrictions.

   iii. Closed forum: a place not open for the exchange of ideas and the purpose of the place would be lost if a free exchange of ideas were allowed. Ex: class time or other school-sponsored activities. Schools have the greatest ability to restrict speech in a closed forum.

c. Schools must provide guidance in advance as to when and where students can express their ideas and distribute materials. Schools bear the burden of justifying policies that restrain speech.

d. *Tinker v. Des Moines*, 393 U.S. 503 (1968)

   i. Students were suspended for wearing black armbands to protest the Vietnam war, and were suspended. USSC held that the suspensions were unconstitutional, in violation of the students' First Amendment rights to freedom of speech/expression. USSC explained that students do not shed their constitutional rights at the school house gate.

   ii. Students have the right to speech but that speech could be limited if based on the facts and circumstances the school could demonstrate that the speech would substantially disrupt school activities.

iii. The standard of proof is proof of a reasonable forecast of a material and substantial disruption or invasion of the rights of others.

iv. This is known as the *Tinker* analysis. It does not apply to school-sponsored speech or speech within the curriculum.

e. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)

i. The case focused on the ability of the school to restrict what was published in a school newspaper (article about student pregnancy, birth control and the impact of divorce on students).

ii. Student expression that appears to be school-sponsored or is part of the curriculum can be more directly restricted as long as the restrictions are reasonably related to legitimate pedagogical concerns and as long as viewpoint discrimination does not occur.

f. *Bethel School District v. Fraser*, 478 U.S. 675 (1986)

i. A student provided an elaborate graphic and sexually explicit metaphor when nominating a classmate for student council.

ii. USSC held that even if student speech does not cause a disruption, it may be restricted if it is harmful to students or pervasively vulgar.

g. *N.J. v. Sonnabend*, 536 F. Supp. 3d 392 (7th Cir. 2022)

i. The Seventh Circuit held that schools must apply the test from *Tinker v. Des Moines* prior to restricting students from wearing clothing depicting firearms. Through this decision, the *Sonnabend* Court has resolved conflicting decisions within the Eastern District of Wisconsin.

ii. Overruled *Muller v. Jefferson Lighthouse School*, longstanding Seventh Circuit precedent involving a fourth-grade student who was not allowed to distribute religious fliers at school. The Court in *Sonnabend* concluded that the *Tinker* standard must be used not only when assessing gun imagery-related student speech restrictions, but also when examining limitations on students' right to express religious speech at school.

iii. Schools must satisfy the substantial disruption standard to restrict student speech that does not fall into one of the three aforementioned categories. While it is not necessary to wait for a substantial disruption to actually occur, schools must be able to articulate a reasonable basis for forecasting a substantial disruption.

h. *Mahanoy Area School District v. B.L.*, 594 U.S. ___ (2021)

i. The case involved a student who was disciplined for using profanity/vulgar language on social media when she did not make the Varsity Cheerleading team.

ii. The case limited, though did not eliminate, the ability of schools to regulate off-campus conduct, indicating that a school's regulatory interests are lessened when dealing with off-campus speech. The rationale was based on three factors:

1. Off-campus speech is typically left to the parents and schools rarely stand *in loco parentis* in such situations.
2. Courts are skeptical of requiring schools to police social media speech around the clock.
3. There is an interest in protecting even unpopular speech because "America's public schools are the nurseries of democracy."

iii. The USSC explained that schools may still have an interest in regulating social media speech that constitutes harassment, bullying, or threats.

iv. "[T]he school's interest in teaching good manners is not sufficient, in this case, to overcome B.L.'s interest in free expression." The Court also applied the *Tinker* analysis and did not find it caused a substantial disruption so regulating the speech violated the student's First Amendment rights.

IV. Face Masks In Schools

a. School Districts can enact and enforce their own mask policies. In Wisconsin, state statutes allow school boards to establish health and safety rules.

b. Districts have to consider liability concerns (negligence claims), health and safety risks, and recommendations from the CDC, DHS, or local health departments.

c. Modifications to mask policies may be appropriate for individual students who qualify for reasonable medical/disability-related accommodations, or accommodations due to sincerely-held religious beliefs, under the ADA/Section 504 and Wisconsin anti-discrimination statutes (Wis. Stat. § 118.13).

d. With regard to Title II of the ADA and the Wisconsin pupil nondiscrimination statutes, a district's mask policy that is neutrally applicable, meaning that it applies to all students, staff and visitors, without regard to religion or disability, will not be considered discriminatory.

a. Common Federal Religious-Based Challenges

i. U.S. Const. amend. I. Free Exercise Clause

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

ii. U.S. Const. amend. I. Establishment Clause

The Establishment Clause prohibits the government from making any law "respecting an establishment of religion."

iii. 42 U.S.C. § 2000bb-Religious Freedom Restoration Act of 1993

"(a)In general Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b)Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
(1)is in furtherance of a compelling governmental interest; and
(2)is the least restrictive means of furthering that compelling governmental interest."

iv. Mask policies are generally neutral, meaning that it applies to all students, staff, and visitors, regardless of religion. Pursuant to the exceptions in the Religious Freedom Restoration Act, a district may burden the students' exercise of religion if it has a compelling interest to do so and does so using the least restrictive means.

v. A public health mask mandate can be likened to a vaccination mandate. A school district's right to mandate action to safeguard students and staff is well settled law. The leading case on government mandates to protect safety, which has not been overturned, is *Jacobson v. Massachusetts*, 197 US 11, 38 (1905). The United States Supreme Court held that a community has the right to protect itself against an epidemic of disease which threatens the safety of its members, and can therefore mandate vaccines and can impose reasonable regulations to protect the public health even when such regulations interfere with individual rights. The *Jacobson* decision reminds us that individual liberties can be limited to protect public health.

vi. The United States Supreme Court has also addressed public restrictions in several cases during the COVID-19 pandemic. The court found the state's restrictions to be consistent with Free Exercise of the First Amendment in that similar restrictions apply to secular gatherings and are a public health necessity. *South Bay United Pentecostal Church v. Newsom*, United States Supreme Court, 590 US ___ (2020). Most recently, again on a case brought by South Bay United Pentecostal Church, *South Bay United Pentecostal Church v. Newsom II*, United States Supreme Court, 590 US ___ (2020), the Court overturned a California mandate that no religious service could be held indoors. However, the Court upheld reasonable restrictions based on a percentage of capacity, due to the safety interests of the public. Therefore, arguably, districts have a compelling interest in safeguarding health, welfare, and safety of students and staff during a pandemic.

vii. Additionally, in implementing a district-wide, neutral face mask policy and providing a reasonable religious accommodation when requested, a district arguably is achieving its interest in protecting the health and safety of staff and students during the period of the COVID-19 pandemic.

b. Title 18 U.S.C. § 242 Civil Rights – Color of Law

viii. This statute makes it a crime for any person acting under color of law, statute, ordinance, regulation, or custom to willfully deprive or cause to be deprived from any person those rights, privileges, or immunities secured or protected by the Constitution and laws of the U.S. Title 18, United States Code, Section 242 makes it a crime to deprive any person of his or her civil rights under color of law. To be guilty of a deprivation of rights under this Title, the government must prove each of the following beyond a reasonable doubt:

1. That the defendant deprived the victim of a right secured or protected by the Constitution or laws of the United States [the right infringed must be identified], or to different punishments, pains, or penalties on account of such person being an alien, or by reason of his color or race;
2. That the defendant acted under color of law; and
3. "Under color of law" means the real or purported use of authority provided by law. A person acts "under color of law" when that person acts in his or her official capacity or claims to act in his or her official capacity. Acts committed "under color of law" include not only the actions of officials within the limits of their lawful authority, but also the actions of officials who exceed the limits of

their lawful authority while purporting or claiming to act in performance of their official duties.

ix. A district may burden or impede the free exercise of religion if it has a compelling interest in doing so by way of the least restrictive means and is applying a neutral policy (a policy not targeting or treating those with a certain religious differently). Generally, it's argued that a district has a compelling interest in protecting the health and safety of its staff and students by enacting and enforcing its own mask policy during the COVID-19 pandemic.

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