

District Court Rules College Policy Prohibiting “Inappropriate or Offensive” Student Postings May Violate Students’ Free Speech Rights

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The United States District Court for the Eastern District of California issued a preliminary injunction preventing a community college from enforcing a policy that prohibited student posted material that was “inappropriate” or “offensive.” (*Flores v. Bennett* (E.D. Cal., October 14, 2022, No. 1:22-cv-01003) __ F.3d __.)

Background

In November 2021, Alejandro Flores, a student at Clovis Community College (College) and founder of the local chapter of the student organization Young Americans for Freedom (YAF), posted flyers on student bulletin boards in permitted College locations. The flyers included anti-left, anti-communist, and pro-life themes.

The College’s Administrative Regulation No. 5550 controlled the posting and distribution of student materials on campus. The policy, among other things, required a posting to be pre-approved by College staff, if it was not from a College department or division. The policy also expressly prohibited “[p]osters with inappropriate or offense [sic] language or themes.”

The flyers were initially approved by College staff. However, one set of flyers was taken down after the College received complaints that the flyers made people feel “uncomfortable,” and other flyers were only approved to be posted in a remote area of campus that had little visibility by students.

YAF student members challenged the College’s prohibition on material containing “inappropriate or offensive language or themes” on several grounds. First, the students argued the policy on its face was unconstitutional viewpoint discrimination and was incapable of reasoned application. Second, the students alleged the policy was overbroad and vague, and constituted unlawful prior restraint. Finally, they alleged the College applied the policy in a discriminatory manner based on the students’ political views. The students sought a preliminary injunction to prevent enforcement of the policy.

Decision

The court granted the preliminary injunction, finding that the necessary elements were satisfied, which were that (1) the students were likely to succeed on their First Amendment claims; (2) the students were likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tipped in the students' favor; and (4) an injunction was in the public interest.

The court noted that the government may not prohibit speech based on the speaker's viewpoint, no matter the forum.

The College cited the school-sponsored speech doctrine, arguing that schools have a heightened interest in regulating third-party speech when the public may reasonably perceive the speech as sponsored or endorsed by the school, which would allow the College to lawfully regulate speech based on viewpoint. The court, however, noted that the doctrine had its roots in the K-12 school setting and that the Supreme Court had previously analogized the free speech rights on college campuses to that of the adult community, not the K-12 school setting.

The court then ruled that the students had demonstrated a likelihood of establishing the policy was overbroad. It explained that the government may not prohibit speech "merely because it offends someone or because it contains an unpopular viewpoint." The court rejected the College's argument that the students had alternative locations to post the flyers, observing this did not cure the fact that the policy was not content-neutral in the first instance. Similarly, the court rejected the College's argument that the policy constituted a permissible time, place and manner restriction because that also did not cure a policy that is impermissibly viewpoint-based on its face.

The court observed:

"... the general tenor of cases involving restrictions on college student speech strongly suggest that a ban on "offensive" speech undermines the school's own interest in fostering a diversity of viewpoints on campus, thus frustrating, rather than promoting, the College's basic educational mission."

The court concluded the policy likely created a chilling effect on student speech and an "unacceptable risk of the suppression of ideas" otherwise protected by the First Amendment. Accordingly, the court found that the students demonstrated a likelihood of success on the merits that the policy was unconstitutionally overbroad.

Similarly, the court held that the students demonstrated a likelihood of success on the merits that the policy's "inappropriate" or "offensive" provision was unconstitutionally vague. It explained that the policy did not give a person of ordinary intelligence a reasonable opportunity to know what speech is prohibited under the "inappropriate or offensive" provision. The terms "offensive" and "inappropriate" lack a commonly understood meaning, leaving students guessing what speech violates the policy.

Because it found the students likely to succeed on the facial overbreadth and vagueness claims, the court declined to rule on the students' prior restraint and viewpoint discrimination claims.

The court further found that the students had established irreparable harm by demonstrating a colorable First Amendment claim with a likelihood of success, which created a presumption of irreparable harm, even in the absence of actual harm.

Finally, the court noted that the two remaining factors—balance of equities and public interest—merge when the government is a party. Here, since the injunction did not prevent the College from crafting a new policy that is viewpoint neutral and provides reasonable standards for determining what is prohibited, and does not restrict any other policies the College may have or implement, the balance of equities and the public interest also weighed in favor of the students.

Takeaways

This case serves as a reminder that stringent First Amendment principles are applied to the regulation of student speech in higher education. In particular, it highlights how careful institutions must be with regard to policies that, either on their face or as applied, may unlawfully treat speech and speakers differently based on viewpoint. As this case reveals, speech policies that prohibit speech using terms such as “offensive” and “inappropriate” may run afoul of the First Amendment.

Importantly, the ruling in this case was not a decision on the merits of the policy, meaning the court did not make a final determination that the policy in fact violated the First Amendment. Rather, the grant of a preliminary injunction means that the court concluded that there is a likelihood that the policy will ultimately be found unconstitutional.

The College has appealed the ruling to the United States Court of Appeals for the Ninth Circuit, delaying any final ruling on the merits regarding the policy. A decision from the Ninth Circuit could provide needed clarity on some of the many important constitutional issues raised in the case. To date, however, while a briefing schedule has been established, there is no date for oral arguments. Lozano Smith will continue to follow the appeal proceedings and report on any decision from the Court of Appeal.

If you have questions about this case or about student free speech rights, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcasts](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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