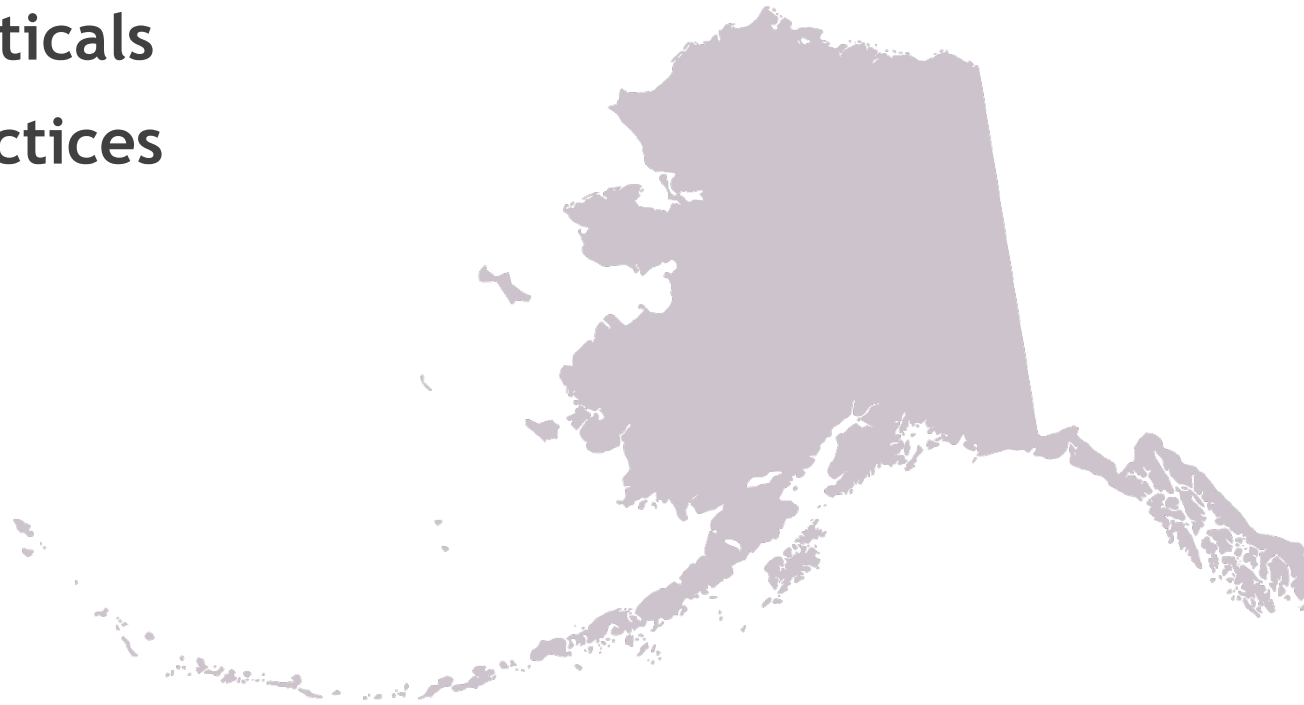


Navigating Student Free Speech

Michael Caulfield
Jermain, Dunnagan & Owens, PC

AGENDA

- ▶ **Legal Overview**
- ▶ **Hypotheticals**
- ▶ **Best Practices**



BEDROCK LEGAL CONCEPT

▶ Tinker v. Des Moines

- ▶ Students wore black armbands to protest the Vietnam War.
- ▶ Holding: Students do not shed their constitutional rights at the schoolhouse gate.
- ▶ A public school generally may not punish a student for speech, absent any evidence that the rule was necessary to avoid substantial interference with school discipline or the rights of others.

ANALYSIS

- ▶ Is speech protected under the First Amendment?
 - ▶ Intended to convey a message?
 - ▶ Under the circumstances, is the likelihood great that the message would be understood by those who view it?
 - ▶ If not intended to convey a message, the speech may not be protected under the First Amendment.
 - ▶ However, beware of other due process and equal discrimination rights.

ANALYSIS

- ▶ A school district can prohibit protected speech that **materially disrupts** classwork or involves **substantial disorder** (or is reasonable likely to).
- ▶ Factors to consider:
 - ▶ Content of the speech
 - ▶ Time, place, and manner of the speech
 - ▶ Student's intent in making the speech
 - ▶ The current environment of or in the community
 - ▶ What is acceptable in one place may not be acceptable in another
- ▶ Also, consider - does the speech infringe on the rights of others?

ANALYSIS

- ▶ Even if speech is protected and does not cause substantial disruption...
 - ▶ Is it lewd, vulgar, or profane?
 - ▶ Does it promote illegal conduct?
 - ▶ Is the speech school sponsored?

BEDROCK LEGAL CONCEPT

- ▶ **Bethel School District v. Fraser**
 - ▶ Student gave speech at assembly filled with sexual double entendres.
 - ▶ **Holding:** The constitutional rights of students in public school are not automatically coextensive with that of adults in other settings.
 - ▶ Schools may restrict protected speech that is lewd, vulgar, or profane.

BEDROCK LEGAL CONCEPT

▶ Morse v. Fredrick

- ▶ Student unfurled poster that said, “Bong Hits of Jesus” at school sponsored appearance at parade.
- ▶ Holding: The First Amendment does not require schools to tolerate at school events student expression that encourages participation in illegal conduct (specifically, drug use).
- ▶ Was this even intended to convey a message? Did it cause substantial disruption?

ANALYSIS

- ▶ A note on **school-sponsored speech**:
 - ▶ Be wary of viewpoint discrimination.
 - ▶ Some states have passed student journalism laws that return editorial control of school publications to students.
 - ▶ Consider:
 - ▶ The amount of control exercised over the publication or activity by the district.
 - ▶ Any relevant school district policies.
 - ▶ Past practice related to publication/activity at issue.
 - ▶ State law.

HYPOTHETICALS

- ▶ Kneeling?
- ▶ Use of religious clothing?



PRACTICAL CONSIDERATIONS

- ▶ Do not make assumptions about a student's intent.
 - ▶ Ask the student what he or she meant by the conduct in question.
 - ▶ Ask other students what they understood by the conduct in question.
- ▶ An actual disruption does not need to occur!
- ▶ When school officials reasonably foresee that speech will cause substantial disruption or materially interfere with learning environment, the school can prohibit the speech.

BEST PRACTICES

- ▶ Focus on the facts.
- ▶ Document current environment to justify determination that substantial disruption is reasonable likelihood.
- ▶ Consider whether to address the behavior through disciplinary consequences, or an alternative approach.
- ▶ Consider whether it is better to prevent or facilitate a protest.

BEST PRACTICES

- ▶ Provide proactive training.
- ▶ Use community resources.
- ▶ Be prepared for media.
- ▶ Be reasonable.
- ▶ School officials must remember:
 - ▶ Approach conduct in a viewpoint neutral manner, and
 - ▶ Treat similar conduct in a similar manner.
- ▶ If in doubt, consult your attorney.

QUESTIONS?