

**Online Student Expression:**

**An Analysis and Comparison of Public and Private School Regulation**

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### **An Analysis and Comparison of Public and Private School Regulation**

Since the advent of the modern Internet in the early 1990s, lawmakers and school administrators have been faced with the burden of evaluating how students communicate online. When students are on campus, their speech is more justifiably regulated, but when off school grounds, students have legal rights afforded to them by the United States Constitution. Further, disciplinary action by school officials is contingent upon the type of school the student attends based on the government's involvement in administering the school (Olson, 2017). The purpose of this paper is to analyze, compare, and contrast the rights of public and private schools and their students by exploring the First Amendment to the United States Constitution, statute law, recent case law and contract law.

### **A Brief History: Deriving the Rights of the School and the Student**

In order to comprehend the rights of the student and school as well as the discrepancy between public and private school regulation, one must understand that the guarantees of the First Amendment are not absolute (Olson, 2017). A variety of factors — such as the status of the individual, presence of a contract, and medium of communication — affect the level of protection the Constitution provides (Olson, 2017). The First Amendment states that laws abridging the freedom of speech are prohibited. The amendment “does not tell citizens they must speak or what they must say if they do; it tells government not to interfere with citizens’ expressive rights,” (Kozlowski, 2017, p. 124). Thus, public schools, which are run by governmental entities, are bound by the First Amendment. However, a hierarchy of expression protected by this amendment exists. Because schools cannot operate without order and civility,

administrators and teachers may, to a certain extent, restrict students' free speech protections to preserve order and conduct and to avoid hindering their educational mission (Olson, 2017). As exemplified in *Tinker v. Des Moines Independent Community School District* (1969), students may express themselves freely, as long as they are not disruptive in doing so (*Tinker v. Des Moines*, 1969). In this case, public school students in Des Moines, Iowa, made plans to wear black armbands in protest of the Vietnam War (*Tinker v. Des Moines*, 1969). Despite their principals' warnings that they would be disciplined, the students followed through with their plan and were suspended (*Tinker v. Des Moines*, 1969). During the students' suspension, their parents sued the school district for violating their children's First Amendment rights to free speech (*Tinker v. Des Moines*, 1969). The United States Supreme Court ruled in a 7-2 decision in favor of the students stating, "Students don't shed their constitutional rights at the schoolhouse gates" (*Tinker v. Des Moines*, 1969). This landmark Supreme Court case helped derive the rights of the school and the student and has been cited in hundreds of school cases that have reached state and federal courts (Kozlowski, 2017).

Conversely, because the First Amendment's restrictions apply only to governmental entities, they are not applicable to "private people and institutions" (Olson, 2017, p. 31). Thus, students who attend private schools do not have First Amendment protections within those schools (Kozlowski, 2017).

### **Statute Law**

While few concrete laws regulating online student expression exist, some states, such as Minnesota, have statutes that focus on students' online activity. A new Minnesota law mandates that public school boards adopt policies that ban bullying that "occurs by use of electronic

technology and communications on the school premises, during the school functions or activities, on the school transportation, or on the school computers, networks, forums, and mailing lists” (Minnesota Statutes §121A.03, 2016). With this, the law prevents bullying “by use of electronic technology and communications off the school premises to the extent such use substantially and materially disrupts student learning or the school environment”(Minnesota Statutes §121A.03, 2016).

Similarly, in 2012, North Carolina legislators passed a law that makes it "unlawful for any student to use a computer or computer network to...build a fake profile or website" or to "post a real or doctored image of the school employee on the Internet" (*North Carolina School Violence Prevention Act* § 14-458.2, 2012). Students who do so could be subject to paying a \$1,000 fine or spend as many as sixty days in jail (Kozlowski, 2017).

### **Recent Case Law in the Public School Space**

There is significant recent case law in student online speech and press rights. In essence, schools can only punish students for off-campus speech if, when it reaches the school, it meets the “substantial disruption” standard of *Tinker* (Kozlowski, 2017).

In *Sagehorn v. Independent School District* (2015), a 17-year-old student at a public Minnesota high school responded to a tweet asking if he "made out with" a teacher with the words "actually, yeah" (*Sagehorn v. Independent School District*, 2015). The student, Reid Sagehorn, was suspended for the tweet, which he insisted was sarcastic and which was made off campus (*Sagehorn v. Independent School District*, 2015). In accordance with the First Amendment and outcome of *Tinker*, posts made off school grounds, “that are neither school-sponsored nor at a school-sponsored event, and which do not present a substantial disruption at the school, are not

subject to school discipline” (Binder, 2016, p. 366). For this reason, Sagehorn was awarded a \$425,000 settlement by a federal judge (*Sagehorn v. Independent School District*, 2015). This verdict indicates that the judge did not believe “the tweet caused a substantial disruption” (Kozlowski, 2017, p. 145).

Similarly, in 2010, Katherine Evans, a senior at Pembroke Pines Charter High School, a public school, created a Facebook group called "Ms. Sarah Phelps is the worst teacher I've ever met!" (*Evans v. Bayer*, 2010, p. 2). In the virtual group, Evans encouraged her peers to speak negatively of Phelps, a teacher at their school. Though all posts were made off school grounds, principal Peter Bayer discovered the discourse and suspended Evans for three days (*Evans v. Bayer*, 2010). As in *Sagehorn*, Evans’ actions did not cause substantial disruption, and as a result, the school removed all records of Evans’ suspension and paid her \$15,000 in attorney fees (*Evans v. Bayer*, 2010). Upholding the First Amendment, the outcome of *Tinker* restricts public school administrators from disciplining student expression solely because they find it offensive (Kozlowski, 2017). That is why the students in *Sagehorn* and in *Evans* prevailed. Though their school officials were reasonably unhappy with the way their students viewed and discussed them, said officials would have great difficulty proving the students’ words were abusive or disruptive (Wadman, 2011).

Conversely, the results of cases involving off-campus online speech do not always work in the student's favor. As previously stated, a variety of factors affect the level of protection the Constitution provides. In *J.S. v. Blue Mountain School District*, one factor that resulted in an outcome different than those of *Sagehorn* and *Evans* was the ability to create a disruption. An eighth-grade public school student was suspended when she created a MySpace profile that featured a photo of her school’s principal (*J.S. v. Blue Mountain School District*, 2010). The

profile, which impersonated the principal, used language described by the judge as "vulgar" and "lewd" and implied that the principal was a pedophile who performed sexual acts in his office (*J.S. v. Blue Mountain School District*, 2010). Although the student created the profile at home, the judge maintained that the student's actions affected how students and their parents viewed the principal and, therefore, caused a disruption (King, 2010). The suspension was upheld, as it was deemed "constitutional under *Tinker's* protective rationale" (King, 2010, p. 629). That is, when students' off-campus actions cause on-campus disruptions, they are not protected by the First Amendment.

### **Contract Law**

The First Amendment applies only when there is government involvement (Kozlowski, 2017). Therefore, students who attend private schools are not protected by the First Amendment within those schools (Kozlowski, 2017). These institutions are free to create their own governance and self-contained laws, by which students and their guardians agree to abide. Such agreements are known as contracts, which consist of an "offer, acceptance of the offer, and consideration" (Kerr, 2017, p. 175).

One example of a private school that utilizes a contract is Creighton Preparatory High School in Omaha, Nebraska. The terms of its contract are detailed in its yearly student-parent handbook, which students and their parents or guardians must sign when enrolling (Creighton Preparatory School, 2016). This handbook details online student expression, on and off school grounds, and states, "when using social media at any time on campus or off campus, students are expected to observe and follow the Student-Parent Handbook which includes demonstrating respect for others and the school" (Creighton Preparatory School, 2016, p. 58). It also indicates that this

activity can include “video and photo sharing, social networking, blogs, wikis, podcasting, instant messaging, texting, web conferencing, or any other technology that allows for direct or indirect interaction between two or more parties” (Creighton Preparatory School, 2016, p. 58). With this, the *Student-Parent Handbook* has a section dedicated to off-campus use of technology:

Creighton Prep reserves the right to impose consequences for inappropriate behavior that takes place on or off campus and outside school hours. Thus, inappropriate use of technology (for example, on a home computer), may subject the student to consequences. Inappropriate use includes, but is not limited to harassment, inappropriate use of the school name, remarks directed to or about faculty, staff, students or others, offensive communication, and safety threats. (p. 58).

Further, the handbook indicates that failure to comply with the guidelines set forth in the contract can result in “disciplinary sanctions, suspension, or expulsion of a student” (Creighton Preparatory School, 2016). Hence, unlike public school administrators, private school administrators can punish students for actions that may be otherwise Constitutionally sound and legal.

### **Recent Case Law in the Private School Space**

Compared to case law in the public school space, significantly fewer lawsuits have been filed on behalf of private school students who believe their First Amendment rights were infringed upon their school administration. This could be due to the fact that the majority of private school students and their parents agree with the regulations and values of the school and do not feel they

conflict with their own. However, two recent cases exist in which high school students felt their schools violated their rights.

In 2010, Hannah Jegart, who attended Roman Catholic Church of the Diocese of Houma-Thibodaux, sued the private high school after she received a nine-day-suspension for her online speech (*Jegart v. Roman Catholic Church*, 2010). She created several Facebook pages, on which she spoke negatively of the bishop who taught her apologetics course and exchanged answers with her peers (*Jegart v. Roman Catholic Church*, 2010). In court, her punishment was upheld, as the First Amendment was not applicable to her private school and as her actions violated the considerations to which she agreed when signing her contract.

Similarly, two students were expelled from California Lutheran High School, a private institution, after school officials found content on their MySpace profiles that uncovered their lesbian relationship (*Doe v. Cal. Lutheran H.S. Assn.*, 2009). The students were unsuccessful when they sued the institution, as the California Court of Appeals determined that the students' actions did not align with the school's code of conduct (*Doe v. Cal. Lutheran H.S. Assn.*, 2009). In its contract, the school detailed a guideline known as "Christian Conduct." This rule lists "scandalous conduct on or off campus which is a serious violation of Christian behavior (including use of illegal substances, pre-marital sex, homosexuality" as a "serious matters for which a student may be suspended or expelled" (California Lutheran High School, 2008, p. 7). Hence, the contract the students agreed to prohibited their activity, which was brought to light by their online speech.

## **Conclusion**

Decisively, several factors go into regulating online student expression. Two key historical factors that derived regulation of said expression are the First Amendment and *Tinker*. They are



the basis for many, if not most, decisions made in court cases involving regulation of student expression in public schools. The First Amendment states that students have rights to free speech — even at school. However, in order for schools to function, there must be decorum and rules. The *Tinker* decision meets the needs of the school and the rights of the student in the middle. It concludes that students may freely exercise their First Amendment rights, as long as they are not disruptive in doing so (*Tinker v. Des Moines*, 1969). Recent cases such as *Sagehorn* and *Evans* exemplify instances in which students were able to successfully sue their school administrators for disciplining them for expression made off campus that was not disruptive. Conversely, cases like *J.S. v. Blue Mountain School District*, highlight how punishments that result from disruptive student behaviors — made on or off campus — are upheld by courts. While public school regulation is, more or less, bound by the First Amendment and *Tinker*, private school regulation of online student expression is generally bound by contract law. That is, students and their guardians (presumably) read, agree to, and sign contracts that detail acceptable and unacceptable behaviors and the disciplinary actions they yield. Therefore, as seen in *Jegart* and *Doe*, a lawsuit in which a student's actions contravene the rules of his or her contract — even if said actions are guaranteed by the Constitution — will likely be ruled in favor of the school district or administration. Thus, it is essential that students and their guardians read their contracts and handbooks in depth. Conclusively, whether students are enrolled in public or private schools, it is very important that they are fully aware of their rights and responsibilities.

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