

Responding to Student Social Media Posts with Discipline? Read This First

PUBLISHED ON
July 2, 2020

A school district violated a student's First Amendment rights when it suspended her from extracurricular activities after she created a social media post that mentions the school and used obscene language.

[A recent Third Circuit opinion](#) held that online student expression can qualify for First Amendment protection. Speech protected under the First Amendment is more difficult for government and public entities, like public schools and colleges, to restrict or punish.

Narrow exceptions to the First Amendment provide avenues for regulating expression when a student speaks "in the school context." Speech or expression that occurs in the school building, during the school day, on a school bus, or at a school-sponsored activity is clearly in the school context. Even though students retain some First Amendment protection, their expression can be regulated or restricted because of the unique characteristics of the school setting.

So, for example, the U.S. Supreme Court in [Bethel School District No. 403 v. Fraser](#) found that a school may discipline a student for telling lewd jokes at a school assembly without running afoul of the First Amendment. In [Morse v. Frederick](#), however, the court opined that the same conduct - lewd jokes - could not be punished by a non-school governmental entity if the conduct occurred in a public forum outside of the school context.

Online posts that are not created on physical property owned by a school create a more challenging situation. In the recent Third Circuit case, the post was viewed by 250 people, many of whom were also members of the school community, but it was created on the weekend without using district owned technology. In addition, the post used an obscenity directed at the school's cheerleading team and did not advocate illegal activity or violence. Accordingly, the court found these "few points of contact" were not enough to be considered "in the school context."

The court also observed that schools and colleges cannot escape First Amendment scrutiny by pursuing avenues of discipline other than detention, suspension, or expulsion. The court explained that "[w]hat was unseemly and dangerous' about efforts to apply *Fraser* to off-campus speech was not the punishments the students received, but that those punishments were used to control' students' free expression in an area traditionally beyond regulation. Those concerns apply with equal force where a school seeks to control student speech using even modest measures"

Even when a student social media post advocates violence or threatens the school community, schools and colleges must analyze the specific facts in each situation before imposing discipline. In another recent case, for example, the Commonwealth Court agreed with a lower court decision expunging a student's expulsion for sending social media messages promising a school shooting. The online messages also said that the student who received the messages

would "perish in the storm." The expulsion could not be supported, the courts found, without more evidence of the student's intent to make a threat. Otherwise, the messages qualified for First Amendment protection, preventing the district from disciplining the student.

Public schools and colleges must exercise caution when restricting or responding to student expression on social media platforms. The past few months demonstrate that - now more than ever - online speech and expression are vital. School and work rely on virtual correspondence and online meeting rooms. Protesters have been able to organize using the internet in lieu of traditional word of mouth. Our social lives have transitioned to online platforms as well with comments, likes, and video calls replacing our online conversations.

In student conduct matters that implicate the First Amendment, schools and colleges should seek legal counsel. While the internet has blurred the off-campus/on-campus distinction, there are situations where schools and colleges are required to respond to student expression. Sexual harassment, threats of violence, and cyber-harassment may all necessitate official response. Those situations, however, also implicate First Amendment rights of the speaker. If you have any questions on the impact of these two cases to your policies and practices related to student conduct, please any member of the [Barley Snyder Education Practice Group](#).