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## Untangling the Confusion Involving Public School Censorship

**T**he First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” Public school students do not lose this right when they walk through the schoolyard gates. Students possess freedom of expression when they are in the cafeteria, on the playground, and at school-sponsored events. Freedom of speech includes the right to express opinions even on controversial topics. Although repugnant to society’s norms, rude, obnoxious, and sometimes hurtful comments are also allowed by freedom of speech. The dilemma is where the line is between when students have the right to speak and when they do not.

No one believes students automatically possess unlimited First Amendment rights in public schools. But mixed messages are conveyed through court decisions as to what are the appropriate limitations. On the one hand, schools have the authority to dictate limitations on student expression pursuant to “the special characteristics of the school environment.”<sup>1</sup> **“Learning is more vital in the classroom than free speech.”**<sup>2</sup> Schools are told that they

- Need not “surrender control of the American public school system to public school students.”<sup>3</sup>
- Need not tolerate expression that is inconsistent with the fundamental values or educational mission of public schools.<sup>4</sup>
- May limit the free speech rights of students in classrooms, “because effective education depends not only on controlling boisterous conduct, but also on maintaining the focus of the class on the assignment in question.”<sup>5</sup>
- May punish expression that promotes illegal drug use.<sup>6</sup>
- Have an “affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place.”<sup>7</sup>
- Can restrict on-campus speech that is lewd, vulgar, indecent, or plainly offensive.<sup>8</sup>

On the other hand, school leaders are

- Told students do not “shed their constitutional rights to freedom of speech or expression at the school house gate.”<sup>9</sup>
- Told they have limited power to insist on civility outside the schoolhouse doors.<sup>10</sup>
- Obligated to provide substantial justification for limiting free debate. “Undifferentiated fear or apprehension of disturbance” or a “mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint” does not suffice.<sup>11</sup>
- Advised that students generally have the right to express themselves freely off campus on their own time.
- Sometimes financially accountable for inappropriately sanctioning students for bullying.<sup>12</sup>

The comments cited above highlight a common confusion felt by school leaders related to their authority to punish students for the content of their expressions. The confusion is further complicated by the emergence of technology usage by students. The parameters of the schoolyard are no longer clear. What expression occurs on campus and what occurs off campus is often blurred. The Internet has become the “most participatory form of mass speech yet developed,”<sup>13</sup> and students are increasingly accessing it to express themselves.

For the most part, the Internet is a free speech zone that is off limits for restriction. In fact, Congress enacted the Communications

Decency Act (CDA)<sup>14</sup> explicitly to minimize government (and school) interference therein. The goal in passing the CDA was to promote the Internet as an unrestrained forum for diversity of political discourse and an avenue for accessible and available intellectual materials. Unless the Internet expression significantly or substantially intrudes within the schoolyard gate or places the safety of others in jeopardy, it cannot be regulated. Add to that the dearth of recent pure First Amendment student speech cases decided by the Supreme Court, the absolute absence of a Supreme Court case addressing a student Internet speech case, and the conflicting decisions surfacing from the lower courts, it is no wonder the issue is muddled. A cursory review of case law precedent reveals that **school officials are damned if they intervene and damned if they don't!**

School authority to intercede in student expression is governed by legislative enactments, school district regulations, acceptable use policies, and prior court precedents. Legislative enactments include state and federal provisions governing criminal activities, civil matters, and state-specific antibullying laws. Most of the legislation and policies concerning cyber bullying are new, having been enacted within the last several years. Hence the constitutionality and effectiveness of these measures have yet to be proven or established. Yet cyber bullying behavior is on the rise. Schools do not have the luxury of waiting for clear laws, proven policies, or controlling legal authority to develop and surface. As a result, many schools turn to the courts for guidance when conflict arises between a school's authority and a student's constitutional First Amendment rights.

## Prior Court Precedent

Existing case law exposes the historical boundaries within which the Constitution allows school authorities to intervene and censor student expression. Prior precedent or court intervention is not the magic mirror to look into to resolve all cyber bullying situations. The decision in a 1968 case describes the limitation thus: "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."<sup>15</sup> Courts do not have expertise in educational matters. Schools do.

What courts can and do is provide prior case law guidance as to appropriate boundaries. These boundaries are limited to actual cases

and controversies that have been litigated within the judicial system. Since cyber bullying is a relatively new concept, few cyber bullying cases have reached the courts. Notwithstanding that limitation, prior court decisions are invaluable tools for guiding school administrative actions.

## Unprotected Speech

Generally, speech, including student speech, is protected under the First Amendment. Beginning with *Cohen v. California*,<sup>16</sup> where the Supreme Court upheld the right of an adult to wear a jacket proclaiming “Fuck the Draft,” First Amendment free speech protection is typically upheld with few exceptions.<sup>17</sup> Obscenity, fighting words, sexting, defamation, and true threats are unprotected exceptions to the free speech rule. However, schools may regulate or ban these expressions only within their narrowly defined parameters as **exceptions to the free speech rule**.

Cyber bullying is not necessarily synonymous with these terms. For example, some cyber bullying incidents may constitute true threats, whereas others may not. To constitute a true threat, a statement must be communicated directly to someone, and it must be interpreted as a “serious expression of an intention to inflict bodily harm upon or take the life of the target.”<sup>18</sup> This standard is difficult to meet. As the Supreme Court explained in *Watts v. U.S.*,<sup>19</sup> the true threat category requires more than mere political hyperbole. Watts’s comment, “If they ever make me carry a rifle the first man I want to get in my sights is LBJ,”<sup>20</sup> could not be taken seriously as a true threat to injure President Johnson. The statement must cause a reasonable person to feel immediately threatened. Thus, most student cyber expression, like Watts’s ranting hyperbole, would fall short of the definition of a true threat.

The test for determining whether an expression is a true threat is very high. It requires an **unequivocal intention to harm** someone. The statement must communicate “a serious expression of an intention to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>21</sup> Statements made in jest or as parodies do not qualify as true threats. Similarly, conditional threats or threats of future harm are not true threats. Each of these types of expressions may retain some First Amendment protection.

The distinction between protected speech and true threats is exemplified by the rulings in the following cases. In *Lovell by and*

through *Lovell v. Poway Unified School District*,<sup>22</sup> the court found that the student's statement to her counselor was a true threat. Frustrated by the administrative shuffle in getting her class schedule changed, a tenth-grade student uttered under her breath to her counselor, "If you don't give me this schedule change, I'm going to shoot you!"<sup>23</sup>

The court found this statement to be a true threat, because a reasonable person would interpret this comment as a serious expression of intent to harm or assault. Factored into this reasonable belief of harm is the level of violence pervasive in public schools today. Additionally, the counselor asserted that she felt threatened enough by the statement that she reported it to the assistant principal. Hence it was proper for the school to suspend the girl, as threats of physical violence are not protected speech.

Likewise, a face-to-face statement referencing "pulling a Columbine" was found to be a true threat in a 2008 Pennsylvania case.<sup>24</sup> "In today's society, the term 'Columbine' connotes death as a result of one or more students shooting other students and school staff."<sup>25</sup> The court found that referencing "Columbine" with malice or anger can be viewed at a "minimum as 'fighting words' or a 'true threat' or 'advocating conduct harmful to other students.'"<sup>26</sup>

On the other hand, the *Mahaffey v. Aldrich*<sup>27</sup> case found that a student's statements on a website were not true threats and thus were protected by the First Amendment. The Michigan court ruled that the school could not punish the student for publishing the following statements on a website: "People I wish would die. . . ." "Satan's mission for you this week: stab someone for no reason then set them on fire and throw them off a cliff, watch them suffer and with their last breath, just before every-thing goes black, spit on their face."<sup>28</sup> No true threat existed, because the website did not communicate the statements to anyone else or to any particular student. Further, the website contained a disclaimer indicating that the author did not really wish anyone to die.<sup>29</sup> Hence, no reasonable person would interpret his comments as a serious expression of intent to harm or assault.

A court came to a similar conclusion in a Seattle, Washington, case where a student created an unofficial Internet home page of his high school. The senior student created a mock obituary page that allowed website visitors to vote on who would "die" next—that is, who would be the subject of the next mock obituary. The court found that the student's suspension was improper, because no true threat existed. There was no evidence that the "mock obituaries and voting on the website were intended to threaten

anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.”<sup>30</sup>

Internet-based cyber speech rarely meets the true threat definition. It is difficult to establish that an Internet comment reasonably creates an unequivocal intention to immediately harm someone. Courts will not uphold school discipline of student speech simply because “young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments.”<sup>31</sup> To create a genuine case for true threat, the victims must establish that reasonable people would interpret the Internet comments as statements to do immediate harm. Several reported decisions reflect the reluctance of the courts to find Internet speech to be true threats.

In 2002, a Pennsylvania court rejected the claim that a middle school student’s website was a true threat, even though the website was devoted to ridiculing the algebra teacher. The student’s website contained a graphic of blood dripping from a teacher’s head. The teacher’s head morphed into an image of Adolf Hitler. Furthermore, the site offered \$20 for killing the teacher. The teacher suffered extreme distress after learning of the site. She testified that she “suffered stress, anxiety, loss of appetite, loss of sleep, loss of weight, and a general sense of loss of well being as a result of viewing the website.”<sup>32</sup> Further, she suffered headaches, was required to take antianxiety/antidepressant medication, feared leaving her home, and was frightened of mingling with crowds. As a result of these conditions, the teacher was granted medical leave for a year, and three substitute teachers were hired to fill her position.<sup>33</sup> Nevertheless, despite her distress and the disruption it caused to the school district, the court still concluded that the website, taken as a whole, did not “reflect a serious expression of intent to inflict harm.”<sup>34</sup>

The website was crude, highly offensive, and a misguided attempt at humor or parody, but it was not a true threat. This conclusion was supported by the fact that the website criticized the math teacher’s physique and disposition and utilized South Park cartoon characters, historical figures (Adolf Hitler), and songs.

Similarly, in a 2010 Beverly Hills case, a California court found that a video posting on YouTube calling an eighth-grade classmate “spoiled,” a “slut,” and “the ugliest piece of shit I’ve ever seen in my whole life”<sup>35</sup> was not a true threat. The court concluded the statements did not show the requisite level of threat to harm, despite the fact that the video received over 90 hits, the victim required some counseling, was crying, did not want to attend class, was humiliated, and had hurt feelings.

However, a 2010 Studio City, California, case found that hostile Internet banter did constitute a genuine threat of harm. The Studio City court concluded that the posting of death threats and antigay diatribes against a boy was sufficient. In this case, visitors to the website left messages for the victim stating that they “wanted to pound your head in with an ice pick” and posted that the boy was wanted “dead or alive.”<sup>36</sup> The court recognized the harm that the antigay messages conveyed to the 15-year-old boy. The visitors’ postings sought to destroy the boy’s life and threatened to murder him. These statements caused his parents to withdraw him from school and to move out of their Harvard-Westlake community. (Perhaps one of the decisive differences between this case and the 2002 Pennsylvania case was that the Studio City victim was a student as opposed to a teacher. Students who are minors typically receive greater protection from the courts than school personnel.) The results from this recent case may spark other courts to acknowledge true threats of harm from Internet postings. Time will tell whether boundaries are set on Internet conduct.

## Protected Speech

Much of student expression that concerns school officials is not governed by the exceptions characterized above. Obscenity, fighting words, defamation, and true threats are relatively easy to deal with. Students who truly engage in those types of expressions can always be sanctioned. As unprotected speech, the expressions may always be censored, regardless of whether they originate on or off campus. Of most concern to school officials is speech that falls within First Amendment protection. These expressions are the most perplexing, because they would be permissible except for the fact that they involve minors and impact the educational setting.

Initially, the Supreme Court resolved student speech rights cases with the understanding that children were entitled to full constitutional rights, with minor adjustments due to the nature of the school environment.<sup>37</sup> In a 1943 case, the Court declared that “Boards of Education . . . have . . . important, delicate, and highly discretionary functions.”<sup>38</sup> All of the functions that boards of education perform must be accomplished within the limits of the Bill of Rights. “That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>39</sup>

Now, however, the Supreme Court has shifted and somewhat retreated from its opinion that students are entitled to strong free speech rights. Today's Supreme Court emphasizes deference to school authorities concerning matters of school administration. The Court touts that those First Amendment rights of public school students "are not automatically coextensive with the rights of adults in other settings"<sup>40</sup> and must be "applied in light of the special characteristics of the school environment."<sup>41</sup> Thus, the Court now recognizes that boards of education hold the "authority to prescribe and control conduct in the schools"<sup>42</sup> and "the determination of what manner of speech in [schools] is inappropriate properly rests with the school board, rather than with the federal courts."<sup>43</sup>

Although the Court has granted educators substantial deference as to what speech is appropriate within the confines of the school environment, the deference is not absolute. Specifically, three categories of speech have been identified that school officials may constitutionally regulate. These categories are

- vulgar, lewd, obscene, and plainly offensive speech;<sup>44</sup>
- school-sponsored speech;<sup>45</sup> and
- speech that falls into neither of these categories.

This third category, by far the most prolifically litigated, includes student speech that substantially and materially disrupts the educational institution, threatens the physical safety of students from actual violence, advocates illegal drug use, or impinges on the rights of other students.

### Highlights to Remember

- Students possess freedom to express their opinions even on controversial topics.
- The school's authority to intercede in student expression is governed by court precedents, legislative enactments, district regulations, and acceptable use policies.
- Schools have expertise in educational matters, while courts have expertise concerning appropriate legal boundaries.
- The categories of speech that school officials may constitutionally regulate are narrowly defined and difficult to meet. They include
  - vulgar, lewd, obscene, and plainly offensive speech;
  - school-sponsored speech; and
  - speech that substantially and materially disrupts the educational process, threatens the physical safety of students, or impinges on the rights of other students.



## Notes

1. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).
2. *Settle v. Dickson County School Board*, 53 F.3d 152, 156 (6th Cir. 1995).
3. *Tinker*, U.S. 393 at 526 (Black, J., dissenting).
4. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1988).
5. *Settle*, 53 F.3d at 155.
6. *Morse*, 551 U.S. 393 at 402, 408.
7. *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007), *cert. denied* 2008 U.S. LEXIS 6449 (2008).
8. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).
9. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969).
10. *Layschock v. Hermitage School District*, 593 F.3d 249, 256–257 (3d Cir. 2010), *vacated* 2010 U.S. App. LEXIS 7362 (2010).
11. *Tinker*, U.S. 393 at 508–509.
12. *Yap v. Oceanside Union Free School District*, 303 F. Supp. 2d 284 (2004).
13. *Reno v. ACLU*, 521 U.S. 844, 863 (1997).
14. 47 U.S.C. § 230(c)(1) (2000).
15. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).
16. *Cohen v. California*, 403 U.S. 15 (1971).
17. Papandrea, M.-R. (2008). Student speech rights in the digital age. *Florida Law Review*, 60, 1027, 1046.
18. *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 785 (E.D. Mich. 2002).
19. *Watts v. U.S.*, 394 U.S. 705, 708 (1969).
20. *Id.* at 705.
21. *Virginia v. Black*, 538 U.S. 343, 360 (2003).
22. *Lovell by and through Lovell v. Poway Unified School District*, 90 F.3d 367 (9th Cir. 1996).
23. *Id.* at 372.
24. *Johnson v. New Brighton Area School District*, 2008 LEXIS 72023 (W.D. Pa. 2008).
25. *Id.* at 26.
26. *Id.* at 26–27.
27. *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (2002).
28. *Id.* at 782.
29. *Id.* at 786.
30. *Nick Emmett v. Kent School District No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).
31. *J.C. v. Beverly Hills Unified School District*, 2010 LEXIS 54481, 79 (C.D. Cal. 2010).
32. *J. S. ex rel. H. S. v. Bethlehem Area School District*, 569 Pa. 638, 646 (2002).
33. *Id.*
34. *Id.* at 658.
35. *J. C. v. Beverly Hills*, 2010 LEXIS 54481 at 4.
36. Williams, C. J. (2010). Court tightens definition of cyber-bullying. *Los Angeles Times*. Para. 5. Retrieved from <http://articles.latimes.com/2010/mar/18/local/la-me-cyber-speech18-2010mar18>.

37. Papandrea, *supra* note 19, at 1038.
38. West Virginia State Board of Education. v. Barnette, 319 U.S. 624, 637 (1943).
39. *Id.* at 637.
40. Bethel School District No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
41. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).
42. LaVine v. Blaine School District, 257 F.3d 981, 988 (9th Cir. 2001), *cert. denied* 536 U.S. 959 (2002).
43. Fraser, 478 U.S. at 683.
44. *Id.* at 675.
45. Morse v. Frederick, 551 U.S. 393, 430 (2007) (Thomas, J., concurring in the result).