

Regulating Students' Online Speech Under the First Amendment

In an era where the Internet is integral to public speech, students' online free speech rights in public elementary and secondary schools and universities are unsettled. For example, it is not clear whether First Amendment standards affecting student speech in public elementary and secondary schools apply equally to universities, whether it matters that online speech occurs on or off campus, or whether offensive or otherwise harmful communications posted on Facebook or other social media are public or private.

Courts exercise restraint when considering the policy decisions of school officials

Courts generally recognize school officials' authority over K-12 students and exercise restraint when considering the policy decisions that school officials make. However, school officials' authority is not boundless and students retain free speech rights in school, even if those rights are limited by previous U.S. Supreme Court decisions dealing with First Amendment rights.

The U.S. Supreme Court has decided four major cases regulating K-12 First Amendment student speech on campus or at a school activity

The way in which First Amendment speech standards apply to students' online speech is unsettled law. In the last 40 years, the U.S. Supreme Court has decided four major cases regulating student speech in elementary and secondary schools, none of which specifically address students' online speech.

- In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the school district suspended students for wearing black arm bands in school to protest the Vietnam War. The court ruled that schools could ban student speech only if it materially and substantially disrupted the work and discipline of the school. The court found the students' suspensions unconstitutional because school officials had no reason to believe the students' black arm bands would cause a material disruption in the school.
- In *Bethel School District v. Fraser*, 478 U.S. 675 (1986), in order to teach the boundaries of socially appropriate behavior, the court allowed secondary school officials to prohibit a student's speech containing "explicit sexual metaphors," regardless of whether the speech materially or substantially disrupted the education process.
- In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the court allowed school officials to remove from a school-sponsored student newspaper, articles on teen pregnancy because the topic was inappropriate for younger students and unfair to pregnant students who might be identified from the text. The court held that school officials can censor school-sponsored student publications produced as part of a journalism class in order to address legitimate educational concerns.
- In *Morse v. Frederick*, 551 U.S. 393 (2007), a principal suspended a student for holding up a banner at a school-sponsored event with the message "Bong Hits 4 Jesus," a slang reference to marijuana smoking. The court ruled that school officials can prohibit students from displaying messages that promote

illegal drug use.

The U.S. Supreme Court recently refused to hear two student online speech cases

The U.S. Supreme Court recently let lower court decisions stand when it refused to hear two student online speech cases. In *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), a middle school student used her home computer to create a phony MySpace profile that cruelly ridiculed her school principal. The Third Circuit Court ruled the district could not reasonably show the spoof profile would substantially disrupt the school, and the decision to suspend the student violated her First Amendment right to speech.

In *Kowalski v. Berkeley Count Sch.*, 652 F.3d 565 (4th Cir. 2011), a high school student used her home computer to create a MySpace chat group page SASH (Students Against Sluts Herpes) that successfully encouraged vulgar and offensive comments about another student. The Fourth Circuit Court ruled that the student's speech was not constitutionally protected because the distress it inflicted on the targeted student disrupted the school. (Minnesota is in the 8th Circuit.)

Minnesota's antibullying law prohibits online student speech that disrupts the school

In Minnesota, there is limited state oversight of elementary and secondary students' online speech on or off campus, but state laws do address bullying in schools. [Minnesota Statutes, section 121A.031](#), requires school boards to adopt a policy prohibiting student bullying that occurs "by use of electronic technology and communications off the school premises to the extent such use substantially and materially disrupts student learning or the school environment."

The U.S. Supreme Court has not decided the standard of review for university students' speech

It is not clear whether the U.S. Supreme Court's secondary students' free speech analysis applies equally in a university setting. The court reserved in a footnote in *Hazelwood* the question of whether the deferential standard of review used to regulate high school speech in a school-sponsored student newspaper also applies to universities. However, the court has not upheld a restriction on university students' speech, and most of the speech-related cases the court has reviewed have implicated universities' funding of student groups on campus.

The Minnesota Supreme Court allowed the University of Minnesota to punish a student for satirical Facebook comments

In 2012, the Minnesota Supreme Court in *Tatro v. University of Minnesota* ruled that the University of Minnesota did not violate a college student's free speech rights when it punished her for posting satirical Facebook comments about the school cadaver she was working on as part of the university's mortuary science program; the program prepares students to become funeral directors and morticians. The court found the university's sanctions of Amanda Tatro's off-campus online speech justified because she violated the university's narrowly tailored academic program rules that directly relate to established standards of professional conduct in mortuary science. The court noted that it was the specific circumstances of the case—a professional program that operates under standards of professional conduct, a program that gives students access to donated human cadavers, written program rules that require a high degree of respect for human cadavers, and discipline that was not arbitrary or intended to punish the student for protected speech—that accounted for the court's narrow holding.

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