



# Unit 5

## Free Speech Rights in Schools

**Unit 5**  
**Free Speech Rights in Schools**

**Unit Questions**

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How are students' free speech rights protected in a public school environment? To what extent can public school officials exercise discipline and control over a student's speech without infringing on the First Amendment? What role do negotiations play in the legal process and how can parties use a negotiation to resolve conflict without trial? How do court arguments work in the legal process?

**Length of Unit**

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This unit consists of six one-hour class sessions.

Lessons 1-3 develop the factual background of a fictional case involving a First Amendment controversy in the public school context. These lessons introduce Supreme Court decisions about students' First Amendment rights, as well as a complaint and three depositions from the fictional case. Depositions are interviews with witnesses conducted under oath. After completing these first three lessons, teachers have two options:

- Proceed to lessons 4-6, which allow students to conduct a mock negotiation, OR
- Proceed to lessons 7-8, which allow students to conduct a mock oral argument.

**Overview**

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This unit asks students to consider the permissible restrictions schools can place on students' freedom of speech, as they learn about the (fictional, but realistic) case of *Davis v. Ann Arbor School Board*. Students will either conduct a mock negotiation in which they will try to resolve a First Amendment related conflict between a student and his public high school, or a mock argument in which they will argue for one side in front of a panel of student judges.

**Unit Objectives and Standards**

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By the end of this unit, students will be able to:

- Summarize the facts and identify the First Amendment issues and holdings in opinions from the United States Supreme Court.
  - [CCSS.ELA-LITERACY.RI.11-12.1](#); [CCSS.ELA-LITERACY.RI.11-12.8](#);  
[CCSS.ELA-LITERACY.RH.11-12.2](#);
  - [C3 D4.2.9-12](#);
  - [MI-HSCE P2.3](#);
- Explain the importance and scope of First Amendment rights and the reasons for limitations on those rights in the public school context.
  - [NSCG I.LD.3](#); [NSCG I.LD.4](#); [NSCG V.B.2](#); [NSCG V.B.5](#)
  - [CCSS.ELA-LITERACY.RI.11-12.8](#);
  - [C3 D2.Civ.4.9-12](#);

## Unit 5: Overview

### First Amendment Rights in Schools

- [MI-HSCE 5.3.2](#); [MI-HSCE 5.3.4](#); [MI-HSCE 5.3.6](#);
- Assess whether a (fictional) student's First Amendment rights were violated; support arguments with specific facts from the case materials and authority from United States Supreme Court opinions.
  - [CCSS.ELA-LITERACY.SL.11-12.4](#); [CCSS.ELA-LITERACY.RI.11-12.7](#);
  - [C3 D3.3.9-12](#); [C3 D3.4.9-12](#); [C3 D4.1.9-12](#); [C3 D4.2.9-12](#);
  - [MI-HSCE P2.3](#); [MI-HSCE P2.4](#);
- Evaluate the advantages, disadvantages, and overall effectiveness of negotiations and oral arguments as a means of conflict resolution.
  - [NSCG III.D.1](#); [NSCG III.D.2](#); [NSCG V.D.4](#)
  - [C3 D2.Civ.14.9-12](#); [C3 D2.Civ.11.9-12](#);
- Collaborate with other students to resolve multiple pieces of a conflict through a mock negotiation or mock argument.
  - [CCSS.ELA-LITERACY.SL.11-12.1](#)
  - [C3 D2.Civ.7.9-12](#); [C3 D2.Civ.10.8-12](#);
  - [MI-HSCE P4.1](#);

### **Anticipated Student Understanding/Challenges to Understanding**

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This unit assumes that students have *not* been introduced to the litigation process and court procedures which are addressed more fully in Unit 1 on this website. Unit 1 provides useful background information but is not a prerequisite for this unit, as basic explanations and resources are included throughout the lessons as needed.

### **Materials Needed**

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*What we provide:*

- Unit readings and handouts
- Teacher answer keys
- Sample court documents including a complaint and depositions

*What you provide:*

- Hard copies of handouts
- A stopwatch for the mock argument

### **Unit Assessment**

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Students will either:

- conduct a mock negotiation and develop a settlement agreement that addresses the interests and goals of each party in the case *Davis v. Ann Arbor School Board*; or
- prepare and deliver a mock oral argument advocating for one of the parties, while supporting the arguments with holdings and reasoning from the U.S. Supreme Court.

### **References**

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## Unit 5: Overview

### First Amendment Rights in Schools

- Dorn, Jonathan, *For Argument's Sake: Playing "Devil's Advocate" With Nonfiction Texts* (last visited January 1, 2017), [http://www.readwritethink.org/files/resources/lesson-docs/HowtoPlay\\_Devils\\_Advocate.pdf](http://www.readwritethink.org/files/resources/lesson-docs/HowtoPlay_Devils_Advocate.pdf)
- *Teaching Materials & Publications*, Program on Negotiation at Harvard Law School (last visited December 25, 2016), <http://www.pon.harvard.edu/store>

## Lessons

### Lessons 1-3: Factual and Legal Background

#### **Lesson 1: Are schools permitted to limit students' First Amendment freedom of speech?**

Students will formulate hypotheses about the scope of a student's freedom of speech; read the fictional complaint; and read a seminal opinion from the U.S. Supreme Court on First Amendment rights in the public school context.

Students will be able to:

- Hypothesize scenarios where a student's freedom of speech might be limited in the school context, drawing on their own experiences and intuitions.
- Describe the factual background of *Davis v. Ann Arbor School Board*, the (fictional) case around which this unit is structured.
- Identify the rule of *Tinker v. Des Moines Independent Community Sch. Dist.* and explain the Court's rationale.

#### **Lesson 2: Under what circumstances may a school punish student speech?**

Students will continue reading and synthesizing opinions of the U.S. Supreme Court which describe situations in which a school may punish or otherwise censor student speech.

Students will be able to:

- Summarize and explain the rules from three Supreme Court opinions.
- Identify textual clues about how the Supreme Court rules might apply in the case at hand.

#### **Lesson 3: How does the law apply to our case?**

Students will read the depositions of three key players in the fictional case, and apply the Supreme Court opinions to the facts collected from the depositions.

Students will be able to:

- Contrast the facts of the complaint with the deposition testimony.
- Analyze how the law would apply to the facts of the case.

### Lessons 4-6: Negotiation

#### **Lesson 4: What are the key elements of a negotiation?**

Students will learn about the principles of a negotiation, identify the desires and demands of their clients, and begin planning and strategizing for a mock negotiation.

Students will be able to:

- Examine the key principles relating to negotiations.
- Formulate a negotiation plan for their side.

#### **Lesson 5: How can parties use negotiation to achieve the best solution?**

Students will engage in a mock negotiation with other students who are representing the opposite side.

Students will be able to:

- Practice their negotiation skills using the facts from *Davis v. Ann Arbor School Board*.
- Evaluate the outcomes of the negotiation.

**Lesson 6: Is negotiation an effective tool in the legal process?**

Students will evaluate and critique their negotiations and compare outcomes and strategies with other groups.

Students will be able to:

- Compare the results of their negotiations with their peers and evaluate their own negotiation strategies.
- Identify the advantages and disadvantages of engaging in negotiations.

Lessons 7-9: Mock argument

**Lesson 7: What is an oral argument?**

Students will learn about the role of summary judgment in the litigation process and practice using Supreme Court opinions to support their arguments.

Students will be able to:

- Identify some of the steps of the litigation process before trial
- Explain where an oral argument can take place in the litigation process
- Explain the key elements and roles of an oral argument

**Lesson 8: How do I prepare for a mock argument?**

Students will outline and strategize to prepare for their roles in the mock oral argument.

Students will be able to:

- Identify the strengths and weaknesses in their party's main arguments.
- Prepare arguments with textual support from the fictional depositions and the supporting Supreme Court opinions.
- Anticipate and respond to questions addressing weaknesses in each party's arguments.

**Lesson 9: How do attorneys conduct oral arguments to advocate for their clients?**

Students will conduct a mock oral argument and evaluate their performances.

Students will be able to:

- Organize and deliver oral arguments to a panel of judges during a mock argument exercise.
- Defend a position by referring to facts from fictional depositions and reasoning from Supreme Court opinions.
- Respond to questions from judges and rebut arguments from opponents.

**Lesson 1**  
**Are schools permitted to limit students' First Amendment freedom of speech?**

**Lesson Objectives**

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Students will be able to:

- Hypothesize scenarios where a student's freedom of speech might be limited in the school context, drawing on their own experiences and intuitions.
- Describe the factual background of *Davis v. Ann Arbor School Board*, the (fictional) case around which this unit is structured.
- Identify the rule of *Tinker v. Des Moines Independent Community Sch. Dist.* and explain the Court's rationale.

**Materials**

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- Handout 1: Journal prompt
- Handout 2: Plaintiff Kenji Davis's complaint
- Handout 3: *Tinker v. Des Moines Independent Community Sch. Dist.*
- Handout 4: Case organizer and accompanying answer key

**Lesson Assessments**

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- Journal prompt: When should a school be permitted to censor student speech?
- Think-pair-share: Applying class-created rules to the complaint
- Case organizer: Check for understanding of *Tinker* excerpt

**Instructional Activities**

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*Anticipatory Set*

- Distribute **Handout 1: Journal prompt**. Instruct students to independently journal responses to the questions for 10 minutes. Ask for volunteers to share some of the situations they came up with.
- Ask a few more volunteers to articulate their rules. List them on the board as students share. Discuss whether there might be any exceptions to the rules listed.
- Explain that in this unit, students will learn about how the Supreme Court of the United States has dealt with the issue of student speech in schools.

*Guided Practice*

- Explain to students that a plaintiff is someone who files a lawsuit. If a student believes his or her freedom of speech has been violated, the student might file a lawsuit against

Unit 5: Lesson 1  
First Amendment Rights in Schools

the school officials (such as the principal, vice principal, or school board). That would make the student the plaintiff. The school officials would be the defendants, since they must defend their decision to punish the student.

- Explain that plaintiffs’ lawyers’ first step in bringing a case is writing and filing a complaint, in court. The complaint is the plaintiff’s first chance to tell the court his or her side of the story.
- Pass out **Handout 2: Plaintiff Kenji Davis’s complaint**. Instruct students to read the complaint independently.
- Think-pair-share: After students have read the complaint, instruct them to choose a partner and discuss the following questions about what they read. After they have had a chance to discuss with a partner, share with the class:
  - Do you think Kenji Davis should have been punished for his speech? Why or why not?
  - Consider the rules we brainstormed on the board at the beginning of class. Do any of those rules apply to this situation?
- Pass out **Handout 3: Tinker v. Des Moines Independent Community Sch. Dist.** Read the “factual overview” and “the dispute” sections out loud, or ask for volunteers to read.
- Conduct an informal class poll, asking students to predict the result: Do you think the Supreme Court sided with the student, or the school? Ask a couple of students to explain their intuitions.
- Instruct students to read the excerpts from the case. As they read, they should fill in the *Tinker* column on **Handout 4: Case organizer**.

*Independent Practice*

- Students should complete the *Tinker* column on **Handout 4: Case organizer** for homework if they do not finish in class.

*Closure*

- Alert students that in the next class, they will examine two additional Supreme Court opinions to learn about other situations where a student’s speech may or may not be restricted by the school. Then they will figure out how a court might apply those rules to Kenji Davis’s case.



**Handout 4: Answer Key**  
*Case organizer*

	<i>Tinker v. Des Moines Indep. Cmty. Sch. Dist.</i>	<i>Hazelwood Sch. Dist. v. Kuhlmeier</i>	<i>Bethel Sch. Dist. No. 403 v. Fraser</i>
What was the student speech at issue?	Students wore black armbands to school to express their objection to the Vietnam War.	Students wrote articles about teen pregnancy and divorce in a school newspaper.	A student gave a speech at a school assembly with lots of sexual innuendo.
Who won in the Supreme Court – the school or the student?	The students	The school	The school
List at least 3 factors that influenced the Court’s decision.	<ol style="list-style-type: none"> <li>1. There was no reasonable basis to believe that the speech would cause substantial disruption.</li> <li>2. No substantial disruption in fact occurred.</li> <li>2. The school engaged in viewpoint discrimination by only targeting one political opinion.</li> <li>3. Openness and a variety of political opinions is important to our society.</li> </ol>	<ol style="list-style-type: none"> <li>1. School-sponsored activities are part of the curriculum; school may ensure that the lesson teaches what it was meant to teach.</li> <li>2. The school may prevent the speaker's views from being wrongly attributed to the school.</li> <li>3. The school may not be required to affirmatively promote a student's speech.</li> <li>4. The school may refuse to sponsor speech that associates the school with any position other than neutrality on a matter of political controversy.</li> </ol>	<ol style="list-style-type: none"> <li>1. Teaching students socially appropriate behavior is part of a school's educational mission.</li> <li>2. Speech was not related to any political viewpoint.</li> <li>3. The school may disassociate itself from vulgar speech.</li> <li>4. Even legislators must follow rules of appropriate speech.</li> <li>5. The school is acting <i>in loco parentis</i>.</li> </ol>
Choose one quote that best captures the Court’s rule.	"Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained."	"[E]ducators 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."	"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."

**Lesson 2**  
**Under what circumstances may a school punish student speech?**

**Lesson Objectives**

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Students will be able to:

- Summarize and explain the rules from three Supreme Court opinions
- Identify textual clues about how the Supreme Court rules might apply in the case at hand

**Materials**

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- Handout 2: Plaintiff Kenji Davis’s Complaint (from Lesson 1)
- Handout 4: Case organizer (from Lesson 1) with accompanying answer key
- Handout 5: Hazelwood Sch. Dist. v. Kuhlmeier
- Handout 6: Bethel Sch. Dist. No. 403 v. Fraser

**Lesson Assessments**

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- Group share: check on understanding of Tinker excerpt
- Case organizer: identify important points in each reading

**Instructional Activities**

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*Anticipatory Set*

- Instruct students to take out **Handout 4: Case organizer** from Lesson 1. By now, they should already have completed the first column.
- Divide students into groups of three. Each group should discuss their answers to the questions in the *Tinker* column of the case organizer.
  - Instruct students to share with their group their answer to the final question on the handout: which quote did they select from the *Tinker* excerpt to best capture the Court’s rule?
  - Once everyone has had a chance to share with their group, each group must decide whose quote is most representative of the Court’s rule. Each group must then select one person to go up to the board to write down the chosen quote.

*Guided practice*

- As a class, read through the chosen quotes. Note which ones were chosen more than once. Decide which quote most clearly states a rule that other students and principals can look to for guidance if a free speech issue arises in their school.

## Unit 5: Lesson 2

### First Amendment Rights in Schools

- Ask students to share other factors that also seemed important to the Court when it made its decision. (This is the third question on the case organizer.)
- Pass out **Handout 5: Hazelwood Sch. Dist. v. Kuhlmeier** and **Handout 6: Bethel Sch. Dist. No. 403 v. Fraser**. Students will individually read these two case summaries and excerpts, and fill in the corresponding columns on the case organizer, just as they did with the *Tinker* reading.
- As students are reading, write on the board: A school may punish student speech if...
  - *Tinker* -
  - *Hazelwood* -
  - *Fraser* -
- After students have finished, ask some to share which quote they thought best articulated the rule for *Hazelwood* and *Fraser*. Ask students to summarize in their own words what each case tells us about when a school is allowed to punish student speech. Write on the board as students articulate their summaries. It might look something like this:

A school may punish student speech if ...

  - *Tinker* - ...the speech is substantially disruptive to school work or discipline
  - *Hazelwood* - ...the speech is school sponsored, and there is a legitimate educational concern about it
  - *Fraser* - ...the speech is lewd, indecent, or offensive

#### *Independent Practice / Homework*

- Direct students back to **Handout 2: Plaintiff Kenji Davis's Complaint**. Students will skim through the complaint again and look for any clues about how Kenji Davis's case would turn out under the Supreme Court's rules. They should highlight any clues they find.

#### *Closure*

- Remind students that the complaint is only the student's side of the story, and tomorrow they will see what the assistant principal and the assembly speaker have to say about the incident. Then they will be able to more clearly apply the Supreme Court cases' rules to Kenji Davis's case.

**Lesson 3**  
**How does the law apply to our case?**

**Lesson Objectives**

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Students will be able to:

- Contrast the facts of the complaint with the deposition testimony
- Analyze how the law would apply to the facts of the case

**Materials**

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- Handout 7: Fact and argument organizer, with accompanying answer key
- Handout 8: Deposition of Olivia Marquez
- Handout 9: Deposition of George Carpenter
- Handout 10: Deposition of Kenji Davis

**Lesson Assessments**

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- Fact and argument organizer

**Instructional Activities**

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*Anticipatory Set*

- Remind students that so far, they have only heard Kenji Davis’s side of the story through the complaint. Next, they will learn more about the incident by reading depositions of the Vice Principal, the computer science coach, and Kenji himself.
- Explain that after a plaintiff files a complaint and a lawsuit begins, the parties need to collect information about what happened. One of the ways they do this is by taking depositions. Depositions are formal interviews where a lawyer sits down with a witness and asks him or her lots of specific questions. All of the answers are recorded, and the witness is under oath, which means he or she must tell the truth.
- Distribute **Handout 7: Fact and argument organizer**. Explain that the headings in each box represent the arguments that each side would want to make, to persuade the court that the precedent is on their side. Read through the headings. As you read them, ask students to recall which case found those arguments to be relevant. Students may refer to **Handout 4: Case organizer** to aid their memory. Also ask students what they already know about each argument, based on the facts they read in the complaint.
- Number students off 1 to 3. Students in group 1 should brainstorm three questions they would want to ask Olivia Marquez (the computer science coach) if they wanted to learn more about which side has the stronger arguments. Group 2 should do the same for

Unit 5: Lesson 3  
First Amendment Rights in Schools

George Carpenter (the Vice Principal), and group 3 for Kenji Davis (the student). Then call on students to share some of the questions they would want to ask.

*Guided Practice*

- Pass out **Handout 8: Deposition of Olivia Marquez**. Ask for two students to volunteer to read aloud and role play. One student will be the lawyer asking questions, and the other student will be Olivia Marquez, who answers the questions.
- Before reading begins, instruct students that the purpose of reading these depositions is to get more information about the situation so that we can figure out who has the stronger argument. Point out that some arguments might be stronger for the plaintiff, while other arguments might be stronger for the defendant. As they read, students should look out for relevant clues on either side.
- As the volunteers read aloud, other students should say "pause" when they hear a clue. Then they should explain to the class what they heard and which argument it supports, and the class will make a note in the appropriate box on **Handout 7: Fact and argument organizer**. They should also note which deposition they got the clue from. (See the accompanying answer key.)

*Independent Practice / Homework*

- Pass out the remaining 2 depositions - **Handout 9: Deposition of George Carpenter**, and **Handout 10: Deposition of Kenji Davis**. Students will read through these depositions and highlight important facts or “clues” according to their color code system, just as they did together with the class. As they find clues, they should add them to their fact and argument organizer.
- If students do not finish the depositions in class, they are to finish for homework.

*Closure*

- Alert students that soon, they will be assigned to a partner and they will find out whether they are going to be on the school’s side or on the student’s side. Because they don’t know yet, it’s important that they look for clues on both sides as they read through the remaining depositions.

**Handout 7: Answer Key**  
*Fact and argument organizer*

<b>Plaintiff - The Student</b>	<b>Defendant - The School</b>
<p>The speech was <u>not</u> disruptive (<i>Tinker</i>)</p> <ul style="list-style-type: none"> <li>• The assembly went on as planned (Marquez, Carpenter, Davis)</li> <li>• No one mentioned confronting Davis, or getting revenge or anything (Marquez)</li> <li>• Since the incident, students have just given Davis the cold shoulder. (Marquez)</li> <li>• Everyone quieted down at the assembly once the principal took the podium (Carpenter)</li> <li>• No lesson plans affected (Carpenter)</li> <li>• No specific threats or arguments (Carpenter)</li> <li>• Vice Principal was not afraid of violence (Carpenter)</li> <li>• Davis took off the patch as soon as the assembly was over (Davis)</li> <li>• Even when students were expressing disagreement, they were "pretty calm about it" (Davis)</li> <li>• Kids chatted before and after class, but "once the teachers started, it was normal" (Davis)</li> </ul>	<p>The speech <u>was</u> disruptive (<i>Tinker</i>)</p> <ul style="list-style-type: none"> <li>• Some students were murmuring before the assembly (Marquez)</li> <li>• Some students laughed or booed (Davis)</li> <li>• Students in the club were noticeably upset; some were calling Davis a traitor (Marquez)</li> <li>• There was an "unusual buzz" and "rowdiness" in the auditorium (Carpenter)</li> <li>• Faculty lounge had an unusual buzz of conversation (Carpenter)</li> <li>• Students discussed their opinions; one was uncomfortable, one embarrassed (Carpenter)</li> <li>• Students talked in the hallways and in between class; they seemed upset with each other (Carpenter)</li> <li>• Afraid for Kenji's safety when off-campus; prior incident of harassment (Carpenter)</li> <li>• Some students expressed disagreement with Davis (Davis)</li> </ul>
<p>The speech <u>was</u> political (<i>Tinker</i>)</p> <ul style="list-style-type: none"> <li>• Davis was concerned about government spying (Marquez)</li> <li>• Davis' patch was intended to express disagreement with the NSA (Davis)</li> </ul>	<p>The speech was <u>not</u> political (<i>Tinker</i>)</p> <ul style="list-style-type: none"> <li>• The message was more personal, directed at the coach, than political (Carpenter)</li> </ul>
<p>The school selectively enforced the rule in a way that discriminated against one viewpoint. (<i>Tinker</i>)</p> <ul style="list-style-type: none"> <li>• The rule against political T shirts, buttons, etc. had not been enforced since 2000 (Carpenter)</li> <li>• Other students wore shirts with different</li> </ul>	<p>The school did <u>not</u> selectively enforce the rule in a way that discriminated against one viewpoint. (<i>Tinker</i>)</p> <ul style="list-style-type: none"> <li>• Vice Principal never noticed other shirts (Carpenter)</li> </ul>

Unit 5: Lesson 3  
 First Amendment Rights in Schools

<p>pro-government messages but Vice Principal said he would not punish those because they are not the same (Carpenter)</p> <ul style="list-style-type: none"> <li>• Davis has seen other students wear T-shirts, patches, buttons with political messages without punishment (Davis)</li> </ul>	
<p>The speech was <u>not</u> school sponsored (<i>Hazelwood</i>)</p> <ul style="list-style-type: none"> <li>• The administration didn't know Davis was going to wear the patch, so they couldn't have endorsed it (Davis)</li> </ul>	<p>The speech <u>was</u> school sponsored (<i>Hazelwood</i>)</p> <ul style="list-style-type: none"> <li>• Davis sat on stage at the assembly (Marquez)</li> <li>• Sitting on the stage meant Davis was acting as a representative of his class (Carpenter)</li> <li>• The assembly was mandatory (Carpenter)</li> </ul>
<p>The speech does <u>not</u> raise legitimate educational concerns (<i>Hazelwood</i>)</p> <ul style="list-style-type: none"> <li>• The assembly went on as planned. (Marquez, Carpenter, Davis)</li> </ul>	<p>The speech <u>does</u> raise legitimate educational concerns (<i>Hazelwood</i>)</p> <ul style="list-style-type: none"> <li>• The assembly was meant to expose students to different career opportunities, including work with the NSA, which Davis's speech undermined (Marquez, Carpenter)</li> </ul>
<p>The speech is <u>not</u> lewd, vulgar, or socially inappropriate (<i>Fraser</i>)</p> <ul style="list-style-type: none"> <li>• Davis didn't think the speech was lewd and didn't intend it to be so (Davis)</li> <li>• "Sucks" can mean "stinks" or "is lame" (Davis)</li> </ul>	<p>The speech <u>is</u> lewd, vulgar, or socially inappropriate (<i>Fraser</i>)</p> <ul style="list-style-type: none"> <li>• The patch said "The NSA Sucks" in big bold letters. (Marquez)</li> <li>• "Sucks" can refer to a sexual act, and is therefore crude and offensive language (Carpenter)</li> </ul>

**Lesson 4**  
**What are the key elements of a negotiation?**

**Lesson Objectives**

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Students will be able to:

- Examine the key principles relating to negotiations
- Formulate a negotiation plan for their side.

**Materials**

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- Handout 11: Principles of negotiation
- Handout 12A: Confidential Information for Plaintiff’s Counsel
- Handout 12B: Confidential Information for Defendant’s Counsel
- Handout 13: Negotiation Planning and accompanying answer key

**Lesson Assessments**

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- Negotiation planning sheet for mock negotiation

**Instructional Activities**

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*Anticipatory Set*

- What do you think about when you hear the term negotiation? What is a negotiation? What are things we negotiate over? What is the goal of a negotiation? Ask students to journal for five minutes and share out their responses.

*Direct Instruction*

- Although movies and television typically focus on the trial part of the litigation process, in real life, most cases never go to trial. Judges and lawyers try to settle disputes out of court through negotiation, which provides the opposing parties with an opportunity to reach an agreement that is acceptable to all. This week we have read about the development of the fictional case *Davis v. Ann Arbor School Board*. We have learned about the law and tried to predict what might happen if the case went to a court. But in this case – as in nearly all cases – the judge has ordered the parties to engage in negotiations before scheduling a trial. That means Kenji Davis and his lawyers must sit down with the Ann Arbor School Board and their lawyers, to try to work out an agreement. Before we begin to prepare for this negotiation, we are going to think about negotiations more broadly.
- At the heart of every negotiation is a conflict between two parties. This conflict, however, does not mean that the parties are completely opposed to each other on every point.
  - Consider a scenario where there are two people are fighting over one orange. Adam needs the orange peel to make an orange pound cake. Beth needs the flesh



Unit 5: Lesson 4  
First Amendment Rights in Schools

- of the orange, but not the peel, to make juice. Because there is only one orange, the parties might try to negotiate to decide who gets it.
- If the parties approach the negotiation in an adversarial mindset, thinking they need 100% of the orange, only one party will leave the negotiation satisfied -- Adam or Beth could get the whole orange while the other party gets nothing.
  - Alternatively, Adam or Beth could split the orange in half, leaving both parties only partially satisfied, because Adam could only make half as much cake and Beth could only make half a cup of juice.
  - These outcomes approach the negotiation as a "zero sum game" -- a situation where Adam's gain equals Beth's loss, and Beth's gain equals Adam's loss. In a zero sum game, when one party gains something, the other must necessarily lose something.
  - However, negotiations do not have to be that way. Negotiations can be "value adding," which means that the parties identify their respective interests and cooperate to come up with solutions that will satisfy both of them. Instead of framing the negotiation as each party wanting 100% of the orange, it is better to frame it as each party wanting to be 100% satisfied.
  - Approaching the negotiation this way would allow Adam and Beth to discuss their underlying interests. In this scenario, Adam only needs the orange peel and Beth only needs the flesh. If the parties can figure this out through cooperation and communication, they will both leave the negotiation 100% satisfied.

*Guided Practice*

- Distribute **Handout 11: Principles of Negotiation**. Instruct students to read through the sheet, annotating important concepts. Have students pair up and discuss:
  - Why it is important to focus on the sources of conflict in a negotiation?
  - How does analyzing the sources of conflict help you to achieve a mutually beneficial solution?

Students will share their responses with the class.

- Divide students into groups of four.
  - Assign two members to the role of Plaintiff's counsel, representing Kenji Davis. Give them **Handout 12A: Confidential Information for Plaintiff's Counsel**.
  - The other two members will be Defendant's counsel, representing the school board. Give them **Handout 12B: Confidential Information for Defendant's Counsel**.
- Instruct students to read their confidential information sheet to find out what their client wants. Remind students that these sheets are confidential and they cannot share the information with their opponents, or anyone else on the opponent's side. After they read, they may share their initial reactions, questions, or concerns quietly with their partner.

*Independent Practice*

Unit 5: Lesson 4

First Amendment Rights in Schools

- Distribute **Handout 13: Negotiation Planning**. For the chart, instruct students to fill out their client's side with specific details that they learned from their confidential information sheets, and to take their best guess on the opponent's side based on what they have learned from the depositions and case materials. An answer key is attached.
- Read through the questions with students to check for understanding, and then instruct students to spend the remaining class time with their partners completing the questions.

*Homework:*

- Have students complete their negotiation planning sheets so they are prepared for tomorrow's negotiation.

**Handout 13: Answer Key**  
*Negotiation Planning*

	Plaintiff (student)	Defendant (School Board)
Interests <i>“The plaintiff wants _____ because...”</i>	<p>Kenji wants to be reinstated to student council and to obtain an apology or a letter of recommendation, because he is worried about getting into a good college.</p> <p>Kenji wants the school to change its policies on political messages and mandatory assemblies because he believes students should have more expressive freedom.</p>	<p>The School Board wants to avoid bad publicity in the community and maintain high enrollment, because they want to be re-elected to the Board and low enrollment would mean reduced funding for the school.</p> <p>The School Board wants to maintain the public perception that it can discipline its students because its reputation affects both enrollment and funding.</p>
Beliefs <i>“The defendant believes _____ because ...”</i>	<p>Kenji believes that the suspension will look bad on his college applications and that the college he gets into now will have huge long term consequences on his career and his earnings.</p> <p>Kenji believes that the school acted unfairly because students should have the right to express their political opinions in schools.</p>	<p>The School Board believes that it was justified in suspending Kenji for his disruptive behavior because he intentionally violated a clear school rule.</p> <p>The School Board believes that if it backs down too easily, other students will act out and the administration's ability to maintain discipline in the High School will be compromised.</p>
Emotions <i>“The plaintiff feels _____ about ....”</i>	<p>Kenji feels hurt that he was stripped of his role on student council because he has always been a good student and has never intentionally tried to cause trouble.</p> <p>Kenji feels angry because he believes the school infringed on his civil liberties.</p>	<p>The School Board feels worried about the costs of the trial and the negative publicity that this will generate on the school.</p> <p>The School Board feels sympathetic towards Kenji's desire to go to a good school because he has been a high performing student and they don't want this to have any long term effect.</p>
Role <i>“The defendant's role as _____ influences...”</i>	<p>Kenji's role as a student influences his desires and priorities, because he wants to make sure that the incident does not affect his future as far as college or career choices.</p>	<p>The defendant's role as school leadership influences the negotiation because they don't want it to appear that they've lost their power to punish students for disruptive behavior.</p>

**Lesson 5**  
**How can parties use negotiation to achieve the best solution?**

**Lesson Objectives**

---

Students will be able to:

- Practice their negotiation skills using the facts from *Davis v. Ann Arbor School Board*
- Evaluate the outcomes of the negotiation

**Materials**

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- Handout 14: Negotiation Report

**Lesson Assessments**

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- Negotiation Planning Sheet: preparation for negotiation
- Negotiation Report: summary of the students' negotiation results

**Instructional Activities**

---

*Anticipatory Set*

- Instruct students to meet with their partner for five minutes to review and finalize their negotiation plan and strategy.

*Independent Practice*

- Students will meet in their groups and will have 40 minutes to conduct the negotiation. Once students have reached an agreement, each group will complete a Negotiation Report that finalizes the details of their settlement agreement. Remind students their settlement agreement must address: whether money is awarded and the amount, if any policy changes will be made, any actions required by the school, any actions required by Kenji.
- Distribute **Handout 14: Negotiation Report** so that students can record their results.

*Closure*

- Students should turn in their Negotiation Reports at the end of class.

**Lesson 6**  
**Is negotiation an effective tool in the legal process?**

**Lesson Objectives**

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Students will be able to:

- Compare the results of their negotiations with their peers and evaluate their own negotiation strategies
- Identify the advantages and disadvantages of engaging in negotiations

**Materials**

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- Handout 15: Negotiation Evaluation
- Chart of Students' Settlement Agreements

**Lesson Assessments**

---

- Negotiation Evaluation: reflection on the negotiation process

**Instructional Activities**

---

*Anticipatory Set*

- Distribute **Handout 15: Negotiation Evaluation**. Give students 10-15 minutes to respond to the questions. Ask students to share their responses and overall impressions of how the negotiation went.
- While students are filling this out, construct the following chart on the board:

	Group 1	Group 2	Group 3	Group 4 ...
Money awarded to Kenji				
School policy changes				
Does Kenji get a letter of recommendation?				
Does Kenji write a letter of apology?				
Does Kenji get reinstated on student council?				
Other agreements				

Unit 5: Lesson 6  
First Amendment Rights in Schools

*Guided Practice*

- Instruct each negotiation group to choose one student to come up to the board and fill in the chart with what their group decided.
- Engage in a class discussion about the negotiation results, focusing on how students reached their final agreements and how the agreements are similar and different. Go through the questions on **Handout 15: Negotiation Evaluation** and call on students from each group to share their thoughts on each question.
- Allow students an opportunity to read the opposing side's Confidential Information Sheet. When they are finished, ask:
  - What didn't you know about the opposing party's interests or goals?
  - How would you have negotiated differently if you had known this?

*Closure*

- Think-pair-share: When we first discussed negotiations, we learned that most cases don't go to trial because they settle out of court. Do you think negotiation is an effective tool in the legal process? What are some of the benefits that a negotiation offers over litigation, and what are some of the drawbacks?

**Lesson 7**  
**What is a mock argument?**

**Lesson Objectives**

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Students will be able to:

- Identify some of the steps of the litigation process before trial
- Explain where an oral argument can take place in the litigation process
- Explain the key elements and roles of an oral argument

**Materials**

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- Handout 16: Summary judgment video quiz
- Handout 17: The litigation process
- Handout 18: Oral argument

**Lesson Assessments**

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- Practice on Handout 17 using case law to support arguments

**Instructional Activities**

---

*Anticipatory Set*

- Distribute **Handout 16: Summary judgment video quiz**.
- Play the video at the following link, which provides a brief animated explanation of summary judgment. <https://www.youtube.com/watch?v=hMhlyh2WjjY>. While students watch the video, they should answer the questions on Handout 16.
- After the video, go over the answers with the class:
  - (1) without
  - (2) d
  - (3) a
  - (4) b

*Guided Practice*

- Distribute **Handout 17: The litigation process**. Call on volunteers to read each step of the flowchart out loud, along with the description boxes. Remind students of the steps they have already seen throughout this unit:
  - Complaint: students have read Plaintiff Kenji Davis's complaint (Handout 2)

## Unit 5: Lesson 7

### First Amendment Rights in Schools

- Discovery: students have read depositions of Olivia Marquez, George Carpenter, and Kenji Davis (Handouts 8, 9, and 10)
- Motion for Summary Judgment: explain to students that this is where the case is now. Kenji and the school have gone through discovery, taken depositions, and exchanged documents and other evidence. Now, Kenji is filing a motion for summary judgment, which means he wants the court to decide that he wins -- that his First Amendment rights were in fact violated. Meanwhile, the defendant (the Ann Arbor School Board) is opposing the motion for summary judgment; they are trying to convince the judge that the case should proceed to trial instead. As it says on the flow chart, summary judgment motions may involve oral arguments. That is what the students will work be working on for the next few days.
- Distribute **Handout 18: Oral argument**. Read through the questions and answers out loud as a class.
  - Part D is about how lawyers may use case law to support their arguments. Call on a volunteer to read each example out loud, and ask them to finish the argument's train of thought -- in other words, they should try to complete the sentence at the end of the example. Call on other volunteers to help if necessary.

#### *Independent Practice*

- At the bottom of Handout 18, students should work with a partner to come up with their own examples of how they might use one of the three Supreme Court Opinions to (1) cite a rule of law, (2) use persuasive language, (3) analogize, or (4) distinguish. Students should not be concerned about which side they are on yet; instead, they should think about how either side, Plaintiff or Defendant, might use the opinions.
- After students have had time to come up with their own examples, ask them to share with the class.

#### *Closure*

- Have students complete an exit ticket answering the following question: How comfortable are you in using the Supreme Court opinions in arguing about Kenji's case? What do you understand, and what is still confusing?



**Lesson 8**  
**How do I prepare for a mock argument?**

**Lesson Objectives**

---

Students will be able to:

- Identify the strengths and weaknesses in their party's main arguments
- Prepare arguments with textual support from the fictional depositions and the supporting Supreme Court opinions
- Anticipate and respond to questions addressing weaknesses in each party's arguments

**Materials**

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- Handout 19: Mock argument role assignments
- Handout 20A: Prep for introduction
- Handout 20B: Prep for argument
- Handout 20C: Prep for conclusion
- Handout 20D: Prep for judges

**Lesson Assessments**

---

- Mock argument preparation handouts

**Instructional Activities**

---

*Anticipatory Set*

- Instruct students to retrieve **Handout 7: Fact and Argument Organizer**, from Lesson 3.
- With a partner, students should review the handout and decide which argument seems to be the strongest and the weakest for the Plaintiff, and which argument seems to be the strongest and the weakest for the Defendant.
- After students have had a chance to discuss for 5 minutes, call on some volunteers to share their answers with the class and defend their reasoning.

*Guided Practice*

- Break students into teams. Half the class should be Plaintiffs, half the class should be Defendants, and several students should be judges.
- Distribute **Handout 19: Mock argument role assignments**. Read through the order of proceedings.

Unit 5: Lesson 8  
First Amendment Rights in Schools

- Note that this handout creates roles for 20 students. If there are more students in your class, you may have students present the arguments, introductions, and conclusions in pairs instead of individually. For the Plaintiff's arguments, one student could present the 2 minute argument and another student could present the 1 minute rebuttal. For Defendant's arguments, the pair could split their time speaking.
- This handout creates a sequence of events that adds up to 44 minutes. You may choose to lengthen or shorten the timing of each argument to fit the needs of your class.
- Assign the roles and fill in students' names in the chart on **Handout 19: Mock argument role assignments**.
- Now students will have time to prepare their introductions, conclusions, arguments, or questions (if they are judges.) Distribute the appropriate preparation worksheets to each student according to his or her role.
  - Students delivering the introduction get **Handout 20A: Prep for introduction**
  - Students making an argument get **Handout 20B: Prep for argument**
  - Students delivering the conclusion get **Handout 20C: Prep for conclusion**
  - Students acting as judges get **Handout 20D: Prep for judges**
- Instruct students to work through the questions on their handouts. These questions will help them organize and prepare their piece of the argument. They may complete the questions individually or with a partner on their team (Plaintiff or Defendant).
- While students are answering questions and preparing their arguments, circulate the room to answer questions and help any students who may be stuck.

*Independent Practice / Homework*

- Once students have finished filling out their preparation handout, they will choose another student from their team (Plaintiff or Defendant) and practice structuring and delivering their piece of the oral argument out loud. The partner should ask questions and provide feedback, and then switch. Students should complete this process with two different partners, and have each partner sign the bottom of their preparation handout in the designated space.

*Closure*

- Instruct students to practice their arguments, introductions, or conclusions at home so that they are prepared to deliver them tomorrow in class.

## Lesson 9

### How do attorneys conduct oral arguments to advocate for their clients?

#### Lesson Objectives

---

Students will be able to:

- Organize and deliver oral arguments to a panel of judges during a mock argument exercise
- Defend a position by referring to facts from fictional depositions and reasoning from actual Supreme Court opinions
- Respond to questions and rebut arguments from opponents

#### Materials

---

- Handout 19: Mock argument role assignments (from Lesson 8)
- Handout 21: Mock argument rubrics
- Handout 22: Mock argument reflection

#### Lesson Assessments

---

- Mock argument with accompanying rubric
- Mock argument reflection

#### Instructional Activities

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##### *Anticipatory Set*

- Distribute **Handout 21: Mock argument rubrics**. Read through each of the categories together as a class so that students know what they will be graded on throughout the mock argument. Note that there is one rubric for the arguers and one slightly modified rubric for the judges.
- Give students 5 minutes to meet with their partners or other members of their team (Plaintiff / Defendant / judges). Students should review what they are going to say and practice their piece (introduction, conclusion, argument, rebuttal, or questions) one more time.
- Divide the class so that everyone on the Plaintiff's team is sitting on the left side of the room, everyone on the Defendant's team is sitting in the right side of the room, and the judges are in a row in front facing the class.
- Set up one podium facing the judges where students will stand to deliver their arguments.

Unit 5: Lesson 9  
First Amendment Rights in Schools

*Guided Practice*

- The clerk calls the case.
  - "All rise. (*Everyone stands.*) The United States District Court for the Eastern District of Michigan is now in session. The honorable judges \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ presiding. Please be seated. (*Everyone sits.*) Now calling case number 12-45678, *Kenji Davis vs. Ann Arbor School Board.*"
- Use **Handout 19: Mock argument role assignments** (from Lesson 8) to proceed through the order of events. The clerk is responsible for keeping time with a stopwatch, and should alert the parties when their time has expired.
  - The judges may ask questions during any of the arguments or rebuttals and the party must respond to the best of his or her ability. When the party is finished responding to the question, he or she should continue on to the next point.
- As students present, the teacher may use **Handout 21: Mock argument rubric** to evaluate each student's performance.

*Independent Practice / Closure*

- Distribute **Handout 22: Mock argument reflection**. Students should use any remaining class time to begin filling out these reflection questions based on their own performance and that of their peers, and finish it for homework.

**Handout 1**  
*Journal prompt*

When should a school be permitted to censor student speech?

- a. Describe three different situations where, in your opinion, a public school teacher or principal should be allowed to penalize a student because of something the student said.

1)

2)

3)

- b. Explain your reasoning. Why should the school be allowed to punish the student in those situations, even though the U.S. Constitution guarantees the right of freedom of speech?

- c. Turn your examples into a rule by completing the following statement: “A school should be allowed to punish student speech if ...”

**Handout 2**

*Plaintiff Kenji Davis's complaint*

**In the United States District Court for the  
Eastern District of Michigan**

**Kenji Davis, Plaintiff,** )  
 )  
 )  
 vs. ) **Case No. 1:12-cv-45678**  
 )  
 **Ann Arbor School Board, Defendant** )  
 )  
 )  
 \_\_\_\_\_ )

**COMPLAINT**

**NATURE OF THE CLAIM**

This is a civil action for violation of Plaintiff's rights under the First Amendment to the United States Constitution. Plaintiff Kenji Davis alleges as follows:

**PARTIES**

1. Plaintiff Kenji Davis is a 17-year-old senior at Ann Arbor High School (AAHS). He currently resides in Ann Arbor, Michigan.
2. Defendant Ann Arbor School Board is located in Ann Arbor, Michigan.

**GENERAL ALLEGATIONS**

3. In May 2012, Davis was elected Senior Class Representative for the upcoming (2013-2014) school year.
4. Davis was a member of the AAHS computer science club. Club members meet weekly to engage in computer science projects, plan community activities, and compete in computer science competitions. Davis joined the computer science club when he was a freshman.
5. During Davis's junior year, the club supervisor announced that she was no longer able to work with the club due to a personal health matter. AAHS announced that a parent volunteer, Olivia Marquez, agreed to take over supervision and coaching of the club.
6. Ms. Marquez is a computer scientist who worked at the National Security Agency (NSA) in Maryland for 8 years. The NSA is an intelligence organization of the United States government, responsible for global monitoring, collection, and processing of information and data for foreign intelligence purposes. One of its goals is to protect United States government information systems against penetration and network warfare.

## Unit 5: Lesson 1

### First Amendment Rights in Schools

7. At the request of the NSA, Ms. Marquez moved to Ann Arbor for a two-year assignment, collaborating with University of Michigan researchers on NSA projects.
8. Shortly after Ms. Marquez became the supervisor of the AAHS computer science club, Davis discontinued his participation in the club in protest of the NSA's surveillance programs and of AAHS's decision to permit Ms. Marquez to lead the club.
9. In Davis's senior year, AAHS invited Ms. Marquez to speak about the NSA at a school assembly. The assembly took place on February 2th, 2014, from 12:45-1:15 p.m. All students were required to attend. As a member of the student council, Davis was required to sit on the stage, facing the audience, during the assembly.
10. The purpose of the assembly was to allow Ms. Marquez to inform students about computer science careers with the government, and with the NSA specifically.
11. In the summer of 2013, public controversy erupted when a former NSA contractor, Edward Snowden, made unauthorized revelations of the NSA's vast capacity to spy on the private communications of United States citizens. In response to this controversy and his own beliefs that the NSA conducts unconstitutional surveillance activities, Davis opposed Ms. Marquez's appearance at the assembly. He believed it was inappropriate for the school to sponsor a speech that encouraged students to join the NSA.
12. Davis attended the assembly and sat on the stage as required. Right before he entered the auditorium, he taped a patch on the front of his T-shirt that said "The NSA SUCKS." This patch was intended to get the attention of his fellow students in order to encourage them to consider the appropriateness of having an NSA employee lead a student club and speak at a mandatory assembly. Davis's political message did not disrupt the assembly, which began and ended as scheduled without interruption.
13. Immediately after the assembly, Davis was approached in the hallway by other student members of the computer science club. The students told him that they disapproved of his message, that they were offended by his actions, and that they were planning to complain to the administration. They did not threaten him in any other way. Davis remained at school for the rest of the day. A few students made comments to him, some positive and some negative, but he attended classes and finished the day with no interference.
14. At 2:45 p.m., Davis was ordered to report to the office of George Carpenter, the Vice Principal. Carpenter told Davis that his actions were inappropriate, had disrupted classroom activities, and had violated school rules. One rule prohibited lewd speech. Another prohibited wearing buttons, shirts, patches, and other paraphernalia with political messages. Carpenter imposed a three-day suspension and told Davis he must withdraw from student council.
15. Davis and his parents appealed this decision to the Ann Arbor School Board. Their appeal was unsuccessful.
16. The school rule against wearing buttons, shirts, patches, and other paraphernalia containing political messages has been inconsistently applied. It began during the Vietnam War when pro- and anti-war students were having serious conflicts during the school day. Prior to its use against the plaintiff, it had last been applied to discipline a student in 1991.
17. In recent years, students have routinely violated the rule by wearing paraphernalia bearing political messages, including pro-government and pro-surveillance messages related to

national security, such as “Protect America: Arrest Snowden” and “See Something / Say Something” and “I’d Rather Be Waterboarding Terrorists.” No student has ever been disciplined for wearing paraphernalia bearing these messages.

18. The suspension and removal from student council has caused Davis significant reputational damage among his peers and the colleges to which he is applying. Davis is embarrassed about the suspension and his removal from student council, and has felt uncomfortable in school since the incident. Davis is a model student who had never suffered any disciplinary problems prior to this incident, and whose future plans have been negatively impacted by the school’s actions.

### **CAUSE OF ACTION**

19. By suspending Davis and removing him from student council, Defendant infringed upon Davis’s constitutional right to freedom of expression, protected by the First Amendment to the U.S. Constitution.
20. Davis’s speech was intended to convey, and did convey, a political message.
21. Davis’s message was not lewd or vulgar.
22. The school rule prohibiting buttons and patches with political messages has been inconsistently applied. Specifically, it has not been applied against students expressing messages approving of the federal government’s “pro-security” and “pro-surveillance” policies.
23. Defendant restricted Davis’s speech because of its viewpoint.
24. Davis’s actions did not materially or substantially disrupt the work or discipline of the school, or infringe on the rights of other students.
25. The restrictions on Davis’s speech were not reasonably related to legitimate pedagogical concerns.

### **PRAYER FOR RELIEF**

Wherefore, Plaintiff respectfully requests that judgment be entered against the Defendant, awarding him:

- A) declaratory and injunctive relief
- B) monetary damages for his emotional, psychological, and reputational injuries
- C) any further relief to which Plaintiff is entitled, and
- D) reasonable attorney fees, costs, and other damages.

Dated this 21<sup>st</sup> day of March, 2014  
[Attorney's signature and contact information omitted]



### Handout 3

*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

#### Factual overview

This is an actual case, decided by the U.S. Supreme Court in 1969.

In 1965, a group of adults and students in Des Moines, Iowa, wanted to express their objections to the war in Vietnam. To protest the war, they planned to wear black armbands during the holiday season until New Years Day. 15-year-old John Tinker was one of the students.

When the principals of the De Moines schools learned about the group's plan to wear the black armbands, they adopted a policy that any student who wore an armband to school would be asked to remove it, and he would be suspended for as long as he refused. Tinker and the group knew about this policy, but wore the armbands anyway. They were all sent home and suspended until they would come back without the armbands. They refused to return until New Years Day.

#### The dispute

- The students said: The First Amendment of the Constitution protects students' right to freedom of expression, so we should have been allowed to wear the armbands.
- The school officials said: Because school officials may control student conduct in order to maintain discipline and avoid disruption in the school, the suspensions were allowed.

#### Opinion

Justice FORTAS delivered the opinion of the Court.

[T]he action of the school authorities was ... based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance<sup>1</sup> is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious<sup>2</sup>, society.

In order for ... school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained<sup>3</sup>...

<sup>1</sup> *Undifferentiated fear or apprehension of disturbance* - a general fear of upsetting anyone.

<sup>2</sup> *Disputatious* - argumentative

<sup>3</sup> *Sustained* - supported by the court

It is also relevant that the school authorities did not purport<sup>4</sup> to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference<sup>5</sup> with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves<sup>6</sup> of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect ... In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved...

[A student] may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason ... materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized<sup>7</sup> by the constitutional guarantee of freedom of speech ...

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These [students] merely went about their ordained rounds<sup>8</sup> in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

<sup>4</sup> *Purport* - claim

<sup>5</sup> *Material and substantial interference* - this means the expression must interfere in a big way—not just a little.

<sup>6</sup> *Enclaves* - isolated groups

<sup>7</sup> *Immunized* - free from regulation or prohibition

<sup>8</sup> *Ordained rounds* - assigned schedule and activities, such as classes

Unit 5: Lesson 1  
 First Amendment Rights in Schools

**Handout 4**  
*Case organizer*

	<i>Tinker v. Des Moines Independent Community Sch. Dist.</i>	<i>Hazelwood Sch. Dist. v. Kuhlmeier</i>	<i>Bethel Sch. Dist. No. 403 v. Fraser</i>
What was the student speech at issue?			
Who won in the Supreme Court – the school or the student?			
List at least 3 factors that influenced the Court’s decision.	1.  2.  3.	1.  2.  3.	1.  2.  3.
Choose one quote that best captures the court’s rule.			

### Handout 5

*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

#### Factual overview

This is an actual case, decided by the U.S. Supreme Court in 1988.

Three high school students were in a journalism class where they served as staff members for the school newspaper, *Spectrum*. The newspaper was distributed to students, school personnel, and members of the community. It was funded primarily by the Board of Education.

Before publishing an issue, the journalism teacher had to submit a draft to the principal, Mr. Reynolds, for his review. In the spring of 1983, the journalism teacher submitted a draft as usual, but the principal objected to two of the articles. One described three students' experiences with teen pregnancy, and the other discussed the impact of divorce on students at the school.

The pregnancy story used false names to keep the girls' identities secret, but the principal worried that the girls might still be identifiable from details within the story itself. He also believed the divorce story was inappropriate because in it, a named student made specific complaints about bad things her father did. Mr. Reynolds thought that, as a matter of journalistic fairness and integrity, the writers should have given the parents a chance to respond to these remarks, or at least obtained their consent before the article was published.

Because there was not enough time to make the edits before the end of the school year and the publishing deadline, the principal decided to delete the two pages with the articles.

#### The dispute

- The students said: The school violated our First Amendment free speech rights by deleting two pages of articles from the school newspaper based on what the articles said.
- The school officials said: The school should get to control what kinds of things are published in a newspaper that is school-sponsored.

#### Opinion

Justice WHITE delivered the opinion of the Court.

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*<sup>1</sup>—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.<sup>2</sup> These activities may be fairly characterized as part of the school

<sup>1</sup> Remember, *Tinker* held that the school can't punish students for wearing black armbands, as long as they weren't causing a substantial disruption within the school.

<sup>2</sup> *Imprimatur of the school* - the school's official approval

curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Educators are entitled to exercise greater control over this second form of student expression<sup>3</sup> to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously<sup>4</sup> attributed to the school... A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order, or to associate the school with any position other than neutrality on matters of political controversy...

Accordingly, we conclude that the standard articulated in *Tinker* 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<sup>5</sup> 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<sup>6</sup> concerns...

It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so directly and sharply implicated<sup>7</sup>, as to require judicial intervention...

We also conclude that Principal Reynolds acted reasonably ...

The initial paragraph of the pregnancy article declared that “[a]ll names have been changed to keep the identity of these girls a secret.” The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school... In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response...

The student who was quoted by name in the ... divorce article ... made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent ... was entitled to an opportunity to defend himself as a matter of journalistic fairness...

<sup>3</sup> Expression that is part of the school curriculum

<sup>4</sup> *Erroneously* - incorrectly

<sup>5</sup> *Dissemination* - spread; circulation

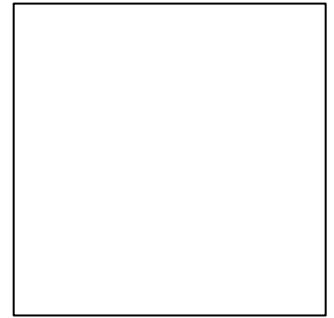
<sup>6</sup> *Pedagogical* - related to teaching

<sup>7</sup> *Implicated* - involved; violated

Here, the Court lists some of Principal Reynold's legitimate pedagogical concerns – that is, concerns about the speech that are related to education.

Unit 5: Lesson 2  
First Amendment Rights in Schools

[The Principal] could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and “the legal, moral, and ethical restrictions imposed upon journalists within [a] school community” that includes adolescent subjects and readers... Accordingly, no violation of First Amendment rights occurred.



### **Handout 6**

*Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

#### **Factual overview**

This is an actual case, decided by the U.S. Supreme Court in 1986.

At a school assembly, Matthew Fraser gave a speech to nominate a fellow student for student council. Students were required to either attend the assembly or go to study hall. The assembly was part of a school-sponsored educational program in self-government.

During his entire speech, Fraser referred to his candidate in terms of an elaborate sexual metaphor:

“I know a man who is firm. He’s firm in his pants, he’s firm in his shirt, his character is firm. But most ... of all, his belief in you, the students of Bethel, is firm. [He] is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts. He drives hard, pushing and pushing until finally he succeeds. [He] is a man who will go to the very end—even the climax—for each and every one of you... He’ll never come between you and the best our high school can be.”

Fraser had discussed this speech with two teachers beforehand, and both teachers told him that his speech was inappropriate and that he should probably not deliver it.

During the speech, some students hooted and yelled, some made sexual gestures, and some seemed bewildered and embarrassed. One teacher reported that the next day, she had to interrupt her lesson plan in order to discuss the speech with the class.

The school had a rule that prohibited the use of obscene, profane language or gestures. When confronted by the Assistant Principal, Fraser admitted that he deliberately used sexual innuendo in the speech. As punishment, the school declared that he would be suspended for three days, and his name would be removed from the list of candidates to be a speaker at graduation.

#### **The dispute**

- The student said: Suspending me for my speech was a violation of my First Amendment right to freedom of speech.
- The school officials said: The school may choose to punish speech that is lewd, indecent, or disruptive to the educational process.

#### **Opinion**

Chief Justice BURGER delivered the opinion of the Court.

[P]ublic education must prepare pupils for citizenship in the Republic. ... It must inculcate<sup>1</sup> the habits and manners of civility...

These fundamental values ... must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these fundamental values must also take into account consideration of the sensibilities<sup>2</sup> of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse<sup>3</sup> in a democratic society requires consideration for the personal sensibilities of the other participants and audiences...

[T]he constitutional rights of students in public school are not automatically coextensive<sup>4</sup> with the rights of adults in other settings...

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others. ... The inculcation of these values is truly the work of the schools. The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment<sup>5</sup> in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd,<sup>6</sup> indecent, or offensive speech...

This Court's First Amendment jurisprudence<sup>7</sup> has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children... These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*,<sup>8</sup> to protect children -- especially a captive audience -- from exposure to sexually explicit, indecent, or lewd speech...

<sup>1</sup> *Inculcate* - instill; persistently teach

<sup>2</sup> *Sensibilities* - emotional responses

<sup>3</sup> *Discourse* - spoken or written conversations or debates

<sup>4</sup> *Coextensive* - to the same extent or amount; equal

<sup>5</sup> *Deportment* - behavior

<sup>6</sup> *Lewd* - crude and offensive in a sexual way

<sup>7</sup> *Jurisprudence* - way of thinking about the law about the law

<sup>8</sup> *In loco parentis* - in place of the parents



We hold that [the] School District acted entirely within its permissible authority in imposing sanctions<sup>9</sup> 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<sup>10</sup> 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.

<sup>9</sup> *Sanctions* - penalties

<sup>10</sup> *Respondent* - in this case, the Court is referring to Fraser, the student.

**Handout 7**  
*Fact and argument organizer*

<b>Plaintiff - The Student</b>	<b>Defendant - The School</b>
The speech was <u>not</u> disruptive	The speech <u>was</u> disruptive
The speech <u>was</u> political	The speech was <u>not</u> political
The school selectively enforced the rule in a way that discriminated against one viewpoint.	The school did <u>not</u> selectively enforce the rule in a way that discriminated against one viewpoint.

Unit 5: Lesson 3  
First Amendment Rights in Schools

The speech was <u>not</u> school sponsored	The speech <u>was</u> school sponsored
The speech does <u>not</u> raise legitimate educational concerns	The speech <u>does</u> raise legitimate educational concerns
The speech is <u>not</u> lewd, vulgar, or socially inappropriate	The speech <u>is</u> lewd, vulgar, or socially inappropriate

**Handout 8**  
Deposition of Olivia Marquez

Q. Ms. Marquez, are you the supervisor for the Computer Science Club at Ann Arbor Public High School?

A. We call it the “coach,” but yes.

Q. How long have you been the coach of the Computer Science Club?

A. Just about two years now, or almost two years, I guess.

Q. How did you come to be the coach?

A. Well, my daughter is a student at the school, and she is in the club. She told me that the previous coach had to step down because he became ill. They needed a new coach, so I volunteered to step in.

Q. What led you to volunteer?

A. Well, it was important to my daughter. But also, I really enjoy working with kids, and I think it is important to encourage kids to consider computer science, and other STEM fields, as a career.

Q. Sorry, other what fields?

A. Oh, right, STEM. It’s an acronym that stands for Science, Technology, Engineering, and Mathematics.

Q. Do you also encourage students to work for government agencies like the NSA?

A. Well, I certainly discuss it with them. I think that working for the government gets a bad reputation. Teenagers especially see it as bureaucratic and boring. I want to make sure they know how important the work we do is, and how interesting it can be. I want them to view a government job as a terrific use of their talents. The government needs talented scientists and engineers. And high school is a perfect time to get kids thinking about these things, while they are thinking about where they want to go to college.

Q. So do you talk about those things as coach of the club?

A. Yes, absolutely. I expose them to opportunities for careers in the STEM fields, and tell them how to train for those jobs, and encourage them to have the confidence to take the necessary classes.

Q. Ms. Marquez, how do you know the Plaintiff, Kenji Davis?

A. Kenji was a member of the Computer Science Club. I met him about a year before I became the coach, because I was a guest speaker at one of the club meetings and he came up to chat with me afterwards. I was impressed with his passion for computer science and math, and his ability to engage with me in a very mature and articulate way.

Q. But he isn’t currently a member of the club, correct?

A. No, he dropped out about a month after I took over as coach.

Q. What were your impressions of Mr. Davis?

A. I thought he was bright, motivated, disciplined, mature, and not afraid to tackle a challenge.

Unit 5: Lesson 3  
First Amendment Rights in Schools

Q. Was he well-liked by the other club members?

A. Oh yeah. I get the sense that the computer science club is like a second family for these kids, especially because if they aren't into sports, or the arts, or things like that. And from what I saw, Kenji got along well with the other kids and was part of that family, at least until he quit.

Q. Did you discuss his decision to quit with him?

A. Yes, I tried, but he wasn't really responsive. He developed this conspiracy-theory mindset about how the government is spying on everyone all the time. I think he spent a lot of time reading some fringe websites and believing everything he read. I tried to talk to him about his views, and how the NSA does a lot of things other than some of the controversial programs he sees in the news. I told him about all of the other math and science opportunities there are, both in the government and out of it. But he still quit the club.

Q. Did that bother you?

A. Well, a bit, I guess. I hated to think that he was giving up participating in this club that had been so important to him just because I was the coach and I work for the NSA. But I wasn't going to stop volunteering, because I knew the club really needed me.

Q. Ms. Marquez, let's turn now to February 20, 2014, the day of the assembly. Why were you asked to speak at the assembly?

A. The Principal asked me to speak as a computer scientist and government employee, to inform the students about careers in the STEM fields and in the government, and also to talk about what the computer science club does and how to get involved.

Q. Did you see Mr. Davis at the assembly?

A. Yeah, he was hard to miss. He was on stage and in the front row. Not to mention the patch on his shirt that read "The NSA Sucks" in big bold letters. You couldn't really miss it.

Q. Did Mr. Davis interrupt your speech?

A. Well, not orally. There were students murmuring before the assembly began, but I gave my speech as planned. I don't hold anything against Kenji, but he definitely disparaged the computer science club and my employer in front of the entire student body, which is disappointing.

Q. Were any of the club activities affected, either that day or in the days following the assembly?

A. The other students in club were noticeably upset. You know, these kids, they devote a lot of time and passion to computer science club and believe in it and they are sort of protective of me, I think. That day some of the other club members were calling him a traitor.

Q. Did anyone mention confronting Mr. Davis?

A. Not that I can remember. They were clearly upset but no one said anything to me about approaching him, or getting revenge or anything like that, if that's what you're asking.

Q. Since the incident, have you observed any interaction between Mr. Davis and the current members of computer science club?

A. Well, I think he was suspended for the rest of the week of the incident. Since then, I've seen some students give him the cold shoulder, but I have not seen any actual interaction between Kenji and the rest of my kids in the club.

**Handout 9**  
Deposition of George Carpenter

Q. Mr. Carpenter, you are a Vice Principal at Ann Arbor High School, is that correct?

A. Yes.

Q. Did you handle the disciplinary action against the Plaintiff, Kenji Davis, on February 20th, 2014?

A. Yes.

Q. Let's turn to that day, the day of the assembly. First, can you tell me a little bit about what type of assembly this was?

A. Well, we hold periodic mandatory assemblies about issues facing the school and the community. Sometimes we use them to educate the students on different programs available to them outside of classes that they may not otherwise know about, and we also use them as an opportunity expose students to careers and other opportunities they might not know a lot about, and to take advantage of the many accomplished people in our community who have a message we think our students would benefit from hearing.

Q. Are the assemblies open to the public?

A. No. Only students and faculty of the school may attend.

Q. Who was at the assembly on February 20th, 2014?

A. The entire student body because it was a mandatory assembly.

Q. Can you describe the format of the assembly on that day?

A. Well, as the students entered the auditorium, the student council members filed into their seats on the stage. The speakers usually wait behind the stage until the Principal introduces them. On that day, Ms. Marquez was the speaker, and she was standing with the Principal backstage while the students were all taking their seats.

Q. So what was the subject of the assembly on this particular day?

A. Ms. Marquez was going to speak about careers in science and engineering and related fields.

Q. Was she also supposed to talk about how to get a job working for a government agency like the NSA?

A. Well, it was certainly something I had discussed with her when we arranged for her to speak. She is a terrific ambassador for the computer sciences, and also for bringing those talents to bear in the service of your government. So that was something I knew she planned to discuss, particularly in the context of her own career, how she ended up working for the NSA, why she found it rewarding.

Q. You mentioned that the student council members sit on the stage. Is that usually the case at assemblies?

A. Yes.

Q. Why do they sit there?

Unit 5: Lesson 3  
First Amendment Rights in Schools

A. Well, it's a longstanding tradition at our school. I guess it's a chance for them to shine as representatives of their class during a school event.

Q. Did the assembly start and end on time?

A. Yes it did.

Q. Were there any interruptions during the assembly?

A. No, well, not really during the assembly.

Q. What do you mean by that?

A. Well, as Kenji sat down in his seat, there was an unusual buzz in the auditorium. There were hoots and hollers coming from the audience.

Q. That was before the assembly began, is that correct?

A. Yes, the rowdiness was before the Principal addressed the students.

Q. And what do you exactly mean by 'rowdy'?

A. Well, the students were shouting Kenji's name, and shouting different comments, as they all filed into the auditorium.

Q. And did those comments from the crowd continue during the assembly?

A. Everyone pretty much quieted down once the Principal took the podium.

Q. Were you able to decipher what the comments were about?

A. Well, no not at first. I mean, I was at the front of the auditorium, near the stage along with the other vice principals. It took me a second to figure out that the hoots and hollers were directed at the stage. Then, just as the student council members were taking their seats, I saw that Kenji's t-shirt read "The NSA Sucks." Kenji was sitting in the front row. When I realized the noise was directed at Kenji, it was just a few seconds before the Principal began the assembly.

Q. Did the rest of the assembly run as planned?

A. Well, Ms. Marquez spoke and then the students were dismissed, so I guess it did, but I was pretty focused on Kenji's shirt the whole time.

Q. Has there ever been any "rowdy" behavior at any other assembly?

A. Maybe on occasion, during a particularly controversial assembly, but like I said, it's unusual.

Q. Mr. Carpenter, let's move on to after the assembly. Did the remainder of the school day run as planned?

A. Yes, I mean if you're asking about the bell schedule, well that went as planned. But outside of that, the faculty lounge had an unusual buzz of conversation, centering around the assembly fiasco.

Q. What do you mean by that?

A. A lot of teachers were discussing the issue of Kenji's inappropriate t-shirt in the faculty lounge during lunch. One teacher mentioned that one of her students approached her expressing discomfort with her class representative sporting an unpatriotic message in front of the whole school. Other teachers were just generally discussing their opinions. Ms. Marquez's daughter told me she was really embarrassed for her mom.

Unit 5: Lesson 3  
First Amendment Rights in Schools

Q. Did the student who reported her discomfort to a teacher specifically identify Kenji's message as being "unpatriotic"?

A. I don't know. The teacher used the phrase "unpatriotic message" when she described the student's complaint to me, but I don't know if the student used those words.

Q. Did any teachers report that their lesson plans were affected?

A. No, not that was specifically reported to me. Several teachers commented that their students were talking about the t-shirt, Kenji, and the NSA, in the hallways and in between classes. I could tell that both the students and teachers were riled up over the t-shirt.

Q. Did you take any actions after hearing this in the faculty lounge?

A. First I went outside to the courtyard where students sometimes gather, and heard a lot of students talking about Kenji.

Q. What were they saying?

A. Well, some of them were saying he was an activist standing up for what was right, and others said that the computer science kids and Alice Marquez were probably not going to be very happy about it. That kind of stuff. They seemed upset with each other. It seemed to me that something had to be done before the situation escalated.

Q. Did you hear any specific threats or arguments?

A. Not specifically, no. But like I said it seemed like something was on the verge.

Q. At what point did you talk directly with Mr. Davis?

A. I met with Kenji after his last class ended, at approximately 3pm.

Q. Did you punish him?

A. Yes, I suspended him for three days. I also told him that due to his disregard for school rules and due to the fact that his message offended his fellow classmates, he would no longer be able to serve as senior class representative.

Q. Had Kenji ever had disciplinary action taken against him before?

A. No, he didn't have any other adverse actions in his file.

Q. What was the basis for suspension of Mr. Davis?

A. Well, as I explained to Kenji, the language "The NSA Sucks" is inappropriately crude and offensive language at school, and he inappropriately used his position as a student council member to send a derogatory message about an assembly that the school specifically sponsored and about career opportunities the school chose to publicize. We discussed the divisive atmosphere the message had created at school that day, and I suspended him for breaking School Rule #45 which specifically prohibits students from wearing t-shirts, buttons, patches, and any paraphernalia that contain a political message.

Q. Why do you think "The NSA sucks" is inappropriately crude and offensive language?

A. Well, "sucks" can refer to a sexual act. I think all the students know that.

Q. You mentioned the divisive atmosphere Mr. Davis's shirt created. What exactly were you afraid would happen?



Unit 5: Lesson 3  
First Amendment Rights in Schools

A. I was afraid there might be unrest. Some of the other students and teachers were offended by the patch and I thought they might be unhappy if we did nothing about it. Plus I didn't want it to become even more of an issue in the school, and I thought that by removing Kenji for a couple of days it would help quiet things down.

Q. So you weren't afraid of violence?

A. No, not violence, but I was afraid of confrontation between Kenji and the other students. And, I want to emphasize, I was also afraid for Kenji's safety when he was off campus.

Q. Why were you afraid for his safety while off campus?

A. Well, I know that once or maybe twice in the last several years there have been problems off campus.

Q. Can you describe those incidents?

A. I remember one student in a government class expressed disdain for how the United States was conducting the war on terror, and was then followed home from school and harassed when she was off campus.

Q. Any other incidents?

A. That's the only one I remember the specifics of.

Q. Did that make you concerned about Kenji?

A. Yes, of course. And I thought that since Kenji's message was a personal one directed at a beloved volunteer coach, as opposed to a more general political one, he might be more likely to be harassed.

Q. What do you mean by "beloved volunteer coach"? Can you say more about that characterization?

A. Oh, sure. Students absolutely love Ms. Marquez. She has really gotten a lot of them so engaged in science and technology, she plans lots of activities and field trips to the university, and she is tremendously warm and mentoring. She just has one of those personalities that really connects with teenagers, which not very many people have. And she has made herself available to our students who want advice or help about just about anything.

Q. When was the rule against political buttons and patches put into place?

A. It was formally adopted in 1972. It's a long-standing rule and has been on the books ever since.

Q. And in what context was the rule enacted?

A. It was during the Vietnam Era, when activism on campuses – not only college campuses, but also on high school campuses such as Ann Arbor High School – was soaring. From what I understand, the tension between the pro- and anti-war activists was at its all time highest, and resulted in a series of incidents during which both pro- and anti-war student activists were harassed on campus. The curriculum and learning were both suffering, and the Administration prohibited political and other controversial messages and paraphernalia in an effort to curb the disputes at school.

Q. When was the last time the rule was enforced?

Unit 5: Lesson 3  
First Amendment Rights in Schools

A. Um, after the havoc of the 1970s, there were some problems with political issues on campus arising out of the Iran-Contra affair in the mid-1980s, and a few students were disciplined for violating Rule 45 in 1986 or 1987, and around the time of the first Gulf War in the early '90s. And then there was another flare-up of problematic political messages in the immediate aftermath of the contested presidential election in 2000, and students had to be disciplined then. But after that political activism really died down.

Q. So was Kenji's suspension the first time that the school has enforced the rule since December 2000?

A. Yes, that's right.

Q. So between 2000 and Mr. Davis's punishment in 2014, the rule had not been enforced?

A. No, I mean, there was no need until now.

Q. Mr. Carpenter, isn't true that students regularly wear t-shirts to school that say things like "I'd Rather Be Waterboarding Terrorists?"

A. I don't think that's the case.

Q. What about shirts that say "Protect America: Arrest Snowden?"

A. I haven't seen those shirts either.

Q. What about shirts that say "See Something / Say Something"?

A. No.

Q. So you don't have any awareness of students wearing any of those shirts?

A. I haven't noticed those shirts, at least not as a regular occurrence.

Q. Have any students been disciplined for wearing shirts or buttons or patches with those messages?

A. No, and I mean, those wouldn't even be the same as Kenji's display.

Q. What do you mean by that?

A. Well, those messages are not the type of inflammatory political or controversial messages prohibited by the Rule. "The NSA Sucks" is lewd language that has no place inside a school.

Q. Have there been any other incidents on school premises involving messages about the government's surveillance program or war on terror?

A. Not on school premises as far as I'm aware, no.

Q. Are you aware of any other incidents involving such messages that occurred off of school premises?

A. Like I said earlier, I know one student who expressed concern about U.S. government actions during a government class was harassed by other students at his home once or twice. Her parents called me to express concern. There could be others, but that's the only one I'm aware of.

**Handout 10**  
Deposition of Kenji Davis

Q. Please state your name for the record.

A. Kenji Davis.

Q. How old are you?

A. Eighteen.

Q: Were you recently a student at Ann Arbor High School?

A: Yes. I just graduated a few months ago, in June.

Q. While you were a student at Ann Arbor High School, were you a member of the Computer Science Club?

A. For a little while. I joined in the spring of my freshman year, and I quit in the middle of my junior year because Ms. Marquez became the coach of the club and she works for the NSA.

Q. And why did that make you want to quit?

A. Well, I did some research and learned that the NSA spies on American citizens, wiretaps phones, that sort of thing.

Q: And did that make you dislike Ms. Marquez?

A. Well, I don't like the NSA and what it does to citizens. I wanted to take a stand for what I believed in, and quitting seemed like an effective way to do that. I didn't think it was right that someone who worked for this agency was now supposed to be someone we looked up to.

Plus all she did was encourage us to work for the government, to be computer scientists for the government.

Q. Did she tell you much about her job?

A. Not really, or at least, nothing specific. She was very clear that she couldn't tell us anything about what she actually did, except that she used her computer science degree a lot. It's all super secret.

Q. Is it fair to say that you and Ms. Marquez had substantial differences of opinion?

A. Yes, we disagreed about the NSA's spying programs, among other things. She defended the NSA, saying that it did everything necessary to keep Americans safe. She thinks it's OK for the government to do anything it wants as long as it says it is trying to protect Americans. And I think that civil rights and civil liberties are actually important. It doesn't matter whether Americans are protected if our core values are completely undermined in doing so.

Q. So you disliked Mr. Marquez?

A. Not personally, no. We disagreed on a lot of things, but she was always nice to me and we got along well personally. I just felt like I couldn't stay in the club once I started to think about the terrible things our nation has done in the name of "protecting" Americans.

Q. How did you get along with the other students in the Computer Science Club?

A. I got along well with them when I was in club. Not as well when I started talking to them about how I felt about the NSA

Unit 5: Lesson 3  
First Amendment Rights in Schools

Q. Did the other students generally agree with Ms. Marquez?

A. Well, yeah. I mean, she's really nice and all. The other kids seemed really eager to just believe everything she said about how great it was to be a computer scientist at the NSA, and they all wanted to be just like her. So they seemed willing to defend her and the NSA every time it came up. So yeah, they agreed with her, but I think it's mostly because they didn't really spend a lot of time thinking about it and learning about what the NSA actually does.

Q. Let's talk about what happened on February 20, 2014. You attended an assembly at school, right?

A. Yes.

Q. Can you tell me a little bit about these assemblies generally?

A. We have them about once a month. We usually have a speaker. Sometimes someone from outside the school, sometimes a teacher, sometimes a student. They talk about various topics and issues facing the school or the community.

Q. Where do you usually sit during the assemblies?

A. Well, I'm in student council, or, at least I was, at that time. Student council members sit on the stage behind the speaker, facing the audience.

Q. And that's where you were sitting during this assembly?

A. Yes.

Q. Who was the speaker at the February 20th assembly?

A. Ms. Marquez. I knew she was going to be a speaker because they announce the speakers to the whole school the week before. Also, the student council gets to propose speakers, and we usually get early notice of who the speaker is going to be.

Q. Did the student council propose Ms. Marquez?

A. No, the administration did that all on their own, I think because it was so early in the school year, and we hadn't really had time to meet and propose speakers yet.

Q. Were you upset that Ms. Marquez was speaking?

A. Well, yeah, of course. I didn't like what she was there to say. I didn't think it was appropriate to have a speaker encouraging students to join an organization that spies on Americans in violation of the Constitution.

Q. Did you do anything at the assembly?

A. I wore a patch to the assembly, attached to the front of my shirt, that said "The NSA Sucks."

Q. Why did you wear the patch?

A. To express my disagreement with NSA. I wanted to bring the issue to the attention of the students, and let them know that lots of people don't like what the NSA does.

Q. Why did you choose that message?

A. I thought it would get people's attention. Also it was short enough to fit on my shirt and still be visible from the audience.

Q. You were sitting on the stage during the assembly, correct?

Unit 5: Lesson 3  
First Amendment Rights in Schools

A. Yes. I was sitting on the stage with the rest of the student council, behind Ms. Marquez, facing the audience.

Q. So the audience could see you?

A. Yes.

Q. Could Ms. Marquez see you at all?

A. I think she saw me when I walked in, but she wasn't looking at me while he was speaking or anything.

Q. Did Ms. Marquez react to seeing the patch?

A. Like I said, I think she saw me but I'm not sure. She didn't do or say anything about it if that's what you're asking.

Q. And how did the other students react?

A. They didn't really. There were a few murmurs from the audience, but they quieted down as soon as the assembly started.

Q. Did some students laugh?

A. I guess so.

Q. And some booed?

A. One or two maybe.

Q. Were the murmurs, laughter, and boos typical for this type of assembly?

A. Kind of. Anytime there's a controversial topic at the assembly, like when we had someone come in to talk about sexual health and stuff, there's a reaction from the students.

Q. But people don't react that way to every assembly, right?

A. They do when the topic is interesting to them. But I guess not to every single one, no.

Q. Did anyone ask you to leave the stage or say anything to you during the assembly?

A. No.

Q. What happened after the assembly?

A. Not much. I went out into the hallway and chatted with friends.

Q. Were you still wearing the patch?

A. I wore it out into the hall but I took it off while I was talking to my friends. There was no point in wearing it all day.

Q. Did anyone from the computer science club approach you?

A. Yeah. Some guys came up to me and started giving me a hard time, saying that I wasn't patriotic and that they didn't like how I'd embarrassed Ms. Marquez and her daughter.

Q. Did these students insult you?

A. Um, I know they called me unpatriotic and a bully.

Q. Did these students threaten you?

A. No. They were actually pretty calm about it.

Unit 5: Lesson 3  
First Amendment Rights in Schools

Q. What else did they say?

A. They said they were offended and were planning to complain to Mr. Carpenter.

Q. How did you respond?

A. I just shrugged it off. Mr. Carpenter was at the assembly and I figured if he had a problem with it, he would have approached me about it right away.

Q. Did the students say anything else?

A. No, not really. They walked away and I went to eat lunch.

Q. Did you hear anything else about the assembly and your patch over the rest of the day?

A. Yeah. People were coming up to me all day. Some of them were saying that that they were happy someone was finally telling it like it is. Other people didn't like it.

Q. Were people talking to you during class?

A. No, nothing in class. Just in the halls and at lunch.

Q. Was the conversation disruptive to your classes?

A. No. People were chatting about it a little before and after class, but once the teachers started class it was normal.

Q. But it was a big deal around the school?

A. Not really. Like I said, a few people said stuff to me, but it didn't really seem to be a huge issue or anything.

Q. You said you were suspended at the end of the day. How did you learn you were suspended?

A. Well, I was in my last class and I got a note that I should go to Mr. Carpenter's office. Mr. Carpenter told me that he thought my actions were disrespectful and inappropriate. He said that other students were distracted and upset by what I'd done, and that I had disrupted the activities of the school. He also told me that I had violated school rules about lewd speech and wearing patches that convey political messages. I was pretty surprised and told him so. I said I thought he was wrong, especially about the lewd thing, because I certainly wasn't intending to be lewd and I didn't think what I said was lewd at all. I knew about the patches rule but I never thought they'd bring it up since students always wear T-shirts and patches and buttons and stuff, and the administration never does anything about it. In fact, I heard that the last time they enforced the rule was before I was even born.

Q. Do other students wear paraphernalia bearing political messages?

A. Oh, yeah, definitely. Many students wore pro-government and pro-surveillance shirts and buttons, and stuff that say things like "I'd Rather Be Waterboarding Terrorists" and "See Something / Say Something" and "Protect America: Arrest Snowden." And none of those kids were ever suspended or anything like that.

Q. Mr. Carpenter told you that you were suspended for breaking the school rules -- not for the viewpoint you expressed. Correct?

A. He might have said that, but all I know is that I was suspended for what I said. The school didn't like what I had to say, some of the other students didn't like it.

Unit 5: Lesson 3  
First Amendment Rights in Schools

Q. So what about the lewd language? You've testified that the patch said "The NSA Sucks." "Sucks" refers to a sexual act, right?

A. Um, no.

Q. Well then what does it mean, in your opinion?

A. It just means "stinks" or "is lame."

Q. But it is commonly understood to refer to a sexual act, correct?

A. No, not really.

Q. So after your suspension, what happened after you returned to school?

A. Pretty much nothing. A few people said stuff to me, both positive and negative, but it wasn't really a big deal around the school after I got back. I was really embarrassed about being suspended, and I didn't want to talk about it, so no one really bugged me about it.

Q. Are you in college now?

A. No.

Q. Why not?

A. Well, I decided to take a year off and so I'm applying this year.

Q. Why did you decide to take a year off?

A. A lot of it was because of the suspension. I had already applied to colleges when I got suspended, but then I had to update them about the suspension, so I decided to withdraw my applications instead.

Q. Why did you withdraw your applications?

A. I was worried that the suspension would negatively impact my chances for acceptance. So I wanted to wait until I could get the school to withdraw the suspension or until the court case finishes.

Q. Prior to this incident, had you ever gotten into trouble in school?

A. No, never.

Q. What about your performance in school? Were you a good student?

A. Yes. I graduated with a 3.8 GPA.

Q. How did you get along with your classmates?

A. Really well. I mean, that's probably one of the reasons I was elected to student council in the first place. I think like 8 or 9 kids ran for just 2 senior class rep spots, and I got the most votes out of everyone.

Q. And what about your teachers? Did you get along well with them?

A. Of course. Up until the suspension, I always really liked school, my classes, all that stuff.

### **Handout 11**

#### *Principles of Negotiation*

(adapted from Roger Fisher and Douglas Stone,  
Consensus Building Institute and the Program on Negotiation at Harvard Law School,  
<http://www.pon.harvard.edu>)

Negotiations do not just happen during the litigation process; negotiations occur throughout our daily lives and are used to decide many conflicts, big and small. A negotiation can result in two countries signing a trade agreement or can help you and a friend decide what restaurant to go to for dinner. A negotiation is a bargaining process that involves both give and take – parties must work together to find common ground and reach a solution that settles the conflict.

At the center of every negotiation is the conflict between the parties. This conflict, however, does not mean that the negotiation is a zero sum game where one party can only gain if the other party loses. Instead, negotiations can be *value adding* by addressing and satisfying each party's underlying interests and needs. Parties can create a value-adding negotiation by focusing on the different sources of conflict. There are four main sources of conflict:

- **Interests**
  - **Interests** are what the party wants and their reasons for wanting those things. During a negotiation it is important to listen to the party's demands and to analyze the underlying needs or desires that drive those demands. Basing a negotiation off a discussion of true interests, instead of a debate about demands, will help both sides get what they want and help generate nuanced and creative solutions.
  - During a negotiation it may be helpful to ask questions such as: Why is that important to you? How does this demand address your goals or interests?
- **Beliefs**
  - **Beliefs** underlie the positions of each party. There are two types of beliefs: beliefs about the way the world is (beliefs about what is true) and beliefs about the way the world should be. Both types of beliefs are often affected by the parties' past experiences or the parties' relationships with each other.
  - During a negotiation it may be helpful to ask both yourself and the other side: Why do you believe that your proposed solution is the best way to resolve the issue?
- **Emotions**
  - **Emotions** are how a person feels about something, whether it is the conflict, a demand, or a proposed solution. It is difficult to keep emotions out of a negotiation, however it is important that parties make sure their emotions don't get in the way of reaching a solution. Parties often feel anger toward the other side, fear of losing what they want, or pride about their own beliefs.
  - During a negotiation, it will be particularly important to understand the party's emotions when you are discussing the facts. It may be helpful to ask: How did that make you feel? What caused you to feel that way? How does this solution make you feel better?



- **Roles**
  - **Roles** are the labels people use to define themselves and the groups they identify with and belong to, such as student, parent, or teacher. The identity of each of these roles is shaped by history, culture, qualities, and characteristics.
  - During a negotiation it may be helpful to ask: What roles do you represent in the negotiation? How does this role shape your demands?

Once you have analyzed the conflict from both parties' points of view, it is important to think about developing solutions. A good starting point is to think about the likely outcomes if you are *not* able to reach an agreement in the negotiation. It is important to think about both your ideal solution and the least favorable deal that you would be willing to except. Establishing both a bottom line and an ideal solution will determine a framework that you can work within and help you create a range of options that address different aspects of your party's goals and interests. This framework can help you create a structure of what you value; during a negotiation each party will have to make trade-offs and its important to know what issues you care about most and what issues you are more willing to concede. As you develop your solutions, look back to the interests of both parties, and think about how that option addresses each party's interest.

As you begin a negotiation, it is useful to build a relationship with the opposing party. A good way to do this is to the negotiation with small or easily resolved issues. Once you have found common ground with the opposing party it will be easier to work towards resolving the more difficult conflicts and developing more nuanced solutions. You will want to draft a set of initial questions and solutions you can explore with the opposing party. As you begin to draft solutions, think about how you can invent a solution that is beneficial for all parties. How does this solution respond to the needs of both your party and the opposing party? Together you will work together towards building a solution that addresses the underlying interests and needs of both parties.

**Handout 12A**  
*Confidential Information for Plaintiff's Counsel*

***Davis v. Ann Arbor School Board***

The judge has ordered the parties to engage in negotiations. Your client and his parents have asked you to try to settle the case. You have learned the following information from them to help you in your negotiations with counsel for the School Board.

The Davis family would prefer that this case not proceed to trial. They think that a trial could come out either way and do not want to risk losing. Kenji Davis is at a point in his life where he just wants to move on. The whole episode has been emotionally taxing, and he'd really like to move past the issue before he goes away to college. Although Kenji has graduated from high school, he is taking a gap year and will not apply to college until this coming fall. Kenji is worried that he will not be able to go to the college of his choice because he was suspended and lost his position on student council. He hopes that by settling this case and getting some sort of admission of wrongdoing out of the School Board, he can regain his prior competitive edge in the college admission process.

Kenji genuinely believes it was wrong that the school interfered with his right to express himself. He also believes that the school should not have held a mandatory assembly that highlighted working for a government organization that unconstitutionally spies on Americans. Even though he wants to settle for the reasons discussed above, it's important to him as a matter of principle that he stand up the school's policies, which he believes are unjust.

Details on what Mr. Davis is willing to settle for are as follows:

1. Money: Kenji's trial lawyer has taken the case "on contingency." That means she has agreed to forego any attorney's fees if Kenji loses the case. If Kenji wins at trial, the Defendant (the School Board) must pay for Kenji's reasonable attorney's fees. Kenji's lawyer's (reasonable) rate is \$200 per hour, and she will spend about 200 hours preparing for trial. This means his lawyer would be entitled to \$40,000 of attorney's fees if Kenji wins the case. (In a real trial, both the cost and the hours would likely be substantially higher). So either way, if the case goes to trial, Kenji doesn't have to worry about paying his attorney; if he wins, the Defendant pays, but if he loses, the lawyer does not get paid by anyone.

Kenji's lawyer has already spent 100 hours preparing for trial. To settle the case, Kenji and his family would like the School Board to pay the \$20,000 her time is worth.

Kenji would also like compensation for his reputational and emotional injuries, the full extent of which he believes is not yet measurable. He thinks that \$10,000 would be the proper amount for this harm, but recognizes that this might be difficult to obtain.

Kenji further believes that there is a good chance that these events could lead to a loss in earnings down the line. He already fears that he won't get into good colleges when they

Unit 5: Lesson 4  
First Amendment Rights in Schools

see that he has been suspended and kicked off of student council. (Kenji is very concerned that the college he attends will make or break his future.) He knows this number is tough to quantify, but ideally he'd like \$50,000 to offset his lost earning potential. That is, he says he won't be able to go to as good of a college, and therefore he won't get as good of a job, and won't earn as much money. If the School Board is reluctant to compensate him for lost earning potential, he would be satisfied if it agreed to the non-monetary conditions below, particularly those that would help him regain his status as a student leader and get into the colleges of his choice.

2. Other considerations: It is very important to Kenji that this episode not affect his future. Thus, he wants the suspension removed from his permanent record. He also wants a letter of recommendation to colleges from the Principal or Vice Principal, admitting that the suspension was wrong.
3. Kenji would also very much like to be reinstated, retroactively, to his position on student council. While that wouldn't have a practical effect because he has already graduated, it would allow him to list his student council membership on his resume and his college applications. As an active student leader for many years, Kenji is frustrated that he has had to essentially erase this important part of his high school experience from his resume, and of course, he believes that this important leadership role will help his college applications.
4. Lastly, Kenji feels this whole episode would be pointless if it does not result in some change to school policy regarding political speech, and assemblies in general. He'd like to see the school rule forbidding political buttons or messages rescinded, because he believes students should have the right to express their political opinions in school. Kenji also believes that the school shouldn't host assemblies promoting any topic the student body votes not to hear about. He thinks having students vote about every assembly would encourage them to learn more about current events. At a minimum, the assemblies shouldn't be mandatory; if students don't want to hear a particular speaker try to tell them about how great the NSA is, or the military, or some other potentially controversial employer, they shouldn't have to. Alternatively, because he is concerned about other kinds of mandatory assemblies that contain a political component, he wants the school to enact a policy under which an opposite political view is presented.
5. While they don't want to go to trial given the information above, the Davis family will take the risk if the Defendant plays hardball. Therefore, their absolute bottom line is (1) \$22,000 in money, of which \$20,000 would go to the attorney, and (2) the School somehow lessening the impact of the suspension on Kenji's permanent record, backed up by a glowing letter of recommendation from an appropriate employee of the High School. If the Defendant won't agree to that, they would prefer to go to trial. Of course, they would like to settle for a lot more.

**Handout 12B**  
*Confidential Information for Defendant's Counsel*

***Davis v. Ann Arbor School Board***

The judge has ordered the parties to engage in negotiations. Your client has asked you to try to settle the case. You represent the School Board. You have learned the following information from the members of the School Board to help you in your negotiations with counsel for Mr. Davis.

The School Board would like to avoid trial in this case. The Board thinks that a trial could come out either way. It is concerned that a trial would generate a lot of bad publicity, especially given the generally liberal leanings of the Ann Arbor community. Board members fear that this negative publicity would be a distraction to the High School's educational mission (as well as endanger their chances of being reelected to the School Board). Negative publicity could also negatively affect enrollment, which would reduce the per-pupil funding the district receives from the state. That is a particular concern during these difficult economic times, when budget pressures are intense. (The Governor has just released his proposed budget, which would further decrease the funding the Ann Arbor schools receive. That makes it even more important to maintain enrollment numbers.)

The Board is also concerned that a trial would be extremely costly. The School Board's trial attorney charges \$200 per hour and has already worked on this case for 100 hours, which means the School Board already owes him \$20,000. If they go to trial, the attorney will put in another 200 hours to prepare for trial, which adds \$40,000 to the bill. (In a real trial, both the cost per hour and the hours of preparation would likely be substantially higher).

Additionally, if Kenji wins at trial, the School Board will be required to pay for Kenji's attorneys' fees as well as their own. Assuming Kenji's lawyer charges \$200 an hour and will spend 200 hours preparing for trial, she would be entitled to \$40,000 if Kenji wins the case. If Kenji loses, the School Board doesn't have to pay Kenji's attorney, but must still pay their own attorney.

The School Board is also concerned about maintaining the public perception that it can control and discipline its students. It is concerned that if it appears to make too many concessions to Kenji, other students will act out in similarly obnoxious and juvenile ways and the administration's ability to maintain discipline in the High School will be compromised.

Details on what the School Board is willing to settle for are as follows:

1. Money: The School Board is willing to pay some money to avoid having the case go to trial. Kenji is likely to demand the school board pay for his attorneys' fees, which he would be entitled to get if he won the case. While the Board is willing to provide some of Kenji's attorneys' fees, it is less willing to pay a substantial amount in compensation for Kenji's alleged reputational and emotional injuries. The Board would prefer to keep the total payment (for attorneys' fees and any damages) at \$15,000 or less, but is willing

Unit 5: Lesson 4  
First Amendment Rights in Schools

to pay up to \$30,000 if absolutely necessary to settle the case. Anything above that, and the Board would prefer to take its chances at trial.

2. Other considerations: The Board recognizes that Kenji will also likely make some non-monetary demands as a condition for settling the suit. Due to the concerns about negative publicity discussed above, the Board is wary of any sort of public admission of wrongdoing. The Board recognizes, however, that Kenji was a model student prior to this incident and does not feel the need to further punish him.
3. Removing the suspension from Kenji's permanent record is something the Board is reluctant to do. The School maintains that it was an appropriate punishment for disruptive behavior. However, the Board does not want to prevent Kenji's from going to a good college and would be willing to note in Kenji's permanent record that aside from the suspension, he had no other disciplinary problems. Furthermore, given its recognition that Kenji has for the most part been a good student, the Board is willing to agree that the High School will provide a letter of recommendation for his college applications, although it is not willing to admit to wrongdoing in relation to the suspension in the letter. Given the school's reluctance to admit wrongdoing by the administration, the Board thinks it would look foolish to have a principal or vice principal at the High School write the recommendation.
4. Your client is willing to retroactively reinstate Kenji to the student council. While that wouldn't have a practical effect because he has already graduated, it would allow him to continue to list his student council membership on his college applications and resume. The School Board is willing to take that step only if he takes responsibility for his actions. This would ideally require some sort of public acknowledgment that he acted in an immature manner, or at least a private written statement to Vice Principal Carpenter and Ms. Marquez acknowledging poor judgment.
5. Finally, Kenji has suggested he may make demands concerning future assemblies, political speech, and viewpoint neutrality at the school. The School Board is unwilling to repeal the rule forbidding political T-shirts or patches, as they believe it is necessary to maintain a peaceful and focused learning environment. As for assemblies, the School Board has a relationship with many local university and government leaders, and views assemblies featuring those individuals as valuable to students as they consider their futures. The Board wants the High School to be able to continue telling students about many different career opportunities in a highly publicized way, although you can explore options besides a mandatory assembly. The school is reluctant to have too many assemblies and is reluctant to invite overly political speakers to the High School. Any assembly has to have a clear educational purpose.

**Handout 13**  
*Negotiation Planning*

	Plaintiff (student)	Defendant (Vice Principal, school)
Interests  <i>“The plaintiff  wants _____  because...”</i>		
Beliefs  <i>“The defendant  believes  _____  because ...”</i>		
Emotions  <i>“The plaintiff  feels _____  about ....”</i>		
Role  <i>“The  defendant’s  role as _____  influences...”</i>		

1. What are your client’s goals? How flexible or firm are each of your client's demands or wishes?

2. What is your ideal outcome? What do you think is your opponent's ideal outcome?

Unit 5: Lesson 4  
First Amendment Rights in Schools

3. What is your "bottom line" -- the absolute minimum that your client would settle for? How do you think your opponent would answer this question?

4. What challenges do you think you will face in coming to an agreement? How do you plan to overcome those challenges?

5. How will you begin the negotiation and establish a rapport with the opposing party?

6. Develop a negotiation strategy. What will you start out asking for? What things do you want to reveal to the opposing party, and when? Is there anything you will keep hidden?

7. Brainstorm proposed solutions, considering:

- Money awarded
- Policy changes
- Actions that the school must take
- Actions that Kenji must take

**Handout 14**  
*Negotiation Report*

In the space below, provide the detailed results of your settlement agreement. Once both parties have agreed to the written terms, each group member must sign the agreement.

**Terms of the Settlement Agreement:**

**Money awarded:**

**Policy changes within the school:**

**What Plaintiff (Kenji) has agreed to do:**

**What Defendant (the Ann Arbor School Board) has agreed to do:**

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Signatures of Plaintiff's Counsel

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Signatures of Defendant's Counsel



**Handout 15**  
*Negotiation Evaluation*

1. How does your solution achieve each party's goals and interests? What trade offs did you have to make?

2. What was your overall negotiation strategy? Was it effective?

3. What did you reveal to the other party? What did you keep secret? Why? How did this impact the overall negotiation?

4. What obstacles did you face in reaching an agreement? How did you overcome these obstacles?

Unit 5: Lesson 6  
First Amendment Rights in Schools

5. What did you learn about your opponent's bottom line and ideal solution? Which party do you think had the stronger negotiating position?

6. Are you satisfied with the settlement agreement? What mistakes do you think you made? If you could redo the negotiation what would you change?

7. What did you learn about yourself as a negotiator?

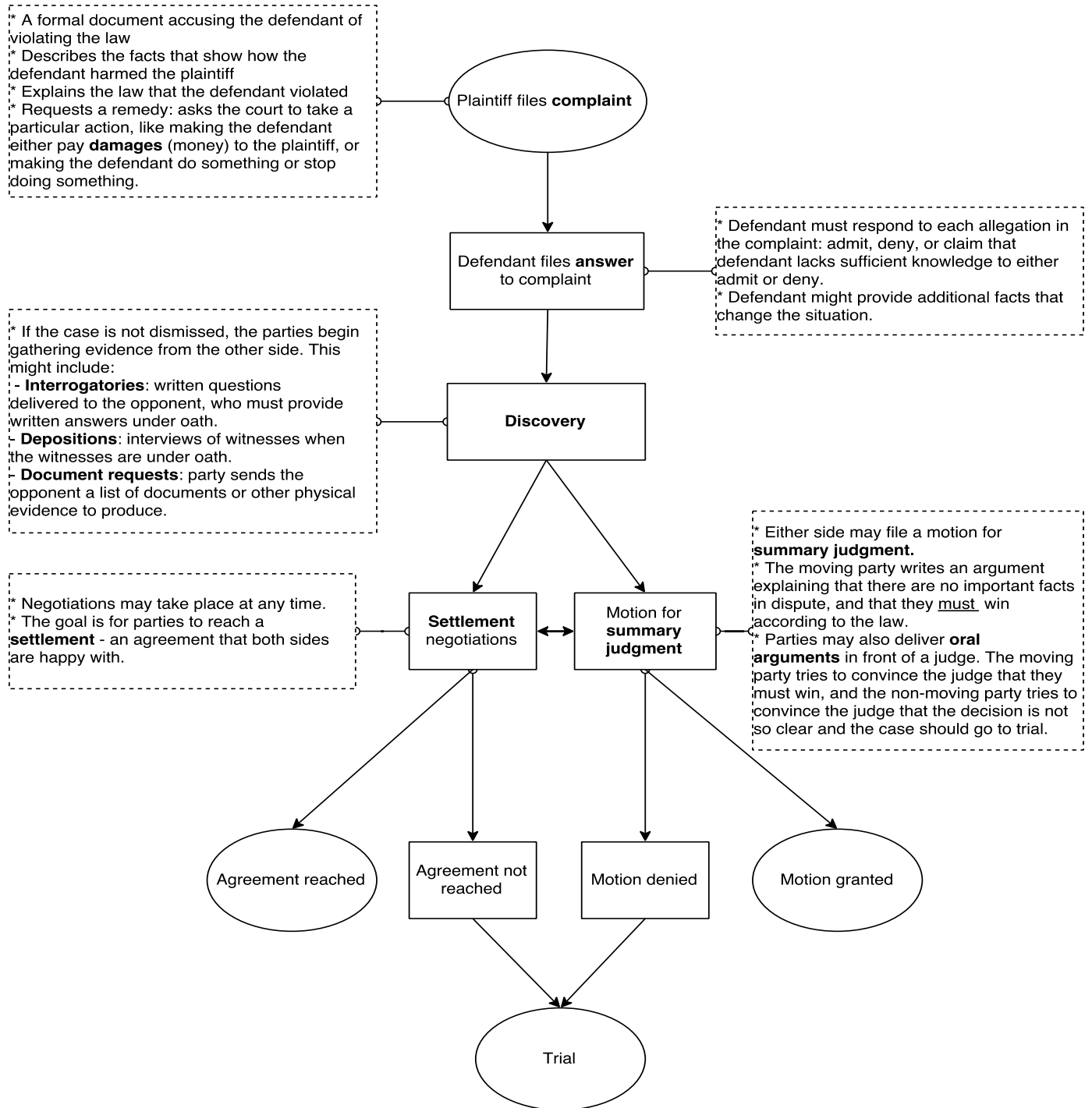
**Handout 16**  
*Summary judgment video quiz*

Answer the following questions while watching the short video at this link:  
<https://www.youtube.com/watch?v=hMhIyh2WjjY>

1. Summary judgment is when a judge makes a decision with / without a trial.
2. What happens during discovery?
  - (a) The parties negotiate and try to settle the case
  - (b) The Plaintiff writes a complaint against the Defendant
  - (c) The judge makes a decision
  - (d) The parties share all the relevant evidence with each other
3. A motion for summary judgment would only be appropriate if:
  - (a) There are no important facts in dispute
  - (b) The parties do not agree on the important facts
4. If summary judgment is granted, that means:
  - (a) If there were a trial, the jury could reasonably decide in favor of either party.
  - (b) We know that if the jury follows instructions, the jury would have to decide in favor of the party seeking summary judgment.
  - (c) We know that if the jury follows instructions, the jury would have to decide in favor of the party opposing summary judgment.

Handout 17

The Litigation Process



**Handout 18**  
*Oral Argument*

**A. What is an oral argument?**

In an oral argument, the lawyers for each party stand up in front of a judge or a panel of judges to explain their legal arguments and answer the judge's questions. Before the oral argument, the lawyers submit written briefs, which are persuasive documents explaining the facts of the case, the relevant law, and the lawyers' analysis. By the time the oral argument begins, the judges have usually had a chance to read the lawyers' briefs. That means the judges already have some knowledge about what is going on in the case, and they might have some questions in mind that they want to ask the lawyers.

**B. What does an oral argument look like for a summary judgment motion?**

In this case, the plaintiff Kenji Davis is moving for summary judgment. That means, according to Kenji (the "moving party,") two things are true:

- (1) There are no important facts in dispute; both sides agree about what happened.
- (2) Kenji should win as a matter of law because his First Amendment rights were clearly violated. There is no need to go to trial; the judge should decide right now.

Meanwhile, the Defendant, the Ann Arbor School Board, wants to oppose the motion. Their goal is to convince the judge that the plaintiff does *not* win, because the law could be interpreted reasonably in favor of the Defendant.

For this exercise, there will be a few important differences between the class oral argument and a real life oral argument for a summary judgment motion.

<b>Class oral argument</b>	<b>Real oral argument for summary judgment</b>
The lawyers will argue in front of a panel of several judges.	Lawyers would argue in front of just one district court judge.
Each side will have many lawyers. Each lawyer will make just one argument, so that everyone gets to participate.	Each side would be represented by 1 lawyer, who makes all of the arguments. (Occasionally, two lawyers will split the arguments).
Lawyers will deliver an introduction to lay out the facts of the case and a roadmap, as well as a conclusion to sum up the arguments and ask the court for relief.	Usually, lawyers do not bother with an introduction or conclusion because the judge has already read the briefs, and the lawyers want to use all of their time for the legal arguments.
The plaintiffs will have a chance to rebut each point.	The moving party would only have one chance at rebuttal, after the opponent has finished.

**C. What roles may students play during the class oral argument?**

- Judges - The judges' job is to listen to the lawyers present their arguments, ask clarifying or challenging questions, and ultimately decide whether summary judgment should be granted -- that is, whether Plaintiff Kenji Davis should win without even going to trial. Judges are free to interrupt the lawyers with questions. When the judge interrupts, the lawyer should stop speaking, listen to the question, and immediately answer it before proceeding with his or her prepared arguments.
- Lawyers for Plaintiff - Kenji Davis's lawyers will present several arguments to persuade the court that Kenji's First Amendment rights were violated. These arguments include: the speech was not disruptive; the speech was political; the school engaged in viewpoint discrimination; the speech was not school sponsored; the speech does not raise legitimate educational concerns; and the speech is not lewd, vulgar, or socially inappropriate.
- Lawyers for Defendant - The Ann Arbor School Board's lawyers will present several arguments to persuade the court that a summary judgment for the Plaintiff is not appropriate. In other words, the Defendant's lawyers are arguing that Kenji's First Amendment rights were not clearly violated as a matter of law. These arguments include: the speech was disruptive; the speech was not political; the school did not engage in viewpoint discrimination; the speech was school sponsored; the speech does raise legitimate educational concerns; and the speech was lewd, vulgar, or socially inappropriate.

#### **D. How do the lawyers use case law to support their arguments?**

Lawyers should use controlling case law to help make their points. Here, the lawyers will be able to refer to *Tinker*, *Fraser*, or *Hazelwood*. Because everyone needs a chance to participate, each lawyer will only make one argument, and therefore should only refer to one case during his or her turn. Of course, real lawyers will incorporate many different cases.

Here are some ways to use a case.

- Cite the rule of law. Use the case to explain what the rule is that the court must follow.
  - Example: "In *Fraser*, the Supreme Court held that school officials may prohibit student speech that undermines the school's basic educational mission because it is lewd and vulgar. Kenji's speech fit this description. It is lewd because ..."
- Use persuasive language. You might wish to quote an opinion, even if the quote does not constitute the holding, because the language is especially persuasive.
  - Example: "The Supreme Court pointed out in *Tinker* that 'students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.' By censoring Kenji's speech, the Defendant was wrongfully trying to confine him to school-approved viewpoints. Therefore..."
- Analogize. Explain how the facts of the case are similar to the facts at issue here. Explain why, because *this* case is like *that* case, the outcome should be similar.

Unit 5: Lesson 7

First Amendment Rights in Schools

- Example: "There was no substantial disruption in *Tinker*. There, the school day continued without disturbance; there were no interruptions in school activities and no interference with classes. The same is true here because..."
- Distinguish. Explain how the facts of the case are different from the facts at issue here. Because the facts are different, the outcome should be different too.
  - Example: "In *Hazelwood*, the speech was clearly school sponsored because the content of the newspaper was supervised and approved by school officials. In contrast, no school official purported to approve the message on Kenji's T-shirt..."

Now you try. Refer to *Tinker*, *Hazelwood*, and *Fraser* (Handouts 3, 5, and 6) and think of another way that you can use one of them for each of the purposes below.

(1) Cite the rule of law.

(2) Use persuasive language.

(3) Analogize.

(4) Distinguish.

**Handout 19**  
*Mock argument role assignments*

**Sequence of events:**

1. The Plaintiff gives introduction. Then the Defendant gives introduction.
  2. The Plaintiff presents argument #1 (2 mins)
  3. The Defendant presents argument #1 (3 mins)
  4. The Plaintiff presents rebuttal to argument #1 (1 min)
  5. The Plaintiff gives conclusion. Then the Defendant gives conclusion.
- } Repeat for arguments #2-6

Plaintiff			Defendant		
Content	Time	Student name	Content	Time	Student name
<b>Introduction</b>	2 mins		<b>Introduction</b>	2 mins	
<b>Argument #1:</b> The speech was not disruptive	2 mins + 1 min rebuttal		<b>Argument #1:</b> The speech was disruptive	3 mins	
<b>Argument #2:</b> The speech was political	2 mins + 1 min rebuttal		<b>Argument #2:</b> The speech was not political	3 mins	
<b>Argument #3:</b> The school engaged in viewpoint discrimination	2 mins + 1 min rebuttal		<b>Argument #3:</b> The school did not engage in viewpoint discrimination	3 mins	
<b>Argument #4:</b> The speech was not school sponsored	2 mins + 1 min rebuttal		<b>Argument #4:</b> The speech was school sponsored	3 mins	
<b>Argument #5:</b> The speech does not raise legitimate educational concerns	2 mins + 1 min rebuttal		<b>Argument #5:</b> The speech does raise legitimate educational concerns	3 mins	
<b>Argument #6:</b> The speech is not lewd, vulgar, or socially inappropriate	2 mins + 1 min rebuttal		<b>Argument #6:</b> The speech is lewd, vulgar, or socially inappropriate	3 mins	
<b>Conclusion</b>	2 mins		<b>Conclusion</b>	2 mins	
<b>Judges:</b>					
_____					
<b>Clerk:</b>					
_____					



**Handout 20A**  
*Prep for introduction*

Name: \_\_\_\_\_

Plaintiff or Defendant: \_\_\_\_\_

After you greet the judges and introduce yourself, what will be the very first thing you say about the case? This should be a strong statement of what your team is here to argue.

How will you introduce your client? Remember that you want to personalize your client to the judges and characterize your client in the most sympathetic way possible.

How will you summarize what happened in the case? Think about how you want to present the story. You want to (truthfully) paint the picture in a way that makes your client look the best. You should choose 3 main points that you want to emphasize.

At the end of the mock argument, what do you want the judges to do for your client? How should the judges rule?

Practice your introduction with two other students on your team. Have them sign here when finished:

(1) \_\_\_\_\_ (2) \_\_\_\_\_

**Handout 20B**  
*Prep for argument*

Name: \_\_\_\_\_

Plaintiff or Defendant: \_\_\_\_\_

Which argument are you making?

Which facts from the depositions will be helpful for your argument?

Which facts from the depositions are not so good for your argument, and how will you respond if the judge or your opponent brings them up?

Because you will only have a few minutes to argue, you should choose just one case to discuss. Which case will you use: *Tinker*, *Hazelwood*, or *Fraser*? What does the case say that will help you make your point?

Write down any relevant quotes or language from the case that you will want to use.

Overall, how would you rate the strength of your argument on a scale of 1-10? (10 is the strongest). Why?

Practice your argument with two other students on your team. Have them sign here when finished:

(1) \_\_\_\_\_ (2) \_\_\_\_\_

**Handout 20C**  
*Prep for conclusion*

Name: \_\_\_\_\_

Plaintiff or Defendant: \_\_\_\_\_

How will you summarize the conflict in this case? Explain what happened, from your client's perspective.

How is the other side at fault?

What are the strongest facts from the depositions that support your client?

What facts from the depositions hurt your side? How will you explain or address those facts?

Why is the outcome of this case important? What message will this case send to society as a whole if the judges rule for you? What if they rule for your opponent?

How should the judges rule? If they decide that the School Board violated the First Amendment, what should they tell the Defendant to do?

Practice your conclusion with two other students on your team. Have them sign here when finished.

(1) \_\_\_\_\_ (2) \_\_\_\_\_

**Handout 20D**  
*Prep for judges*

Name: \_\_\_\_\_

**How to Play ‘Devil’s Advocate’**

(Adapted from Jonathan Dorn, "For Argument's Sake: Playing 'Devil's Advocate' with Nonfiction Texts," [http://www.readwritethink.org/files/resources/lesson-docs/HowtoPlay\\_Devils\\_Advocate.pdf](http://www.readwritethink.org/files/resources/lesson-docs/HowtoPlay_Devils_Advocate.pdf) )

Playing ‘devil’s advocate’ is taking an opposing viewpoint or raising an objection to a claim merely for the sake of argument. You do not actually have to believe what you are saying when you raise these questions or objections; you are simply arguing in order to clarify issues and generate debate. This is a skill that requires considerable practice but when executed well, offers new insights, challenges stagnant thinking, and increases the rigor of debate and level of understanding.

In 2015, the Supreme Court held that the right to marry is a fundamental right, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same sex may not be deprived of that right. Therefore, States must allow same-sex marriage and must also recognize lawful same-sex marriages performed in other States. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

The examples below will provide strategies to help you become an astute yet insightful devil’s advocate. The “speaker” in these examples wants the Supreme Court to change its mind and stop requiring States to recognize same-sex marriages. Meanwhile, the “devil’s advocate” wants to uphold the Supreme Court’s decision.

<p><b>1. Ask incisive questions.</b></p> <p><u>Speaker</u>: “The Supreme Court should reverse its decision that required states to recognize same-sex marriages.”</p> <p><u>Devil’s Advocate</u>: Who does this disadvantage? Are there any exceptions to this proposal? Should the Court overturn the entire decision, or just parts of it?</p>	<p><u>Plaintiff</u>: The school should repeal the rule against political buttons, patches, and T-shirts.</p> <p><u>Judge</u>:</p>
<p><b>2. Consider proposals from other people’s perspectives.</b></p> <p><u>Speaker</u>: “States should no longer have to recognize same-sex marriages.”</p> <p><u>Devil’s Advocate</u>: What about the couples who are already married? What about the children who live with married same-sex couples? Should their opinions be given any weight?</p>	<p><u>Defendant</u>: Kenji's speech was disruptive to the school.</p> <p><u>Judge</u>:</p>
<p><b>3. Think of comparable scenarios that refute the original claim.</b></p>	<p><u>Defendant</u>: Kenji's speech was considered to be school-sponsored speech.</p>

Unit 5: Lesson 8  
 First Amendment Rights in Schools

<p><u>Speaker</u>: "Marriage is meant to provide a stable and safe relationship in which couples can procreate. Since same-sex couples cannot procreate, they have no need for marriage."</p> <p><u>Devil's Advocate</u>: Many straight couples are infertile, are too elderly to have children, or simply do not want children. Does that mean they too have no need for marriage?</p>	<p><u>Judge</u>:</p>
<p><b>4. Pose hypothetical situations to clarify issues.</b></p> <p><u>Speaker</u>: "States should be allowed to recognize same-sex marriages if they want to, but they shouldn't be forced to."</p> <p><u>Devil's Advocate</u>: Suppose a same-sex couple gets married in one state and lives there for several years. Then they have a career change or a family emergency which requires them to move to another state, which does not recognize same-sex marriage. What happens to the couple?</p>	<p><u>Plaintiff</u>: Kenji's speech was not lewd or vulgar.</p> <p><u>Judge</u>:</p>
<p><b>5. Pose alternative explanations or solutions to problems.</b></p> <p><u>Speaker</u>: "Judges, clerks, and magistrates are unfairly forced to violate their religious convictions by being required to marry same-sex couples."</p> <p><u>Devil's Advocate</u>: But as government workers, they are supposed to uphold the laws of the United States. If their job requirements would violate their religious convictions, wouldn't it make more sense for them to pursue a different job?</p>	<p><u>Plaintiff</u>: The school should allow students to express their political opinions during mandatory school assemblies that feature political speakers.</p> <p><u>Judge</u>:</p>
<p><b>6. Use <i>reductio ad absurdum</i></b> – the technique of reducing an argument or hypothesis to absurdity, by pushing the argument's premises or conclusions to their logical limits and showing how ridiculous the consequences would be, thus disproving or discrediting the argument.</p> <p><u>Speaker</u>: "The United States is a Christian nation, and should base its laws in the Bible."</p> <p><u>Devil's Advocate</u>: But the Bible has a lot of rules that we don't follow today. Are you really saying we should follow all of them? What about...?</p>	<p><u>Defendant</u>: The school must be allowed to censor what is on a student's T-shirt.</p> <p><u>Judge</u>:</p>

Unit 5: Lesson 8  
 First Amendment Rights in Schools

<p><b>7. Expose an exception to the proposal.</b></p> <p><u>Speaker</u>: "Marriage is a traditionally religious institution and should remain such."</p> <p><u>Devil's Advocate</u>: What about civil marriages that take place in courthouses or other non-religious environments?</p>	<p><u>Plaintiff</u>: A message on a student's T-shirt or clothing can never be considered school-sponsored speech.</p> <p><u>Judge</u>:</p>
<p><b>8. Identify hidden assumptions</b></p> <p><u>Speaker</u>: "Homosexuality is wrong because it is unnatural."</p> <p><u>Devil's Advocate</u>: You are assuming that if something is unnatural, it is wrong. Man-made medications are also unnatural. Does that mean medications are wrong too?</p>	<p><u>Defendant</u>: The students were acting rowdy during the assembly because of the lewdness of Kenji's message.</p> <p><u>Judge</u>:</p>
<p><b>9. Provide evidence that is ignored but contradicts the proposal</b></p> <p><u>Speaker</u>: "Studies show that children benefit from having both a mother and a father in the household."</p> <p><u>Devil's Advocate</u>: While that is true, studies also show that children raised by two same-sex parents do not show any developmental disadvantages compared to children raised by two opposite-sex parents.</p>	<p><u>Plaintiff</u>: Kenji's speech was not disruptive in any way.</p> <p><u>Judge</u>:</p>
<p><b>10. Show the downside of the proposal</b></p> <p><u>Speaker</u>: "No one is stopping same-sex couples from living together and loving each other; it's just that state should not have to recognize their relationships as a marriage."</p> <p><u>Devil's Advocate</u>: The problem with that idea is that the couples would lose out on all of the legal benefits associated with marriage.</p>	<p><u>Plaintiff</u>: "The NSA sucks" should be considered political speech.</p> <p><u>Judge</u>:</p>

**Handout 21**  
*Mock argument rubrics*

For arguers:

<b>Category</b>	<b>3</b>	<b>2</b>	<b>1</b>	<b>0</b>
<b>Factual support</b>	Refers to facts from the depositions regularly and accurately	Sometimes refers to facts from the depositions	Regularly forgets, misstates, or ignores the facts of the case	Does not demonstrate any knowledge of the facts of the case
<b>Legal support</b>	Refers to and effectively uses relevant Supreme Court opinions when arguing	Refers to relevant Supreme Court opinions but is not clear about how those opinions support the speaker's point	Demonstrates minimal knowledge of any of the Supreme Court opinions	Does not attempt to refer to any relevant Supreme Court opinions
<b>Rebuttals and Questions</b>	Comfortably responds to questions from the judges and unfavorable arguments from the opposite side	Responds to some questions or opposing arguments, but ignores others that need to be addressed	Gives quick and minimal answers to judge's questions without engaging in the problem presented	Does not attempt to respond to questions or address the other side's arguments at all
<b>Listening</b>	Listens attentively to judge's questions, opposing arguers, and arguers on own team	Listens attentively during own round but does not listen to everyone else's round	Does not pay attention when opposing side is arguing	Distracts the class from the mock arguments and does not engage
<b>Preparation and participation</b>	Completed all necessary preparation and practice during class time	Completed some necessary preparation and practice during class time	Did not complete all necessary preparation or did not practice during class time	Did not turn in the preparation at all and did not use class time to practice or prepare

Name: \_\_\_\_\_

Total: \_\_\_\_\_ / 15 points

Unit 5: Lesson 9  
 First Amendment Rights in Schools

For judges:

<b>Category</b>	<b>3</b>	<b>2</b>	<b>1</b>	<b>0</b>
<b>Factual knowledge</b>	Asks questions with accurate references to the facts from the depositions	Questions are sometimes grounded in the facts from the depositions	Regularly forgets, misstates, or ignores the facts	Does not demonstrate any knowledge of the facts of the case
<b>Legal knowledge</b>	Asks detailed questions with accurate references to the Supreme Court opinions	Questions are sometimes related to the Supreme Court opinions, but only superficially	Demonstrates minimal knowledge of any of the Supreme Court opinions	Does not attempt to ask about any Supreme Court opinions
<b>Rebuttals and Questions</b>	Asks several relevant questions throughout the arguments; interrupts politely and asks follow-up questions when appropriate	Asks some questions throughout the arguments but does not engage with the speaker's responses	Only asks one or two questions throughout the arguments; questions are over-simplified	Does not attempt to ask any questions or engage with the speakers at all
<b>Listening</b>	Listens attentively to other judge's questions and all arguers	Listens attentively during some rounds but does not others	Does not pay full attention to the arguers or other judges	Distracts the class from the mock arguments and does not engage
<b>Preparation and participation</b>	Completed all necessary preparation during class time	Completed some necessary preparation during class time	Did not complete all necessary preparation during class time	Did not turn in the preparation at all and did not use class time to prepare

Name: \_\_\_\_\_

Total: \_\_\_\_\_ / 15 points



**Handout 22**  
*Mock argument reflections*

Name: \_\_\_\_\_

Role: \_\_\_\_\_

What did you do well during the mock argument?

What did you find to be the most challenging? How did you address this challenge and what would you do differently if you had the chance?

How do you feel about the format of a mock argument? Do you think it is effective to have the judges ask questions and interact with the attorneys, or not? Why?

Do you think the clients (Kenji Davis and the School Board) would be happy with how they were represented? Why or why not?

Unit 5: Lesson 9  
First Amendment Rights in Schools

In your opinion, should the judges grant summary judgment for either party, or should this case proceed to a formal trial? Why?

What advantages or disadvantages might each party experience if the case proceeded to trial?

Which arguments did your classmates make that you hadn't thought of before? Did any of your classmates make you think of the case a little differently?