



Digital Discipline

We aren't sure if you can say that

by JOSHUA DUNN and MARTHA DERTHICK

Just as the Internet promises to change the delivery of instruction, it challenges as well the administration of school discipline. In a recent wave of cases, lower federal courts have reached contradictory conclusions about school officials' authority to punish students' speech in social media, raising difficult questions about

the applicability of today's First Amendment doctrine to online speech. The Supreme Court has declined three times to review off-campus speech cases but is likely to be drawn in eventually.

At work are two doctrinal impulses pulling in opposite directions. Under *Tinker v. Des Moines* (1969), still the lodestar for school discipline cases, schools can punish student speech only if it will cause a substantial disruption

or violate the rights of others. But the trend of federal courts since the 1980s has been to give school officials more authority in judging what would cause a substantial disruption, as well as allowing them to punish and censor vulgar speech, school-sponsored speech, and pro-drug speech. The obvious question is whether schools can punish off-campus speech that they believe can cause an on-campus disruption. Students have always said unflattering things about teachers and classmates, but, prior to the Internet, for such speech to reach enough people to cause a significant disruption it had to be uttered on campus or brought there. With the Internet, entire student bodies, if not the whole world, can receive slanderous gossip or obscene speech without anyone setting foot on campus.

So far schools have punished students for, among other things, tweeting vulgarities on a school-provided laptop, creating fake Myspace pages that imply their principals are drunk and have hit on students and their parents, and for using a personal blog to encourage fellow students to call school officials "douchebags" for canceling a "jamfest." In the Myspace cases, appellate courts held that the fake pages did not create a substantial disruption and thus couldn't be punished. But in the jamfest case, the appellate court held that the student could be punished, since she was a member of student government and her blog post was "potentially disruptive to student government functions." And in the case of a student who had used a Myspace profile to mock another girl as a slut who had herpes, the Fourth Circuit upheld the school's decision to suspend the student for violating a policy against harassment and bullying.

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In the absence of clear guidance from the Supreme Court, state legislatures have been acting. North Carolina, a leader, passed a cyberbullying law in 2012 that makes it a misdemeanor for students to post anything online "with the intent to intimidate or torment a school employee." Critics of the law immediately objected that the legislation does not define what it means to intimidate or torment. Could, for instance,

students be punished for complaining about a grade on Facebook if a teacher interpreted it as an attempt to intimidate? The law's vagueness invites a legal challenge. But perhaps most troubling to the law's critics, the statute could sanction students for posting factually correct information. For example, the law forbids posting "sexual information" about a school employee, so students could be punished for accurately reporting an affair between two teachers.

Defenders of the law point to examples of students slandering school employees. One student, upset over her schedule, claimed on Facebook that an instructor with responsibility for ROTC groped her during a uniform fitting. She recanted after the schedule was changed. But it is arguable that school employees have adequate recourse under existing law. Slander is not constitutionally protected, so why couldn't civil suits suffice for punishing malicious personal attacks? Or consider threats against teachers. True threats are also unprotected and subject to civil and criminal punishments. If a student's speech were sufficiently intimidating or tormenting, then it would probably be subject to legal action.

While the Supreme Court has expressed a desire to avoid being a national school board, the legacy of its own jurisprudence will make it hard to avoid forever deciding the scope of school officials' authority and students' rights in this new and growing family of cases.

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