

ADOLESCENT SEXUAL EXPRESSION AND THE LAW

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**CHILD, ADOLESCENT, AND ELDER SEXUAL EXPRESSION
Countering Myth with Scientific Fact**

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I. Introduction

The past five years of my life have been significant. Little did I imagine in my youth that I would some day be the father of two infant children, nor did I imagine that I would actually be associated with a landmark civil rights case decided by the United States Supreme Court. However, both of these facts are true. On December 22, 2002, I brought home our infant children, Sebrina and Sebastian, from Guatemala. From that moment on, my life has primarily been focused on their well-being and development. About that same time, I was in the middle of representing John Lawrence and Tyrone Garner against the State of Texas in what came to be known as *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003), the landmark Supreme Court decision that overturned *Bowers v. Hardwick*. Although these two life changing events might at first seem unrelated, they are actually very much connected.

The *Lawrence v. Texas* decision is based upon years of prior Supreme Court decisions involving the right to privacy, freedom of expression, and the liberties embodied in the United States Constitution. As a new parent, I find importance in the constitutional principals as they relate to the freedoms that my children can enjoy and experience as they age and develop. Understandably, as children of a family with no mother and two fathers, my children will need the protections of the United States Constitution in order to be free to express their views and feelings (as well as love for whomever they choose to love) and for the protections that the law provides from anticipated harassment and difficulties which they are sure to experience in school and the world.

This paper and presentation will examine adolescent sexuality and the legal principals which have been established by the United States Supreme Court and interpreted by lower court decisions. We will discuss laws that protect adolescent behavior, the rights of adolescents (i.e., minors) to enjoy the constitutional protections of free speech and freedom of expression of views, moral and religious matters, issues dealing with sexual freedom, and a forecast on what the future holds for both my children and the children of others in our country.

It is important to note at the onset that freedom of speech, expression and association must be appreciated and tolerated regardless of what views are being expressed. I have long argued in favor of the rights of persons who oppose same-sex relationships, and people who oppose the rights of gay and lesbian people to adopt children, to be allowed to express their views because it is only by permitting them the freedom to express their views that I am given the similar right to express my views. Accordingly, as you will see in the cases that follow, when the United States Supreme Court interprets the Constitution to permit either a typically conservative view or typically liberal view, the principals upon which those decisions are based are often used by the “other side.” It is often ironic that such decisions are used by the “opposing side” subsequent to the original case.

In examining adolescent sexuality and the law, it is important to try to understand why adults make laws to try to regulate the conduct of adolescents. For example, in the early 1900s, there was an African-American boxer named Joe Jackson who reportedly had affection for Anglo women. In that regard, it is reported that he would marry white women and have affairs with white women.

Because of his high profile position as a prize winning boxer, certain members of the United States Congress were concerned that his high profile and public affection for white women would send a message to the youth of that day that interracial marriage was acceptable. Accordingly, in 1911, there was a proposed constitutional amendment to abolish racial intermarriage. The proposed constitutional amendment did not get the required vote in the United States Congress, but as a result of the political concern, numerous states enacted laws making interracial marriage a crime. Eventually, such laws were struck down by the United States Supreme Court on June 12, 1967 in a unanimous United States Supreme Court decision in the case of *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967).

History appears to be repeating itself. The constitutional issue of our day is same-sex marriage. In examining the concerns over same-sex marriage, I rarely find a married heterosexual couple who is concerned for their own marriage. So what is the concern? If our society were to permit same-sex couples to marry, it would send an approving message to the youth of our country that same-sex relationships and same-sex sexual behavior is acceptable. Politicians and adults who find same-sex behavior objectionable (for whatever reason) are attempting to control the conduct and feelings of today's youth, and in that regard, they believe that by opposing same-sex marriage, they will prevent the youth of our country, and especially their children, from engaging in behavior that they find objectionable.

Nevertheless, most adults in control of our political and legal system realize that sexual freedom is continuing to grow in the youth of our country, and in particular, gay, lesbian, bi-sexual, and transgendered youth are coming "out" at record numbers and are doing so with the protection of the Constitution. According to the Gay, Lesbian, Straight Network which surveys national school climate regarding the nation's lesbian, gay, bi-sexual and transgendered youth, and assists GLBT school organizations in forming and operating, nearly 3,000 schools have gay straight alliances, or other student clubs that deal with GLBT issues. It has also been reported that during the 2004-05 academic year, gay straight associations were formed at a rate of three a day.

The gay, lesbian, straight education network mission statement reads as follows: the Gay, Lesbian, Straight Education Network strives to assure that each member of every school community is valued and respected regardless of sexual orientation or gender identities-expression. According to information provided by GLSEN, 75% of American students still do not have legal protections in place, more than 80% of high school still lack gay straight associations or similar student clubs, and nearly 70% of high school students admit that they personally use homophobic or derogatory statements frequently or often. Obviously, although many advances have been made, there is still a great deal of work that needs to be done.

According to Lambda Legal Defense and Education Fund, 5% to 6% of American students are lesbian, gay, bi-sexual, or transgendered, a conservative estimate means that there are 2.25 to 2.7 million school age GLBT youth. Additionally, recent studies show that more youth become sexually active and sexually aware at younger ages.

As a parent of two 3-year olds who are currently enrolled in a public school pre-kindergarten class, I am for the first time experiencing dealing with public school teachers and public school administration. Upon registering Sebrina and Sebastian at Wilson Elementary School, I had a private conversation with the school principal explaining that we have a “unique family” and hope that there would not be any problems. The principal quickly understood what I was referring to and explained that our family was not “unique” in that they had had many same-sex parental families in the past and that they are not treated any differently than heterosexual families. Accordingly, as more and more gay and lesbian parents have children, the expectation that same-sex parents are unique will fade away. Based upon a recent study, it has been determined that there are between 1 million and 6 million children in the United States which are being reared by committed lesbian or gay couples. According to Ellen C. Perrin, M.D., Professor of Pediatrics at Tufts University School of Medicine in Boston, she told WEB, M.D. that “the vast consensus of all of the studies shows that children of same-sex parents do as well as children whose parents are heterosexual in every way.” She further said that “in some ways children of same-sex parents actually may have advantages over other family structures.” Nevertheless, as more and more same-sex parents raise children, more and more public and private schools will need to adjust to these one time “unique” families. Fortunately, the United States Supreme Court and the public school system have already dealt with the expression of controversial views by students and there is a well developed body of case law to receive students from same-sex families.

The First Amendment to the United States Constitution is one of the most powerful and enduring rights we enjoy as a free people. However, as with any statute or constitutional provision, the interpretation of such provision by the courts (especially the Supreme Court) is vital to its meaning.

Amendment I. (1791)

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.

Amendment XIV. (1868)

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. Free Speech and Expression

1. *Terminiello v. City of Chicago*, 337 U.S. 1, 69 S.Ct. 894 (1949) (Chicago “breach of peace” ordinance held unconstitutional under First Amendment).

Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire*, *supra*, 315 U.S. at pages 571-572, 62 S.Ct. At page 769, 86 L.Ed. 1031, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See *Bridges v. California*, 314 U.S. 252, 262, 62 S.Ct. 190, 193.

2. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733 (1969) (School regulation prohibiting wearing armbands to school and providing suspension of any student refusing to remove such was an unconstitutional denial of student’s right to expression of opinion).

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without ‘materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others. *Burnside v. Byars*, *supra*, 363 F.2d at 739. But conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (C.A. 5th Cir. 1966).

3. *Bethel School District No. 403 v. N. Fraser*, 478 U.S. 675, 106 S.Ct. 3159 (1986) (School district decision upheld in imposing sanctions upon student in response to his offensively lewd indecent speech, which had no claim to First Amendment protection).

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from

determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education. Justice Black, dissenting in *Tinker*, made a point that is especially relevant in this case:

"I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." 393 U.S., at 526, 89 S.Ct., at 746.

4. ***Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573 (1987)** (Louisiana statute requiring balanced treatment for creation-science and evolution-science in public school instruction held unconstitutional under the Establishment Clause).

The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose.

5. ***Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562 (1988)** (School authorities reasonable restrictions to exclude two pages from student newspaper dealing with pregnant students and divorce was upheld because newspaper was not a "public forum").

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

Accordingly, we conclude that the standard articulated in *Tinkler* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

6. ***Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533 (1989)** (Conviction under Texas statute prohibiting desecration of national flag violated defendant's rights of expression under First Amendment).

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten

to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression.

7. **Board of Education of the Westside Community Schools v. C. Mergens, 496 U.S. 226, 110 S.Ct. 2356 (1990)** (The Equal Access Act requires school district to give equal access to student Christian club due to limited open forum given to other clubs).

In 1984, Congress extended the reasoning of *Widmar* to public secondary schools. Under the Equal Access Act, a public secondary school with a "limited open forum" is prohibited from discriminating against students who wish to conduct a meeting within that forum on the basis of the "religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. §§ 4071(a) and (b). Specifically, the Act provides:

"It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." § 4071(a).

Accordingly, we hold that the Equal Access Act does not on its face contravene the Establishment clause.

8. **Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510 (1995)** (University's denial of funding for publishing student newspaper with Christian editorial viewpoint held unconstitutional as "viewpoint discrimination" in violation of First Amendment).

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972). Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984). Discrimination against speech because of its message is presumed to be unconstitutional. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643, 114 S.Ct. 2445, 2458-2460, 129 L.Ed.2d 497 (1994). These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 112 S.Ct. 501, 507-508, 116 L.Ed.2d 476 (1991). When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. See *R.A.V. v. St. Paul*, 505 U.S. 377, 391, 112 S.Ct. 2538, 2547, 120 L.Ed.2d 305 (1992). Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the

opinion or perspective of the speaker is the rationale for the restriction. See *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983).

9. ***Boy Scouts of American v. Dale*, 530 U.S. 640, 120 S.Ct. 2446 (2000)** (New Jersey's public accommodations law requiring Boy Scouts to admit gay scoutmaster violated Boy Scout's First Amendment right of expressive association under the Constitution).

We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S., at 579, 115 S.Ct. 2338.

10. ***Good News Club v. Milford Central School*, 533 U.S. 98, 121 S.Ct. 2093 (2001)** (School's exclusion of Christian children's club from meeting after hours at school based on its religious nature was unconstitutional viewpoint discrimination because the school had established a "limited public forum" under the First Amendment.

When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); see also *Lamb's Chapel, supra*, at 392-393, 113 S.Ct. 2141. The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, *Rosenberger, supra*, at 829, 115 S.Ct. 2510, and the restriction must be "reasonable in light of the purpose served by the forum," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

11. ***J. Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (2000)** ("Marilyn Manson" T-shirt case. Held student not permitted to wear T-shirt because it was determined by school officials to be vulgar, offensive and contrary to the educational mission of the school).

The record establishes that all of the T-shirts were banned in the same manner for the same reasons – they were determined to be vulgar, offensive, and contrary to the educational mission of the school . . . In sum, we are of the view that the School has the authority to prohibit Marilyn Manson T-shirts under these circumstances.

12. ***Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 258 F.Supp.2d 667 (2003)** (Rights of gay-straight student group were upheld to allow it to

meet at school under Equal Access Act. Heckler's veto not sufficient disruption to warrant restriction on group).

Under the EAA, if a public school which receives federal financial assistance has created a limited open forum, it is unlawful for that school to deny equal access to, or a fair opportunity to, or to discriminate against, any students who wish to conduct a meeting within such limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings. 20 U.S.C. § 4071(a). A public secondary school has a "limited open forum" whenever it grants an offering to, or opportunity for, one or more noncurriculum-related student groups to meet on school premises during noninstructional time. 20 U.S.C. § 4071(b).

Refusing to allow a "heckler's veto" to justify suppression of student speech, the Court in *Tinkler* was careful to focus on whether "*engaging in the forbidden conduct* would materially and substantially interfere with the requirements of appropriate discipline," *id.* at 538, 89 S.Ct. 733 (emphasis added), and concluded that the protesting students' speech was protected because it was "entirely divorced from actually or potentially disruptive conduct *by those participating in it.*" *Id.* at 505-06, 89 S.Ct. 733 (emphasis added). *Tinker* expressly relied on the leading heckler's veto case, *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).

13. ***Newsom v. Albemarle County School Board*, 354 F.3d 249 (2003)** ("NRA" T-shirt case. Held viewpoint discrimination and as such, violated First Amendment right of student).

The First Amendment bars the government from "abridging the freedom of speech" – that is, generally, "from dictating what we see or read or speak or hear." U.S. CONST.amend. I; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Notwithstanding this edict, courts have long recognized that a public school student's First Amendment rights are not coextensive to those held by others in other contexts. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). Because most public school students are minors and school administrators have the duty to provide and facilitate education and to maintain order and discipline, the Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Consequently, while a public school student does not "shed [his] constitutional rights to freedom of speech or expression at the school-house gate," *id.* at 506, those rights may be limited as long as the limitation is consistent with constitutional safeguards.

14. ***Hansen v. Ann Arbor Public Schools, et al.*, 293 F.Supp.2d 780 (2003)** (One-way diversity program prohibited by "school-sponsored" speech in violation of First Amendment; additionally, religious panel also violated Establishment Clause of Constitution).

This case presents the ironic, and unfortunate, paradox of a public high school celebrating "diversity" by refusing to permit the presentation to students of an "unwelcomed" viewpoint on the topic of

homosexuality and religion, while actively promoting the competing view. This practice of “one-way diversity,” unsettling in itself, was rendered still more troubling – both constitutionally and ethically – by the fact that the approved viewpoint was, in one manifestation, presented to students as religious doctrine by six clerics (some in full garb) quoting from religious scripture. In its other manifestation, it resulted in the censorship by school administrators of a student’s speech about “what diversity means to me,” removing that portion of the speech in which the student described the unapproved viewpoint.

All of this, of course, raises the question, among others presented here, of what “diversity” means and whether a school may promote one view of “diversity” over another.

CATEGORIES OF SPEECH WITHIN THE SCHOOL SETTING

There are three primary categories of speech that occur within the school setting. **Student speech** that “happens to occur on the school premises,” is governed by *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). Pure student speech, such as the black armbands worn by the students protecting the Vietnam War in *Tinker* or the tee-shirts worn by the students in *Castorina v. Madison County School Bd.*, 246 F.2d 536 (6th Cir. 2001), and *Barber v. Dearborn Public Schools*, 286 F.Supp.2d 847 (E.D. Mich. 2003), must be tolerated by the school “unless school authorities have reason to believe that such expression will ‘substantially interfere with the work of the school or impinge upon the rights of other students.’” *Hazelwood*, 484 U.S. at 266, 108 S.Ct. At 566 (quoting *Tinker*, 393 U.S. at 509, 89 S.Ct. at 738).

At the other end of the spectrum is “**government speech**,” such as the principal speaking at a school assembly. When the government itself is the speaker, it may make viewpoint-based choices and choose what to say and what not to say. See *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000) (“[W]hen a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical considerations applicable to any individual’s choice of how to convey oneself: among other things, content, timing, and purpose.”)

Between pure student speech and government speech is “**school-sponsored**” speech, which is governed by *Hazelwood Sch. Dist. v. Kuhlmeier, supra*. School-sponsored speech is student speech that a school “affirmatively . . . promote[s],” as opposed to speech that it “tolerat[e]s.” *Hazelwood*, 484 U.S. at 270-71, 108 S.Ct. 562. “Expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school” constitute “school-sponsored” speech over which the school may exercise editorial control so long as its actions in doing so “are reasonably related to legitimate pedagogical concerns.” *Id.* at 271, 273, 108 S.Ct. 562.

15. **Caudillo v. Lubbock Independent School District, 311 F.Supp.2d 550 (2004)** (School's abstinence only policy prohibited sexually explicit gay-straight student group from forming and participating in school activities).

Under First Amendment analysis, schools that open their doors for groups to meet have created "limited public forums" (not to be confused with "limited open forums" under the EAA).

Limited public forums allow a school to limit the subject-matter topics that will be discussed, but not the individual viewpoints on the allowed subject matter.

Here, the entire subject matter of sexual activity was banned. Restrictions to the subject matter are allowed if reasonable in light of the purpose served by the forum and as long as the restrictions are "not an effort to suppress expression merely because officials oppose the speaker's view."

16. **Nixon v. Northern Local School District Board of Education, 383 F.Supp.2d 965 (2005)** ("Homosexuality is a sin" T-shirt case. No disruption shown to exist and therefore, viewpoint discrimination held unconstitutional).

The three categories can be summarized as follows: (1) school-sponsored speech under *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988); (2) vulgar, lewd, obscene and plainly offensive speech under *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986); and (3) speech that falls into neither category, but causes a material disruption, is reasonably likely to do so, or interferes with other students' rights as provided in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). These three categories are essentially a balance between a student's right to free expression and the ability of schools to carry out their educational mission.

The Supreme Court has pronounced that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508, 89 S.Ct. 733.

17. **Doe v. Yunits, 2000 WL 33162199 (Mass.Super.) (2000)** (15 year old transgendered student permitted to wear any clothing or accessories that any other male or female student could wear without being disciplined).

Plaintiff in this case is likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being, as attested to by her treating therapist. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity.

III. Physical and Mental Harassment

18. **Davis v. Monroe County Board of Education, 526 U.S. 629, 119 S.Ct. 1661 (1997)** (Student against student harassment may give rise to a cause of action against a school board/district when the school acts with “deliberate indifference” and the harassment is severe).

Title IX provides, with certain exceptions not at issue here, that

“[n]o 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.” 20 U.S. § 1681(a).

We stress that our conclusion here – that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment – does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action. We thus disagree with respondents’ contention that, if Title IX provides a cause of action for student-on-student harassment, “nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages.”

19. **S. Nabozny v. Podlesny, 92 F.3d 446 (1996)** (Gay student harassed by other students in 7th, 8th, 9th, 10, and 11th grades; two suicide attempts. Upheld student’s right to pursue school on violation of equal protection claim on both gender and sexual orientation discrimination).

Nabozny was treated differently. What is more, Nabozny introduced sufficient evidence to show that the discriminatory treatment was motivated by the defendants’ disapproval of Nabozny’s sexual orientation, including statements by the defendants that Nabozny should expect to be harassed because he is gay.

Our discussion of equal protection analysis thus far has revealed a well established principle: the Constitution prohibits intentional invidious discrimination between otherwise similarly situated persons based on one’s membership in a definable minority, absent at least a rational basis for the discrimination. There can be little doubt that homosexuals are an identifiable minority.

We are unable to garner any rational basis for permitting one student to assault another based on the victim’s sexual orientation, and the defendants do not offer us one.

20. **Saxe v. State College Area School District, 240 F.3d 200 (2001)** (Schools anti-harassment policy held too broad and therefore unconstitutional violation of First Amendment).

We disagree with the District Court’s reasoning. There is no categorical “harassment exception” to the First Amendment’s free speech clause. Moreover, the SCASD Policy prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law.

To summarize: Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories 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. *See Chandler*, 978 F.2d at 529; *Pyle v. South Hadley Sch. Comm.*, 861 F.Supp. 157, 166 (D. Mass. 1994).

A regulation is unconstitutional on its face on overbreadth grounds where there is a "a likelihood that the statute's very existence will inhibit free expression" by "inhibiting the speech of third parties who are not before the Court." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). To render a law unconstitutional, the overbreadth must be "not only real but substantial in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

21. ***Doe v. Perry Community School District*, 316 F.Supp.2d 809 (2004)** (Student harassed by other students for three years based on perceived sexual orientation. Student failed to introduce sufficient evidence to support case).

The majority of the alleged instances of harassment involving other students consist primarily of the use of anti-gay epithets or homophobic comments aimed at Plaintiff. The epithets used include, but are not limited to, "gay," "queer," "homo," "pussy," "fag," and "faggot." On one specific occasion, a fellow student and team mate on the wrestling team removed Doe's cell phone from his bag at a wrestling match and typed the phrase "Huge Homo" on the greeting screen.

In other words, a school district "may be liable for subjecting [its] students to discrimination where the recipient [of federal funds] is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority." *Davis I*, 526 U.S. at 647, 119 S.Ct. 1661. Where misconduct occurs during school hours and on school grounds, it is indeed taking place under the operation of the funding recipient.

IV. Sexual Freedom

22. ***Ginsberg v. State of New York*, 390 U.S. 629, 88 S.Ct. 1274 (1968)** (New York statute prohibiting sale of obscene material to minors upheld as constitutional based on a rational relation to the objective of safeguarding such minors).

We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State, cf. *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527. It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York, insofar as s 484-h does so, to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.

23. **Griswold v. State of Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965)** (Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy).

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum restrictive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' *NAACP v. Alabama*, 377 U.S. 288, 307, 84 S.Ct. 1302, 13143, 12 L.Ed.2d 325. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

24. **Eisenstadt v. William R. Baird, 405 U.S. 438, 92 S.Ct. 1029 (1972)** (Massachusetts statute permitting married persons to obtain contraceptives to prevent pregnancy but prohibiting distribution of contraceptives to single persons for that purpose violates equal protection clause).

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

25. **Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973)** (Texas criminal abortion statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother are unconstitutional).

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved.

26. **Planned Parenthood of Central Missouri v. Danforth v. Planned Parenthood of Central Missouri, 428 U.S. 52, 96 S.Ct. 2831 (1976)** (Missouri abortion statute requiring spousal consent and a blanket parental consent requirement for minors to obtain an abortion were unconstitutional).

. . . the State may not impose a blanket provision, such as § 3(4), requiring the consent of a parent or person In loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy.

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

27. **Carey v. Population Services International, 431 U.S. 679, 97 S.Ct. 2010 (1977)** (New York statute prohibiting distribution of contraceptives to anyone under age 16 was unconstitutional).

“Minors, as well as adults, are protected by the Constitution and possess constitutional rights.” *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S., at 74, 96 S.Ct., at 2843. “(W)hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.” *In re Gault, supra*, 387 U.S., at 13, 87 S.Ct., at 1436. On the other hand, we have held in a variety of contexts that “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.” *Prince v. Massachusetts*, 321 U.S. 158, 170, 64 S.Ct. 438, 444, 88 L.Ed. 645 (1944).

Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed. The State’s interests in protection of the mental and physical health of the pregnant minor, and in protection of potential life are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive.

28. **G. Curtis v. School Committee of Falmouth, 420 Mass. 749, 652 N.E.2d 580 (1995)** (Program to make condoms available to junior and senior high students upheld. Program does not violate either liberty interest of parents or the free exercise of religion).

We discern no coercive burden on the plaintiffs’ parental liberties in this case. No classroom participation is required of students. Condoms are available to students who request them and, in the high school, may be obtained from vending machines. The students are not required to seek out and accept the condoms, read the literature accompanying them, or participate in counseling regarding their use. In other words, the students are free to decline to participate in the program. No penalty or disciplinary action ensues if a student does not participate in the program. For their part, the plaintiff parents are free to instruct their children not to participate. The program does not supplant

the parents' role as advisor in the moral and religious development of their children. See *Doe v. Irwin, supra* at 1168. Although exposure to condom vending machines and to the program itself may offend the moral and religious sensibilities of the plaintiffs, mere exposure to programs offered at school does not amount to unconstitutional interference with parental liberties without the existence of some compulsory aspect to the program.

29. ***Decker v. Carroll Academy, 1999 WL 332705 (Tenn.Ct.App.) (1999)*** (Health department's conduct in providing pap smear and birth control pills to 14 year old female did not violate the parent's constitutional right to determine the care, custody and nurture of her child).

Juxtaposed against the minor's right to privacy, including the right to obtain contraceptives, is the fundamental liberty interest of parents to rear their children as they see fit, also protected under the Fourteenth Amendment of the U.S. Constitution. See *Meyer, 262 U.S. at 399, 43 S.Ct. At 626*; see also *Hawk v. Hawk, 855 S.W.2d 573, 578 (Tenn. 1993)*. The right of parents to be protected from unwarranted government intrusion in the rearing of their children is supported by federal case law.

Based on *Doe v. Irwin* and other analogous case law, considering the noncompulsory nature of the statute, we conclude that the absence of a parental notification requirement in the statute at issue, and the Health Department policy implementing it, do not rise to the level of an unconstitutional interference with the parent's right "to the care, custody and nurture of their children as a liberty interest" under the Fourteenth Amendment of the U.S. Constitution. *Irwin, 615 F.2d at 1167*.

30. ***State v. Limon, 2005 WL 2675039 (Kan.)*** (Supreme Court of Kansas relied on *Lawrence v. Texas* in holding a Kansas statute unconstitutional under the equal protection provisions of the U.S. Constitution because the statute's penalty was more severe when sexual conduct was performed by persons of the same sex vs. a similar statute with a lesser penalty for the same conduct, but performed by persons of the opposite sex).

We agree that the United States Supreme Court's decision in *Lawrence* controls our analysis and, when considered in conjunction with several equal protection decisions of the United States Supreme Court, requires us to hold that the State does not have a rational basis for the statutory classification created in the Romeo and Juliet statute.