



Lessons from Recent Court Rulings on Discipline of Students for Off-Campus, Online Speech

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Following on the heels of two recent decisions by the Federal Court of Appeals for the Third Circuit (which we addressed in a [FR Alert](#) in June), three additional federal courts issued opinions addressing the right of school districts to discipline students for off-campus, online speech.

All of the cases applied the familiar standard from *Tinker v. Des Moines School District*, a 1969 United States Supreme Court decision. Under this standard, school administrators may discipline students for protected speech when it is related to the school program and when it causes or is reasonably likely to cause material and substantial disruption to the educational environment. The following outlines some of the lessons that can be drawn about the substantial disruption standard from the cases.

Lesson 1: To establish that the speech is related to school, look at what steps a student took to keep electronic communications “private” or otherwise to limit their reach into the school environment. In *Kowalski v. Berkeley County Schools*, the Fourth Circuit Court of Appeals found a sufficient nexus and allowed discipline where a student created a webpage “for the purpose of inviting others to indulge in disruptive and hateful conduct,” even though her webpage was set to “private.” The student invited more than 100 people from her MySpace “friends” list (including classmates) to join a group created to bully another student. If a student takes steps to keep content private, in contrast, there may not be a sufficient nexus to discipline off campus, online speech.

Lesson 2: In the case of bullying through electronic means, focus on the impact on the victim and the risk for more serious harassment of the student at school to prove a substantial disruption. In *Kowalski*, the Fourth Circuit upheld suspension of a student for five days for using her home computer to create a discussion group webpage on MySpace.com called “S.A.S.H.,” which another classmate said stood for “Students Against Shay’s Herpes.” Shay was a classmate of Kowalski. Approximately two dozen students from the school responded to a request from Kowalski to join the group, and other students posted pictures ridiculing Shay, to which Kowalski responded encouragingly. The court found these facts sufficient to establish a substantial disruption and risk of a substantial disruption.

Lesson 3: In the case of threats through electronic means, focus on the required response by the school to prove a substantial disruption. In *D.J.M. v. Hannibal Public School District*, the Eighth Circuit Court of Appeals held that where school authorities spent considerable time dealing with concerns from parents about a student’s threat to shoot other students and ensuring that appropriate safety measures are in place to protect against the threat, there was a sufficient showing of a substantial disruption to warrant discipline of the student.

Lesson 4: If material posted on the internet is simply tasteless or obscene, be wary of disciplining the student without showing more than a mere buzz about the post. In *T.V. v. Smith-Green Community School Corp.*, a federal trial court in the Northern District of Indiana held that a school did not have the authority to discipline 15- and 16-year-old female students for posing for vulgar and sexually themed photos and posting them online. The court held that there was no substantial disruption because the only alleged disruption was two complaints from parents and “petty disagreements” among students about the content of the photos. Notably, although the *T.V.* case is from a trial court with no authority over school districts in Illinois, it is the first case in the jurisdiction of the



Seventh Circuit Court of Appeals to address the issue of discipline for online, off-campus misconduct. Accordingly, the case may be influential to other courts in the jurisdiction of the Seventh Circuit, which includes Illinois.

Lesson 5: The substantial disruption standard may apply to discipline addressing participation in extracurricular activities. In *T.V.*, the school district tried to argue that it did not need to prove a substantial disruption to suspend a student from an extracurricular activity, since participation in such an activity is a privilege, not a right. The court disagreed, noting that in that context, discipline could still only be imposed if the speech was disruptive. The court noted, however, that what constitutes a disruption may be different with respect to the dynamics of a team than in the general school setting.

One court also addressed the “true threat” exception to the First Amendment, providing the following insight for administrators.

Lesson 6: If a student threatens another student or member of the school community and the threat is believable, the student may be disciplined even if there is no showing of a risk of substantial disruption. Where a student makes a threat to injure or harm another student or member of the school community, the student’s speech may not be protected by the First Amendment at all. If speech is not protected by the First Amendment, it can be disciplined regardless of whether there is a showing of substantial disruption. Administrators should identify what details the student provides about the threat to determine if the threat is reasonably believable based on the details provided. For instance, the Eighth Circuit Court of Appeals in *D.J.M.* found that where a student with a history of depression identified five victims as well as others he would “let live,” identified the weapon he planned to use and indicated he had access to the weapon, and stated that he wanted his school “to be known for something,” the threat was a “true threat” not protected by the First Amendment. No person who heard the threat thought it was a joke, making it even more clear that the threat was a “true threat.” The student could be suspended for the remainder of the school year even though the threat was made at his home during non-school hours through an instant messenger service to a classmate, and regardless of whether the threat caused or was likely to cause a substantial disruption.

In light of these cases, careful attention should be paid to whether student speech falls within any of the relevant legal standards before any discipline is imposed.

More Information

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