FEATURE

Student Free Speech:

School Officials' Response to Student Social Media

Comments, "Likes" and Followers

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The principal of Albany High School first learned about a student's Instagram account featuring racist posts which targeted some of his students and staff when he heard a disturbance in the hallway outside his office. Dozens of students were crying hysterically and talking loudly about the posts, too upset to go to class.

Over the course of five months, one of his students had used a private account to post 30 to 40 racist messages referring to the Ku Klux Klan, lynching, and nooses and featuring photographs of students. Some of the account's followers were students who "liked" the racist posts, while at least one student merely followed the account. Word of the account and its contents spread quickly, upsetting and distracting students and disrupting classes.

The school disciplined the student who created the account and those who followed it, ultimately prompting a federal lawsuit. Resulting from these events, the United States district court's summary judgment ruling in the case, *Shen v. Albany Unified School District* (N.D. Cal. Nov. 29, 2017) Case No. 3:17-cv-02478-JD, 2017 U.S. Dist. LEXIS 196340, 2017 WL 5890089, offers new guidance regarding how school

administrators discipline students for off-campus expression on social media.

When school officials investigate and respond to incidents on social media like that in *Shen v. Albany Unified School District*, they are faced with complex factual and legal questions. Who was involved? What was the extent of the involvement? Did it relate to school, pose a threat, or harm students or staff? What is the appropriate response? Does the school have jurisdiction to discipline students for their online posts? Who should be disciplined and what is the appropriate discipline?

THE OFF-CAMPUS SPEECH TEST

Earlier this year, the United States Supreme Court identified social media as "perhaps the most powerful mechanism available" today to make a person's voice heard. (*Packingham v. North Carolina* (2017) 582 U.S.). Students, like other members of contemporary society, have the right to have their voices heard. They have the right to freely speak, write, and publish their thoughts, and schools may not restrain or abridge this liberty absent certain exceptions. This right is afforded under the First Amendment of the United States Constitution, as well as various California state laws.

Yet, freedom of expression must be balanced with a school's duty under the Education Code to prevent conduct such as discrimination, harassment, intimidation, and bullying based on actual or perceived protected characteristics, regardless of whether it occurs at school, at home, or online. Balancing these interests is difficult and likely to result in a complaint, lawsuit, community unrest, and/or attention from the media.

The Ninth Circuit previously held that off-campus social media speech is not beyond the reach of school officials. (See *C.R. v. Eugene Sch. Dist. 4J* (9th Cir. 2016) 835 F.3d 1142; *Wynar v. Douglas County Sch. Dist.* (9th Cir. 2013) 728 F.3d 1062.) In order to discipline (or otherwise regulate) a student for off-campus speech, however, the speech must meet the requirements of the off-campus speech test. That is, the speech must: (1) be tied closely enough (have some nexus) to the school, **or** it must be reasonably foreseeable that the off-campus speech would reach the school; and (2) substantially disrupt or materially interfere with the school environment or activities, **or** it must be reasonable to forecast that it will cause a substantial disruption of or material interference with the school environment or activities, **or** collide with the rights of students to be left alone in the school environment.

APPLYING THE TEST

Each of these factors requires careful analysis, and school administrators should exercise caution and investigate thoroughly before proceeding with discipline. While every case is fact-specific, the district court's analysis in *Shen v. Albany Unified School District* provides a framework for approaching these issues.

1. NEXUS TO SCHOOL OR REASONABLY FORESEEABLE TO REACH SCHOOL

Under the court's analysis, even though the racist social media posts were made off-campus, many had a close relationship to the school. The posts were readily visible to students and many pertained to students and school activities/events.

School administrators could reasonably expect the posts would reach the school because some of them targeted students who would be affected by the content. The posts also related to ongoing social tensions and race relations occurring at schools, and were designed to garner offensive reactions from classmates.

2. SUBSTANTIAL DISRUPTION OR INFRINGEMENT ON THE RIGHTS OF OTHER STUDENTS

The court also found the offensive and racially insensitive Instagram content to have immediately caused a "substantial disruption." Students gathered in hallways while intensely talking, crying, and yelling about the posts. Police and mental health counselors had to be called. Classroom instruction was halted to discuss the posts, and several students struggled to attend school or perform schoolwork.

The court found the facts clearly supported expulsion of the student who created the Instagram account and subject posts, even though the posts were made off-campus.

The court likewise found it proper to discipline students who actively approved the posts with affirming comments or "likes" because their actions "meaningfully contributed" to the disruption. Since many of the underlying posts were found to have had a nexus to the school and it was reasonably foreseeable they would reach the school, the court extended these findings to the related comments and posts. Moreover, since the students affirmed posts that denigrated their classmates' race, ethnicity, or physical appearance and/or threatened violence, the comments and likes also interfered with the rights of their classmates to be left alone.

The court noted, however, it would likely be improper to discipline students who approve general, offensive posts not directed at any particular student. While generally offensive, racist, or hateful speech not directed toward particular students is unsettling and hurtful, such speech is protected under the First Amendment and did not constitute harassment or bullying. Similarly, disciplining a student who merely "follows" a social media account and does not post, comment, or affirm the speech would likely violate free speech because following may be "completely devoid of any affirmative speech."

While *Shen's* summary judgment order is issued by a federal district court and thus not controlling in California state courts or in other district courts throughout the state,

it is one of the first legal opinions analyzing student speech in the context of reacting to social media posts and following social media accounts. It will, therefore, likely have persuasive effect, if and when relied upon by federal and state courts in California.[1]

EDUCATING STAFF AND STUDENTS

As case law on student free speech rights and social media evolves, it is important that schools remind students to conduct themselves in an appropriate manner both online and in-person and notify them that they may be disciplined for off-campus speech. Furthermore, school districts should educate school administrators and other staff about appropriate responses to online student expression in order to promote student safety, address bullying and discrimination, and prevent free speech violations.

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1 As of the date of this article's publication, the plaintiff students in Shen have not appealed to the Ninth Circuit, although such a filing is perhaps likely.