



Managing Social Media-Issues Consistent With The Law

Insights

10.01.14

In this age of electronic communication, social media has added another dimension to the array of issues schools must address in order to maintain the integrity of the learning environment while also preserving the rights of students and employees. The courts are faced with numerous lawsuits arising out of school discipline for conduct such as cyber-bullying, harassment, or threats of danger, usually originating off-campus.

The schools are faced with balancing their need for order and discipline against students' and employees' rights of self-expression. How much can a school do to address off-campus activity that can impact the school environment? The answer depends upon whether you are a public or private institution.

Issues for Public Schools

As arms of the government, public schools are subject to the restrictions and protections provided in the U.S. Constitution. Disputes most commonly reported relate to the rights of students and teachers under the First Amendment, which protect the freedom of speech and privacy rights guaranteed by the Fourth Amendment.

When faced with a claim that a school has violated these (or other) rights, courts will weigh the individual's rights against the school's interest in maintaining order and a positive learning environment on its campus. The courts have recognized that there are "special characteristics of the school environment" that warrant treating speech or other conduct at a school differently from conduct that takes place in a public forum outside of the school context.

The Background

Court decisions relating to public educational institutions often apply the guidance set out in a 1969 Supreme Court opinion addressing students' rights to wear expressive clothing (black armbands) in protest of the Vietnam War. In that decision (*Tinker v. Des Moines School District*), the Court established the framework relied upon by later courts dealing with modern forms of expression via electronic media.

The *Tinker* Court noted that students are “persons” entitled to the protections afforded by the Constitution, even if they are not adult citizens. The Court decided that students are entitled to express their opinions unless the expression materially and substantially disrupts the operation of the school or invades the rights of others.

Recent Decisions

Last year, in the case of *Nixon v. Hardin County Board of Education*, a federal court in Tennessee applied the reasoning of the *Tinker* decision to determine whether or not a county school had violated the constitutional rights of a student (referred to as, “A.N.”) by suspending her for forty-five days (during which time she would attend an alternate school) as a result of a conversation on Twitter. In the conversation (“tweeting”) A.N. said she would help her friend “shoot [another student] in the face.” Later in the conversation, A.N. said that she hated the other student and that she would kill her. When the school investigated the incident, A.N. professed that she was only joking, but she conceded that an outsider would not have known from the texts (tweets) that she did not actually intend to harm the other student. The school moved for dismissal of A.N.’s claims on several grounds.

The Court summed up the status of the law in the area of students’ First Amendment rights as yielding different analyses, depending on the nature of the conduct at issue: 1) schools are entitled to prohibit, categorically, “*vulgar, lewd, indecent, or plainly offensive*” student speech; 2) schools have limited authority to censor student speech *on campus or at school-sponsored events*, as long as the censorship is done “in a manner consistent with pedagogical concerns;” and 3) as to all other speech, the *Tinker* standard applies, and schools can regulate it only if the school reasonably believes that the speech will “substantially and materially” interfere with schoolwork or discipline.

Applying these standards to off-campus, online student speech, the *Nixon* Court found that the student’s First Amendment claim should proceed because the school had *not* shown that the tweets caused a disruption of school activities or impacted the school environment in a way to warrant dismissal of the student’s claim.

The Court also was not persuaded by the school’s argument that it had to act as it did because of the tweet’s reference to an illegal activity (murder). The message from these public schools cases is to tread carefully and obtain clear advice before proceeding when dealing with off-campus speech, whether online or not.

What About Private Schools?

Private schools enjoy considerable latitude in their ability to regulate student conduct, since the school is not a governmental or public entity. Therefore, the U.S. Constitution does not apply to the school’s actions. However, given the contractual relationship that schools have with parents and

school's actions. However, given the contractual relationship that schools have with parents and students, other concepts do apply to govern the school's actions. In that regard, courts apply a fundamental fairness test to determine whether a school's imposition of serious disciplinary action (including expulsion) is appropriate under law.

Fundamental fairness requires that the school have written policies outlining conduct expectations and potential disciplinary action for violations; that the school appropriately investigates alleged violations of the policy; that it provides the student with an opportunity to be heard before making a final decision; that it follows its own policies; and that it acts consistently with regard to the application of the policy to other student actions as well.

Thus, a private school can be very clear in its policies that a student may not use the school's resources to access social media (on or off campus); that students may not use their own electronic devices on campus to access social media; and that the school may inspect anything and everything brought onto campus, including electronic devices (to determine if its policies have been violated). In addition, as to both off and on campus, the school can outline appropriate restrictions regarding bullying, harassment, hazing, or other unkind behaviors utilizing social media and declare that it will take appropriate action when such behavior is brought to the school's attention that makes the victim uncomfortable at school or otherwise impairs the victim's ability to receive full enjoyment of the school's education.

The difficulty in most situations involving alleged inappropriate social media postings is the investigation. These issues are often dropped into the school's lap by an unhappy parent. In such a case, the first thing the school should do is to decide whether the issue is a "school issue" or a "parent issue." If there is no impact on the student at school and the behavior is occurring off campus, then the issue is likely a parent issue that one parent should resolve with the other parent. If, however, the issue involves actions at school or discomfort at school due to the off-site postings, then it may implicate the bullying or harassment policies. In such case, the school must investigate.

Unfortunately, as many schools have learned, the school has limited ability to dig into the postings where such postings are behind privacy settings. In such a situation, the school should make clear to the offended individual that it is their obligation to provide the administration with the offensive information so the school can evaluate and investigate it. In addition, most schools find that investigation of social media issues takes a substantial amount of time and requires cooperation of a lot of different individuals.

Private schools should also be mindful of the rights that its *employees* may have under civil rights and labor laws. These include the right of employees to engage in protected, concerted activity to discuss terms and conditions of employment with other employees on social media or otherwise. This right is protected under Section 7 of the National Labor Relations Act. Some social media policies could violate an employee's rights if drafted too broadly to inhibit these rights or if the policy is enforced without careful consideration of the facts of each case. Areas to be watchful and to seek advice are when employees are complaining about pay, hours, change in conditions, reduced

advice are when employees are complaining about pay, hours, change in conditions, reduced benefits, supervisory actions they deem unfair or other similar concerns.

Finally, some states (i.e., Rhode Island, Tennessee, and Wisconsin, to name a few) have enacted laws prohibiting employers from requiring applicants and employees to turn over their social media passwords (with limited exceptions). Those laws would apply to schools as well. Thus, before aggressively investigating or disciplining for these postings or discussions, the school should get advice from its education or employment lawyer.

Moving Forward

Social media is here to stay. Schools need to be careful in drafting and enforcing social media policies, in investigating violations, and in imposing discipline for violation of such policies. When in doubt, be sure to contact your employment or education law attorney to avoid the pitfalls of a poorly drafted policy or a hasty disciplinary decision.

For more information, contact your Fisher Phillips attorney or the author at sbarron@laborlawyers.com or 901-233-2072.