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STUDENT SPEECH IN THE ERA OF SOCIAL MEDIA

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DIFFERENT
BY DESIGN

Agenda

- **Regulating Student Speech**
- **Bedrock Legal Concepts**
- **Recent Cases**
- **Best Practices**

Bedrock Legal Concepts

The First Amendment

- The First Amendment guarantees five fundamental freedoms—speech, press, religion, peaceful assembly, and the right to petition for the redress of grievances.
- The right to freedom of speech allows individuals to express themselves without government interference or regulation in most circumstances.

Bedrock Legal Concepts

Tinker v. Des Moines, 393 U.S. 503 (1969)

- Student wear black armbands to school to protest the Vietnam War.
- Older students are suspended by school administration.
- United States Supreme Court holds that students do not shed their constitutional rights “at the schoolhouse gate.”

Analysis

- Is speech protected under the First Amendment?
 - Intended to convey a message?
 - Under the circumstances, is the likelihood great that the message would be understood by those who view it?

Analysis

- A school district can prohibit speech that **materially disrupts** classwork or involves **substantial disorder**.
- Factors to consider:
 - Content of the speech
 - Time, place, and manner of the speech
 - Student's intent in making the speech
 - The current environment in the community
- Also, consider – does the speech infringe on the rights of others?

Bedrock Legal Concepts

Healy v. James, 408 U.S. 169 (1972)

- University president declined to recognize student organization, citing fear of disruption on campus.
- Court noted that “state colleges and universities are not enclaves immune from the sweep of the First Amendment.”
- “First Amendment rights must always be applied ‘in light of the special characteristics of the...environment.’” (citing Tinker)

Bedrock Legal Concepts

Healy v. James, 408 U.S. 169 (1972)

- “Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, **the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.** The college classroom with its surrounding environs is **the marketplace of ideas,** and we break no new constitutional ground in reaffirming this Nation’s dedication to **safeguarding academic freedom.**”

Bedrock Legal Concepts

Healy v. James, 408 U.S. 169 (1972)

- College President objected to student group based on likelihood group would be a “disruptive influence at CSCC.”
- Critical line is “between mere advocacy and advocacy directed to inciting or producing imminent lawless action and...likely to incite or produce such action.”
- Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.

Analysis

- A public college or university can prohibit speech that **materially disrupts** the work of the school or involves **substantial disorder**.
- Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression
- Document evidence to support likelihood of disruption

Bedrock Legal Concepts

Papish v. Bd. of Curators of Univ. of Missouri, 410 U.S. 667 (1973)

- Grad student was expelled after distributing independent student newspapers that displayed foul language and a provocative/controversial political cartoon.
- Supreme Court held “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name along of ‘conventions of decency.’”

Bedrock Legal Concepts

Bethel Sch. Dist. v. Fraser

- Student delivers speech at assembly riddled with inappropriate double entendre.
- Student disciplined by school administration.
- Supreme Court finds that school can restrict speech that is lewd, vulgar, or profane.
- “The constitutional rights of students in public schools are not automatically coextensive with that of adults in other settings.”

Bedrock Legal Concepts

Morse v. Frederick

- While students are watching the Olympic torch running through town, student unfurls a banner that reads “Bong Hits 4 Jesus.”
- Student disciplined by school administration.
- Supreme Court finds that school can restrict speech that promotes drug use.
- “The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.”

Bedrock Legal Concepts

Hazelwood v. Kuhlmeier

- Principal removed certain articles from student newspaper, finding the content to be inappropriate.
- Students claimed First Amendment violation.
- “School officials can regulate the style and content of school-sponsored student speech in ways that are reasonably related to legitimate pedagogical concerns.”

Analysis

- Even if speech is protected...
 - Is it lewd, vulgar, or profane?
 - Does it promote illegal conduct?
 - Is the speech school sponsored?

Analysis

- A note on **school-sponsored** speech:
 - Be wary of viewpoint discrimination.
 - Some states have passed student journalism laws that return editorial control of school publications to students.
 - Consider:
 - The amount of control exercised over the publication or activity by the district.
 - Any relevant policies.
 - Past practice related to publication/activity at issue.
 - State law.

START
HERE

IS STUDENT SPEECH PROTECTED?

Is speech intended to convey a message?
Under circumstances, will messages be understood by those who view it?

IF YES, *Protected!*

IS SPEECH:
 Lewd, vulgar, or profane?
 Promoting illegal conduct?

IF NO, *Not Protected!*

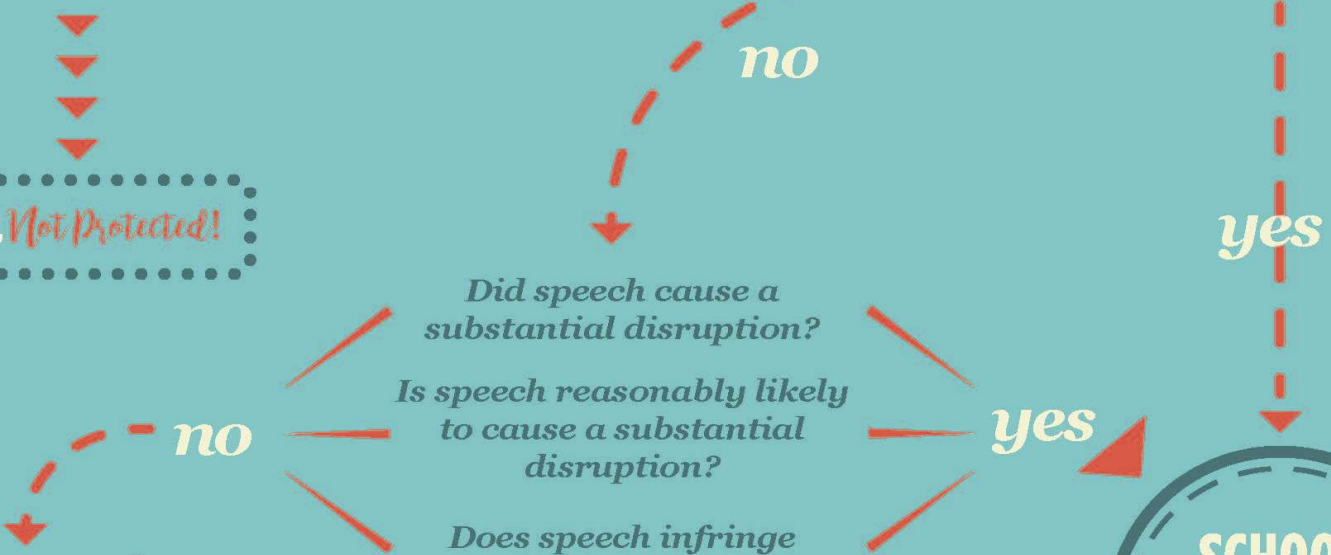
Did speech cause a substantial disruption?

Is speech reasonably likely to cause a substantial disruption?

Does speech infringe upon the rights of others?

Let it go!

SCHOOL likely can *Restrict*



Practical Considerations

- An actual disruption does not need to occur!
- When school officials reasonably foresee that speech will cause substantial disruption or materially interfere with learning environment, the school can prohibit the speech.

Off-Campus Speech?

- What about speech that is made off-campus?
- What about speech that is made online?



It Depends on the Facts and Circumstances

- Some federal circuits have upheld discipline imposed for off-campus student speech when:
 - School officials may reasonably forecast a substantial disruption of school activities as a result of the off-campus speech
 - There is a “sufficient nexus” between the off-campus speech and the educational environment
 - Off-campus speech interferes with the rights of other students to be secure and to be let alone
 - The speech violates a legitimate curriculum-based code of ethics

Circuits Are Split!

- Examples of courts upholding discipline for off-campus speech:
 - *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008)
 - Second Circuit upheld student’s disqualification from running for class secretary after posting a vulgar message about supposed cancellation of an upcoming school event on a blog from home.
 - *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565 (4th Cir. 2011)
 - Fourth Circuit upheld student’s suspension for creating a MySpace page largely dedicated to ridiculing a fellow student.
 - *S.J.W. v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012)
 - Eighth Circuit upheld student suspension for creating website with offensive and racist comments as well as sexually explicit and degrading comments about particular female students.
 - *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013)
 - Ninth Circuit upheld 90-day suspension resulting from student’s violent instant messages threatening school shooting.

Circuits Are Split!

- On the other hand, other federal circuits have held that disciplining students for off-campus speech violated the students' First Amendment rights
- In those cases, courts did not find credible threats of disruptions to the educational environment
 - “An undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 929 (3d Cir. 2011)

Circuits Are Split!

- Examples of courts finding that disciplining students for off-campus speech violated the students' First Amendment rights:
- *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011)
 - Third Circuit held student's fake social media profile mocking principal was protected by First Amendment because it was not reasonably foreseeable that the profile would create a substantial disruption at school (and, in fact, did not create a substantial disruption)
- *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011)
 - Third Circuit held that another student's fake social media profile mocking school officials did not cause substantial disruption to the educational environment and was protected by the First Amendment.

Recent Cases

- *Yeasin v. Durham*, 224 F.Supp.3d 1194 (D. Kan. 2016)
 - Male student at KU dated a fellow university student until the summer of 2013, when their relationship ended with a consent protection order prohibiting the student from having any contact with his ex-girlfriend.
 - Over the next four months, the student sent out fourteen Tweets that referenced his ex-girlfriend.
 - That fall, she complained to the university that the tweets violated the no-contact order, and it agreed, warning him via email that any further violation might result in his expulsion.
 - The student subsequently sent additional Tweets, and the university determined that the student had sexually harassed his ex-girlfriend and had violated the Student Code of Conduct.
 - After a formal hearing, the university found that the student had committed non-academic misconduct that was so severe, pervasive, and offensive that it interfered with his ex-girlfriend's education, and thus the university expelled him and banned him from campus.

Recent Cases

- *Yeasin v. Durham*, 224 F.Supp.3d 1194 (D. Kan. 2016)
 - District Court dismissed student's claims against university administrators based on qualified immunity
 - Court also addressed the student's First Amendment arguments:
 - Although this was off-campus speech, the speech affected [the student's ex-girlfriend] on campus. It was reasonable for Defendant to believe that the Student Code of Conduct, which gave jurisdiction for discipline as required by federal law (notably, Title IX), allowed the Defendant to punish the off-campus conduct that had an effect on [the student's ex-girlfriend] on campus.

Recent Cases

- *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016)
 - State college removed student from college's associate degree nursing program for unprofessional behavior based on student's statements on his Facebook page
 - The student talked about his substance abuse and anger issues, giving someone a hemopneumothorax (a trauma to the lung), and called another student a "stupid bitch" for reporting his posts.
 - Several students raised complaints with the college administration
 - Student showed no remorse or concern in meeting with administrators
 - The Director of Nursing decided to remove the student from the program for violating the nursing program's handbook and the Nurse's Association Code of Ethics provisions regarding professionalism.

Recent Cases

- *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016)
 - The Eighth Circuit rejected the student's First Amendment claim and upheld the removal of the student from the nursing program
 - "Teaching and enforcing viewpoint-neutral professional codes of ethics are a legitimate part of a professional school's curriculum that do not, at least on their face, run afoul of the First Amendment."
 - "A student may demonstrate an unacceptable lack of professionalism off campus, as well as in the classroom, and by speech as well as conduct. Therefore, college administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, so long as their actions are reasonably related to legitimate pedagogical concerns."

B.L. v. Mahanoy Area Sch. Dist.

- The U.S. Supreme Court will soon address the issue of regulating online student speech
- Oral arguments took place April 28, 2021
- Decision pending

B.L. v. Mahanoy Area Sch. Dist.

- B.L. was a sophomore; tried out for varsity cheer squad.
- Before tryouts, B.L. was required to acknowledge “Cheerleading Rules” that would apply if she made the team again.
- She was placed on the J.V. squad, not varsity.
- Over a weekend, B.L. sent a snap over Snapchat that showed a picture of B.L. and a friend, holding up their middle fingers. The text over the photo read, “f*** school f*** softball f*** cheer f*** everything.”
- The snap was only available to her Snapchat friends (~ 250).

B.L. v. Mahanoy Area Sch. Dist.

- The high school's "Cheerleading Rules" prohibits squad members from posting any "negative information" about cheerleading online.
- School officials believed that B.L.'s post was "negative," "disrespectful," and "demeaning."
- B.L. was kicked off the J.V. squad for one year.
- Parents appealed to District administrators and Board of Education to no avail.
- Parents sued the District.

B.L. v. Mahanoy Area Sch. Dist.

- B.L.'s lawsuit alleged three violations under 42 U.S.C. § 1983:
 1. Suspension from team violated the First Amendment
 2. School and team rules that B.L. allegedly violated were overbroad and viewpoint discriminatory
 3. School and team rules are unconstitutionally vague
- The District Court granted summary judgment in B.L.'s favor, ruling that the District had violated B.L.'s First Amendment rights.

B.L. v. Mahanoy Area Sch. Dist.

- Third Circuit determined there were two main questions to consider:
 1. Was B.L.'s speech protected speech?
 2. If so, did B.L. validly waive that protection?

B.L. v. Mahanoy Area Sch. Dist.

- Even though speech occurred over a weekend and on personal device, the District relied on *Tinker*, *Fraser*, *Kuhlmeier*, and *Frederick* to support its decision to discipline B.L.
- **Court disagreed:** A student's First Amendment rights are subject to narrow limitation when speaking in the school context but are coextensive with [those] of an adult outside of school.

B.L. v. Mahanoy Area Sch. Dist.

- On-campus or off-campus speech?
 - Third Circuit noted that the scope of schools' authority is not based on physical boundaries but on the extent to which schools control or sponsor the forum or the speech.
 - Third Circuit relied on precedent from two prior cases:
 - *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011)(en banc).
 - *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011)(en banc).

B.L. v. Mahanoy Area Sch. Dist.

- On-campus or off-campus speech?
 - Third Circuit “easily concluded” that B.L.’s snap fell outside of the school context.
 - No relevant speech took place in a school-sponsored forum.
 - No relevant speech took place in a context that “bears the imprimatur of the school.”
 - The school does not own or operate the online platform.
 - While the snap mentioned the school and reached other students and officials, those few points of contact were not enough to make B.L.’s speech “on-campus speech.”

B.L. v. Mahanoy Area Sch. Dist.

- Could B.L. be disciplined for off-campus speech?
 - School district relied on *Fraser* to defend its actions based on its power to enforce socially acceptable behavior by banning vulgar, lewd, obscene, or plainly offensive speech by students—particularly when student’s speech/punishment related to extracurricular activities.
 - Third Circuit (in *J.S.* and *Layshock*) held that *Fraser* does not apply to off-campus speech.

B.L. v. Mahanoy Area Sch. Dist.

- Could B.L. be disciplined for off-campus speech?
 - School district relied on *Tinker*, arguing the snap was likely to substantially disrupt the cheerleading program.
 - Third Circuit examined circuit split.
 - Second and Eighth Circuits applied *Tinker* where it was “reasonably foreseeable that a student’s off-campus speech would reach the school environment.”
 - Fourth and Ninth Circuits applied *Tinker* to off-campus speech “with a sufficient nexus to the schools’ pedagogical interests.”
 - Fifth and Ninth Circuits have also applied *Tinker* to off-campus speech without articulating a governing test or standard.

B.L. v. Mahanoy Area Sch. Dist.

- Could B.L. be disciplined for off-campus speech?

- Third Circuit’s approach:

We hold today that *Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur. In so holding, we build on a solid foundation, for in his concurrence in *J.S.*, now Chief Judge Smith, joined by four colleagues, embraced this rule, explaining “that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.” 650 F.3d at 936. That rule is true to the spirit of *Tinker*, respects students’ rights, and provides much-needed clarity to students and officials alike.

- Third Circuit does not extend its analysis to whether a school may regulate off-campus speech that threatens violence or harasses particular students/teachers.

B.L. v. Mahonoy Area Sch. Dist.

- The U.S. Supreme Court will consider whether *Tinker v. Des Moines Independent Community School District*, which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus.



Best Practices

- Focus on the facts.
- Offensive/Controversial speech is likely protected speech.
- Students are private citizens. They have a right to publicize beliefs about college or university online, in most circumstances.

Best Practices

- General counsel or counsel for university should help analyze whether speech should be regulated.
- Identify nexus to educational environment.
- Document current environment to justify determination that substantial disruption is reasonable likelihood.
- Consider whether to address the behavior through disciplinary consequences, or an alternative approach.

Best Practices

- Provide proactive training.
- Be reasonable.
- Approach conduct in a viewpoint neutral manner, and
- Treat similar conduct in a similar manner.

QUESTIONS??



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