



Delaware

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Dear Delaware Superintendents:

In recent weeks, multiple groups of students have organized protests at their local school over events involving Immigration and Customs Enforcement (ICE). These protests have raised some questions among parents, students, educators, and community members about the First Amendment rights of students while at school and off campus. This letter is intended to serve as a proactive reminder for school districts to ensure that students' First Amendment rights are protected, while also ensuring the learning environment and school safety are maintained. We encourage you to consult with your own counsel should you have specific questions about a situation in your school district.

Students' First Amendment Rights at School

Federal courts have long held that students maintain their First Amendment rights at school. This may include the right to wear expressive clothing, circulate petitions, hand out literature, or speak out while on campus. Limits to these First Amendment protected activities would include if a student were disrupting the functioning of the school or if they violate the school's content neutral policies.

What may constitute disruptive behavior is highly dependent on the context, but courts have routinely held that school officials disagreeing with the student's position or finding their speech "in bad taste" is not enough to qualify. Courts have upheld students' right to speak on potentially controversial issues such as wearing clothing with pro-LGBTQ+ messages, wearing an arm band opposing the right to obtain an abortion, or wearing anti-war messages such as a black arm band. Schools may apply content neutral policies, such as dress codes that forbid students from wearing any hat while in class, but they may not only target hats with certain messages such as a red Make America Great Again hat or a pink protest hat while permitting other hats.

Walkouts or Other Protests at School

Schools may discipline students for participating in walkouts at school, since attendance is legally required and missing class may violate the school's policies. However, schools may not punish students more harshly for participating in a political protest than they would for students who miss class for other reasons, as that would be unconstitutional viewpoint discrimination. In addition, if the school has had students participate in past walkouts without disciplining

students and then decide to punish another group of students, it may also be a violation of students' First Amendment rights.

While school officials may punish students for walking out of class, they are not required to do so. In fact, many schools have a long history of supporting student walk outs for a variety of important reasons. As institutions of higher learning, it is important to foster an environment where students can express themselves and engage with current events. Many schools use these opportunities to take current day events and have spirited discussions in the classroom, and spur students to better understand civic engagement. In addition, school officials who support walk outs have the opportunity to work with student organizers to ensure the protest is orderly and safe for all members of the campus. The Delaware General Assembly has clearly contemplated that it is important for students to have the opportunity to participate in events like these. See 14 Del. C. § 2702(h).

Students' Rights Off Campus

Schools do not have the right to punish students for their First Amendment activity while off campus and outside of normal school hours. This includes both in person speech and online speech. If students make political or religious posts on social media, schools would have an extremely high legal bar to justify any possible punishment for that speech. Some schools have attempted to extend their power to punish student speech beyond the school walls, but the ACLU has regularly challenged those actions where the speech may be deemed merely disruptive, rather than rising to the level of bullying, harassment, or threats.

Again, we appreciate your attention to these important topics. Our schools should be citadels of free speech where students can feel free to express themselves, while also maintaining safety and the learning environment. We hope these reminders will help you as you navigate these issues in your school district.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike B.", with a horizontal line extending to the right.

Mike Brickner
Executive Director
ACLU of Delaware