



INFRASTRUCTURE PRACTICE

ALERT

WHAT CAN SCHOOLS DO TO COMBAT CYBER-BULLYING WITHOUT RUNNING AFOUL OF THE FIRST AMENDMENT?

By Robert C. Clothier

Imagine a public or charter school where a student creates a fake profile of a school principal saying he or she was a “big steroid freak” who smoked a “big blunt.” Or where a student posts a profile on MySpace that describes a principal as a pedophile and sex addict whose interests included “hitting on students and their parents.”

Not only did both situations occur; they were the facts behind two recent Third Circuit Court of Appeals decisions that have muddied the waters for public and charter schools trying to protect their students and faculty from cyber-bullying. School administrators should now think twice before disciplining a student for online activities.

The only way to make sense of these and other student speech cases is to understand the four tests used by courts to determine whether restrictions on student speech run afoul of the First Amendment. Courts will resolve lawsuits simply by figuring out which test applies and then determining whether the school’s actions, and supporting evidence, satisfy the test.

Here are the four tests, in a nutshell:

1. **Tinker Test:** The general test says school restrictions on speech are permissible if the speech caused, or was likely to cause, a “substantial disruption or material interference with school activities” or “invasion of the rights of others.”

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1967).

2. **Fraser Test:** Schools may also regulate “sexually explicit, indecent or lewd speech.” *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). Under this test, no showing of disruption is required.

3. **Morse Test:** Schools may regulate “speech that can reasonably be regarded as encouraging illegal drug use.” *Morse v. Frederick*, 551 U.S. 393 (2007). It is uncertain whether this test permits regulating speech that encourages other kinds of illegal activities.

4. **Hazelwood Test:** Schools may regulate “school sponsored” speech that is inconsistent with the school’s “basic educational mission.” School-sponsored speech is speech bearing the “imprimatur of the school,” “part of the school curriculum” or “supervised by faculty members” (e.g., school paper, play). *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260 (1988).

Notably, however, all four of these cases dealt with on-campus speech, and one – the *Fraser* case – dealt with sexually explicit speech at a school assembly. The issue now confronting the courts is whether and how these tests apply to off-campus speech – usually online speech – that makes its way onto campus.

Two recent Third Circuit decisions make it clear the courts will apply one or more of these four tests to online speech rather than create a new test.

In *Layshock v. Hermitage School District* (3rd Circ. Feb. 4, 2010) (the principal was a “big steroid freak”), it was easy for the court to find that the “substantial disruption” of the *Tinker Test* was inapplicable — the school district didn’t even argue that it applied. The court instead applied the “sexually explicit, indecent or lewd speech” of the *Fraser Test* and found that it did not justify the school’s suspension of the student because the student’s speech was made off-campus, unlike in *Fraser*, where the speech was made at a school assembly.

By contrast, in *J.S. v. Blue Mountain School District* (3rd Circ. Feb. 4, 2010) (principal was pedophile and sex addict), the court applied the *Tinker Test* and found sufficient the school’s evidence that the student’s speech reasonably threatened to cause a substantial disruption inside the school — even though the speech was made online and not on the school’s campus. The court didn’t need to apply the *Fraser Test*.

So what should a charter school think about before disciplining a student?

First, schools must assess the on-campus impact of any student speech and be prepared to document that

impact for a court that later reviews the school’s actions. The impact must be “substantial” and, if it did not actually occur, the school must have evidence a “substantial” impact would have likely occurred had the school not acted. Schools must be careful to not overreact to hurtful and immature comments by quickly suspending or expelling a student, because courts will second guess their decision and scrutinize the record for evidence of a real and substantial impact.

Second, even before an incident arises, schools must review their student handbook and policies to make sure they are consistent with these legal principles. Courts can and have struck down school policies that sanctioned merely “unpleasant,” “offensive” or “insulting” speech or that failed to require a nexus to school property or activities. A careful review of your policies can help ensure cyber-bullying of students or faculty can be met with certain discipline likely to survive First Amendment challenges by upset parents.

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