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## **Silencing Silent Speech: First Amendment Technology Issues Involving Students and Employees**

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# Silencing Silent Speech: First Amendment Technology Issues Involving Students and Employees

By Wesley E. Johnson

In the wake of the increased use of technology for communication, school districts face numerous issues involving First Amendment concerns regarding student and teacher “speech” in the form of tweets, twitters, posts, printed promotional materials, and even an increased retro return to the most primitive forms of communication – silence itself. This paper will provide a thorough overview regarding the considerations that should be made in conducting a legal analysis of such speech, which is often initiated as a location that is remote from the school, and includes basic overview of free speech claims in the context of both the student and the employee as well as recent federal court decisions and the current Fifth Circuit position.

## Important Definitions for :

**Blog** – “a [website] that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer[.]” *Silver v. Brown*, 382 F.App’x 723, 725 n.1 (10<sup>th</sup> Cir. 2010);

**Twitter** – “twitter is an online social media site whereby its users ‘tweet’ their thoughts.” *Rosario v. Clark Cnty. Sch. Dist.*, No. 2:13-CV-362 JCM (PAL), 2013 U.S. Dist. LEXIS 93963, 2013 WL 3679375, at \*5 (D. Nev. July 3, 2013);

**Hashtags** – “Users of Twitter commonly place hashtags, signified by a number sign (#), in front of words to signify the topic, genre or style of the tweet; users can then search for or sort tweets by hashtag.” *In re Grand Jury Subpoena No. 11116275*, 846 F.Supp. 2d 1, 3-4 n.5 (D.D.C. 2012);

**Tweet** – “A ‘tweet’ is a message by a user of Twitter. *Rosario* at \*14;

**Followers** – “...[O]ther users of the Twitter social media site, [who] may read [another user of Twitter’s] thoughts or ‘tweets.’” *Rosario* at \*14;

**MySpace** – “a social networking website that allows its members to set up online ‘profiles’ and communicate via email, instant messages, and blogs.” *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1065 (9<sup>th</sup> Cir. 2013);

**AOL Instant Messaging ("IM") software** - “Instant messaging enables a person using a computer with Internet access to exchange messages in real time with members of a group (usually called "buddies" in IM lingo) who have the same IM software on their computers. [It] permits rapid exchanges of text between any two members of a "buddy list" who happen to be on-line at the same time. Different IM programs use different notations for indicating which members of a user's "buddy list" are on-line at any one time. Text sent to and from a "buddy"

remains on the computer screen during the entire exchange of messages between any two users of the IM program. The AOL IM program, like many others, permits the sender of IM messages to display on the computer screen an icon, created by the sender, which serves as an identifier of the sender, in addition to the sender's name. The IM icon of the sender and that of the person replying remain on the screen during the exchange of text messages between the two "buddies," and each can copy the icon of the other and transmit it to any other "buddy" during an IM exchange." *Wisniewski v. Bd. Of Educ. Of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 35 (2d Cir. 2007); and

**Facebook** – an internet based social networking site that allows individuals to maintain profiles of themselves, in which comments, photographs, and other postings may be made to certain other persons also subscribed to Facebook. *Gresham v. City of Atlanta*, 2011 U.S. Dist. LEXIS 116812, n. 3 (N.D. Ga. 2011).

### **Student Speech**

Today's school administrators are finding themselves facing more and more student speech that confuses the issue of exactly how student speech conveying an inappropriate message falls into the jurisdiction of the school district and exactly when speech conveying an appropriate message crosses the line with respect to the nature of the delivery method. Another significant issue in today's student free speech cases involves the origin of the speech in relation to the power of the school administrator to take action against the student "speaker." Additionally, the concrete nature of written words can be much more powerful than spoken words. They have a longer shelf life, reach a wider audience, and provide the speaker with an immediate sense of anonymity. Courts are being forced to carefully analyze these issues.

### **Student Free Speech / The Basics:**

*Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969):

- Restriction of student speech on a school campus;
- Political/social student speech although case not restricted to political/social issues;
- The school district was required to demonstrate more than a mere desire to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"; and
- *Tinker* created the requirement that a relationship between the student speech being restricted and a demonstrated substantial disruption must be shown prior to restricting such speech.

*Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L. Ed. 2d 549 (1986):

- Restriction of student speech on a school campus;
- Elaborate, graphic and explicit sexual metaphor(s);

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