A Social Media Exception?

Student Speech Rights: Are Public School Employees Liable When Denying Settled Student Speech Rights Off Campus?

By Melanie V. Slaton and Benjamin A. Holden

Federal circuits are inconsistent in determining when off-campus student speech is subject to public school jurisdiction, and the Supreme Court has not yet clearly opined on the authority of schools to regulate student off-campus speech.

The inconsistency among federal circuits over the ability of public entity employees to discipline students for social media speech reveals a related (and equally unsettled) employment law question. That question: When, and to what extent, can a public school employee be held civilly liable for improperly restricting the First Amendment rights of a student?

Before tackling this timely and unsettled issue, three preliminary premises merit a quick mention.

First, disruptive student speech that occurs in the classroom, in the hallway, in the cafeteria, or anywhere "on campus" is validly subject to discipline by teachers, administrators, and other agents of public schools under Supreme Court precedent. *See Tinker v. Des Moines Indep.*

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Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (holding that a school and its agents may not constitutionally restrict student on-campus speech unless speech was a "substantial disruption" or a "material interference with school activities"). Second, the Court has expressly declined to guide lower courts, and thus public schools, and the lawyers who advise them, on whether *Tinker* applies to public college and graduate students. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."). Third, the federal circuits are in absolute disarray on whether and when public schools may constitutionally discipline off-campus or social media speech. *See* Benjamin A. Holden, *Tinker Meets the Cyberbully: A Federal Circuit Conflict Round-Up and Proposed New Standard for Off-Campus Speech*, 28 Fordham Intell. Prop. Media & Ent. L.J. 233 (2018).

The fees and costs rule in constitutional jurisprudence is pretty straightforward. If a person "under color of law" violates a well-settled constitutional right of which he or she should have been aware, then the judge may find the defendant, such as a school employee, liable for the fees of the student-plaintiff under 42 U.S.C. §1983 (liability) & 42 U.S.C. §1988(b) (fees and costs).

Overarching Supreme Court Analysis: Speech in School

For instance, when primary or secondary public school teachers compel a kid to say the Pledge of Allegiance, such a directive violates *West Virginia v. Barnette*, 319 U.S. 624, 627–29 (1943). A good recent example of the risk faced by public employees in this context comes from *Arceneaux v. Klein Independent School District*, No. H-17-3234, 2018 WL 3496737 (S.D. Tex. July 20, 2018). In *Arceneaux*, a public school teacher disciplined a student for refusing to stand for the Pledge of Allegiance. The student brought a First Amendment action against the teacher, several administrators, and the school district, citing the holdings of *Tinker* and *Barnette*. The district court ruled, among other things, that the claim of the teacher for qualified immunity failed as a matter of law. *Arceneaux*, 2018 WL 3496737, at *5–6.

Similarly, when the public school teacher orders a kid to remove a non-disruptive political armband, and/or suspends the student for wearing it, that public employee, and the employer, have violated a clearly established tenet of the First Amendment under *Tinker*.

But the reinstatement of the student's First Amendment rights is not the end of the story. The teacher, or the principal, or other state actor, also faces the real prospect of being ordered to pay the student-plaintiff's costs and attorneys' fees. The fees and costs rule in constitutional jurisprudence is pretty straightforward. If a person "under color of law" violates a well-settled constitutional right of which he or she should have been aware, then the judge may find the defendant, such as a school employee, liable for the fees of the student-plaintiff under 42 U.S.C. §1983 (liability) & 42 U.S.C. §1988(b) (fees and costs).

To be sure, government employees generally enjoy the nearly impenetrable defense of "qualified immunity" from claims of violations of constitutional rights, which requires courts to enter judgment in favor of a government employee unless the employee's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In the 2007 so-called "BONG Hits 4 JESUS" case, the U.S. Supreme Court granted certiorari to look specifically at two issues: first, whether a student at a primary or secondary school has a First Amendment right to "wield" a banner that administrators regarded as promoting illegal drug use; and second, whether that right was so "clearly established" that the school administrator who ordered the student to take down the banner "may be held liable for damages." *Morse v. Frederick*, 551 U.S. 393, 400 (2007). The result in *Morse* does not speak directly to the issue of qualified immunity, since the Court decided the case expressly on the ground that the student had no First Amendment right to display the banner. *Id.* However, in a footnote, the Court reinforced and restated the very helpful plain language governing what it means for a right to be clearly established: "[T]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [public employee]… that his conduct was unlawful in the situation he confronted." *Id.* at 442 n.5 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

Which fact patterns, then, might meet the clearly established U.S. Supreme Court standard? Well, forcing a student to remove a political, non-profane piece of apparel unrelated to the advocacy of illegal conduct for one. Or, suspending a student for refusing to salute the U.S. flag or say the Pledge of Allegiance.

Equally clear are certain situations in which student discipline or even student speech censorship is permissible, consistent with the First Amendment:

1. Public school students have no right to use sexually suggestive and lewd language at school assemblies, even if that language only implies the naughty stuff. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).
2. Public school students have no right to publish accurate but controversial media (such as a newspaper, website, or a play) if the school has a legitimate pedagogical or teaching concern about its publication and that publication is school sponsored. *Kuhlmeier*, 484 U.S. 260 (1988).

3. Public school students have no right to bear signs (and likely also not to wear clothing) that advocate illegal drug use. *Morse*, 551 U.S. 393 (2007).

An employee who punishes a student for engaging in this constitutionally unprotected behavior is not only on firm ground against any claim by the student for fees and costs but should also easily win the underlying First Amendment dispute, allowing the suspension, dismissal, or other discipline of the student to stand. Punishing a public student athlete for taking a knee? Maybe. Maybe not. But what is certain is that such a right is not clearly established.

Off-Campus Student Speech

This brings us all the way back around to off-campus speech, which nearly always involves social media. Do public primary and secondary schools have jurisdiction over the social media posts of their students? Can they suspend students for racist, sexist, homophobic, or simply profane content on Facebook or Instagram? The Supreme Court has, on at least five occasions since 2011, declined to grant certiorari in cases that would give guidance to school districts, school employees, and those who advise them. *See, e.g., Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (en banc), cert. denied, 136 S. Ct. 1166 (2016); *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565 (4th Cir. 2011), cert. denied, 565 U.S. 1173 (2012); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), cert. denied, 565 U.S. 1156 (2012) (noting that the Supreme Court has not clearly opined on the authority of schools to regulate student off-campus speech). It is thus left to the federal circuits, and there is gross inconsistency on the question of when off-campus speech is subject to the jurisdiction of schools. *See generally Holden, supra*.

So when Avery Doninger of Mills High in Burlington, Connecticut, used her private social media from outside the school to label district brass "douchebags" in protest against a decision to delay a concert that she'd been planning, the student lost her First Amendment claim in the Second Circuit. *Doninger v. Niehoff*, 642 F.3d 334, 346–51 (2d Cir. 2011).

But when J.S., a minor, used her home computer to create an entirely phony website (a MySpace page) dedicated to ridiculing her principal's sex habits, penis size, and the physical appearance of his wife, the student's First Amendment rights were found protected by the Third Circuit. *Blue Mountain*, 650 F.3d at 925–27. These are just two among many examples to illustrate the point that in the context of social media, for schools, their employees, and their lawyers, very little is "clearly established."

So, that's the easy analysis. A public employee who orders a kid to remove a political armband (or something analogous), or to say the Pledge of Allegiance, has undoubtedly violated a "clearly established" constitutional right of that student. The employee faces paying an award of attorneys' fees and costs for depriving a citizen of a well-settled constitutional right under federal law. It is equally clear from those cases in which the school employee or agent prevailed—*Morse*, the marijuana advocacy case; *Bethel*, the sexual innuendo language case; and *Hazelwood*, the imprimatur of the school case—that since no right at all has been violated, no fee or cost award for the plaintiff attaches.

But what about all of the fact patterns upon which the U.S. Supreme Court has yet to opine? What if the Supreme Court has been silent, but the controlling circuit has spoken clearly and decisively? Can a student-plaintiff argue persuasively and successfully that a constitutional right that has been recognized within the relevant circuit is in fact "clearly established?" The Eighth Circuit, citing U.S. Supreme Court authority, says a plaintiff's constitutional rights can be clearly established *within* a particular circuit, despite conflict on the issue *among* the circuits: "It is true plaintiffs can show a right is clearly established by pointing to 'cases of controlling authority *in their jurisdiction* at the time of the incident[]'…." *Z.J. v. Kan. City Bd. of Police Comm'rs*, 931 F.3d 672, 684 n.5 (8th Cir. 2019) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). Thus, when advising public entity clients within a circuit that has clearly established that a hyperbolic joke aimed at school employees—no matter how cruel—is protected First Amendment activity, subsequent state actors within that jurisdiction are subject to paying an award for fees and costs for suspending subsequent students who engage in similar school-related speech.

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Circuit-by-Circuit Roundup

Below is a brief roundup of those First Amendment constitutional rights that are (or are not) in fact "clearly established" within a particular circuit.

First Circuit

No controlling appellate authority exists in the First Circuit; thus, there are no First Circuit-specific "clearly established" First Amendment student speech rights.

Second Circuit

In the Second Circuit, public employees have great flexibility to discipline students. In the leading case from that circuit on off-campus speech, the U.S. Court of Appeals for the Second Circuit found that the First Amendment provides no relief for a high school senior class secretary candidate whose online blog referred to school ad-

ministrators as "douchebags" for cancelling a school concert that she helped plan. *Doninger*, 642 F.3d 334, 339–40, 350–51. Thus, it is likely safe to conclude that the "clearly established" rights of students under *Barnette* (to refuse to recite the Pledge), and *Tinker* (to wear a passive, non-disruptive political armband), form the outer limits of what is "clearly established" in this jurisdiction.

An analysis of the federal cases in which students are disciplined for speech that threatens violence finds that these students who then posit a First Amendment-based defense virtually always lose.

Third Circuit

In sharp contrast to teachers, principals, school district administrators, and lawyers working in the Second Circuit, those administering public schools in the Third Circuit should be afraid. They should be very afraid. The Third Circuit sees school jurisdiction over off-campus speech as involving a multipart test, which sequentially applies the precedents from the major Supreme Court student speech cases.

If the student speech violates *Bethel* as vulgar, lewd, and plainly offensive, the student speech can be banned, and the state actor faces no liability. If a reasonable person would believe that the student speech is made or endorsed by the school, this perceived "imprimatur" of the school under *Hazelwood*, protects the public employee. And if the student speech advocates illegal drug use, it can be banned under *Morse*. Finally, if the speech does not fit any of these scenarios, *Tinker* controls, and the student prevails, unless the school can demonstrate that school administrators could reasonably forecast either (1) material and substantial disruption of the work and discipline of the school, or (2) material interference with school activities. *Id.* at 514.

Thus, in *Blue Mountain School District*, the Third Circuit held that a child was protected by the First Amendment and that the school principal had improperly meted out discipline to that eighth grader, who had created a faux web page ascribed to her principal, which insulted him, his wife, and his son and lampooned his sexuality. 650 F.3d at 930–31. Specifically, the protected speech used the principal's official website photo and created a mock announcement that satirically listed "M-Hoe['s]" general interests as "detention, being a tight ass, riding the fraintrain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, [and] hitting on students and their parents." *Id.* at 920. The school principal's wife, Debra Frain, worked at the school as a guidance counselor and was the subject of several of the comedic insults posted on the internet by J.S. *See id.* at 941 (Fisher, J., dissenting). In finding for the student, the Third Circuit noted that J.S. "took specific steps to make the profile 'private'" and that the principal's investigation of the matter, not the web page itself, created any "disruption" related to the incident. *Id.* at 930–31. In summary, public school employees working in the Third Circuit may very well face a "clearly established" constitutional overlay upon and in addition to *Tinker*, raising their expected level of deference to student speech.

Fourth Circuit

In the Fourth Circuit, public employees are generally subject to no circuit-specific hard rules regarding student speech rights. The standard governing a public school's ability to regulate or punish off-campus speech is whether the discipline or regulation bears a sufficient "nexus" between the student's speech and the "[s]chool's pedagogical interests [that is] sufficiently strong to justify the action taken by school officials." *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011), *cert. denied*, 565 U.S. 1173 (2012).

This amorphous test makes it fairly unlikely that a public employee would face §1983 fees and costs when that employee guesses wrong in the eyes of an appellate court in the Fourth Circuit.

Fifth Circuit

In the Fifth Circuit, public employees are generally subject to the rules of *Tinker*, both for on-campus and off-campus speech. *Bell*, 799 F.3d at 395. There appear to be no traps for the unwary in the Fifth Circuit.

Sixth Circuit

No controlling appellate authority exists in the Sixth Circuit; thus, there are no Sixth Circuit-specific "clearly established" First Amendment student speech rights.

Seventh Circuit

No controlling appellate authority has emerged in the Seventh Circuit, although one interesting district court case did find for the student, while failing to address the "clearly established" constitutional rights issue. In *T.V. ex rel. B.V. v. Smith-Green Community School Corp.*, an Indiana district court concluded that a school district violated the First Amendment rights of two students who "posed for some raunchy photos" that they later posted on the internet. 807 F. Supp. 2d 767, 774–85 (N.D. Ind. 2011). The case also discusses First Amendment concerns and applies *Tinker*'s "substantial disruption" analysis.

Eighth Circuit

The Eighth Circuit has twice tackled major First Amendment student speech cases—both times in off-campus speech cases—but neither stretches the bounds of potential employee or government liability beyond *Tinker*. *See S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. #60*, 647 F.3d 754, 756 (8th Cir. 2011).

Ninth Circuit

The leading Ninth Circuit student speech case involves student threats of extreme violence and thus offers no teaching beyond *Tinker* and *Barnette*. *See Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013). However, see the conclusion of this article for a separate discussion of violence cases and public employee liability.

Tenth Circuit

The Tenth Circuit has no controlling appellate authority; thus, there are no Tenth

Circuit-specific, "clearly established" First Amendment student speech rights.

And while the Tenth Circuit has no controlling appellate authority on public primary or secondary school jurisdiction over off-campus social media speech, the circuit has opined on the subject recently in a case involving a post-graduate, professional-school student, in this instance, a medical school student. *See generally Hunt v. Bd. of Regents*, ___ Fed. Appx. ___, 2019 WL 6003284 (10th Cir. Nov. 14, 2019).

Eleventh Circuit

The Eleventh Circuit doesn't have controlling appellate authority; thus, there are no Eleventh Circuit-specific "clearly established" First Amendment student speech rights.

And while there is no on-point, circuit-level analysis of primary or secondary school reach to off-campus speech here, the Eleventh Circuit has opined that schools do have jurisdiction over off-campus speech in the context of college student online harassment of another college student. *See Doe v. Valencia Coll.*, 903 F.3d 1220 (11th Cir. 2018). The *Valencia* case can be read as the precursor to the likely Eleventh Circuit expansion of school entity jurisdiction over the social media speech of public primary and secondary schools, since the Supreme Court analysis in *Hazelwood* clearly allows more restrictions on the First Amendment freedoms of students at the elementary school levels.

D.C. Circuit

No controlling appellate authority has been articulated in the D.C. Circuit. So there are no D.C. Circuit-specific, "clearly established" First Amendment student speech rights.

Conclusion

One additional, overarching point regarding the "clearly established" concept bears mention, not so much because it is a circuit-based broadening of the First Amendment rights of students, but because it is a very aggressive (and appropriate) narrowing. This point comes in the area of threatened or implied school-based violence by students. An analysis of the federal cases in which students are disciplined for speech that threatens violence finds that these students who then posit a First Amendment-based defense virtually always lose. Thus, there is no "clearly established" right, or any right at all, to threaten violence—even when the police conclude that it was just a joke and pursue no criminal charges. *See, e.g., Wisniewski v. Bd. of Edu. of Weedsport Central Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007) ("[A] police investigator who interviewed Aaron concluded that the icon was meant as a joke, that Aaron fully understood the severity of what he had done, and that Aaron posed no real threat to VanderMolen or to any other school official. A pending criminal case was then closed. Aaron was also evaluated by a psychologist, who also found that Aaron had no violent intent, posed no actual threat, and made the icon as a joke.").

Scholars, practitioners, and school officials have repeatedly called upon the U.S. Supreme Court to add clarity to the circuit conflict in this area by taking a case and settling the issue of when off-campus speech is subject to public scho ol jurisdiction. But until the Court takes up the issue, the murky and developing law of off-campus school speech may have an ironic undertow: because the law is almost by definition unsettled, the First Amendment rights of students in most cases can scarcely be considered "clearly established," thus supporting the immunity arguments of school employees and those who represent them. That is, unless you happen to live in the Third Circuit.