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Flash

What Right Do Schools Have to Discipline Students for What They Say Off Campus?

By Wendy Kaminer

Three girls in Indiana were expelled for joking on Facebook about classmates they would like to kill. Should districts have the authority to intervene?



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Griffith Middle School in Indiana aims to transform "learners today" into "leaders tomorrow." Leaders of which country, I wonder, after reading the Griffith Middle School [Handbook](#). North Korea? The U.S. Constitution appears to have no standing in Griffith.

Idiotic rules like this are bound to be

Students who have the misfortune to attend school here have virtually no speech rights, pursuant to vague, arbitrary anti-bullying and intimidation rules that include such cryptic provisions as a ban on "innuendos," for which they may be

enforced idiotically.

suspended or expelled. They are subject to rules against using or possessing profanity, pornography or obscenity that include a breathtakingly vague prohibition of "other inappropriate materials" and a ban on "using or writing derogatory written materials." I suppose they could be disciplined for reading this post, which intentionally derogates Griffith School administrators.

Griffith students should perhaps learn to behave like obedient little automatons: They may be expelled for displaying "disrespect" toward staff or other students or for "disruptive behavior," including "chronic lack of supplies" and "arguing;" (so much for the spirit of free inquiry). They may be suspended for "hall misconduct," which includes "boisterous behavior" as well as failure to walk on the right.

Idiotic rules like this are bound to be enforced idiotically, but the consequences for students are not amusing. Griffith Middle School is now being sued in federal court for expelling three 8th grade girls for engaging in a girlish exchange on Facebook that included jokes about classmates they'd like to kill. Their conversation, which lasted less than two hours, was conducted after school, on their own time and on their own computers. According to the complaint in *S.M v. Griffith Public Schools*, filed by the Indiana ACLU,

the conversation spanned numerous subjects, from the pain of cutting oneself while shaving to the girl's friendship, before turning to a discussion of which classmates they'd like to kill if they had the chance. At all times, the conversation was purely in jest ... as is evidenced by the girl's repeated use of 'emoicons' ... abbreviations (like lol) and consistent capitalization intended to represent sarcasm.

Nevertheless, they were charged and found guilty of bullying, intimidation, and harassment (even though their conversation was not covered by Griffith's broad definition of bullying which requires "repeated ... negative actions ... over time.") First, the girls were summarily suspended, after the mother of a classmate complained about their exchange. The school principal recommended their expulsion; they appeared before an "expulsion examiner," who agreed and ordered their expulsion, which was approved by the school superintendent.

We are not amused, I can imagine these officials intoning. They were also not persuaded by a letter from one of the students referenced in the alleged threats, explaining that he did not feel threatened, understood that the girls were joking and did not want to see them punished.

The students have a very strong First Amendment case -- if the First Amendment retains any relevance in public schools. There's no question that those of us not in actual or virtual custody of school authorities have the right to make jokes about killing each other. Student rights, however, are increasingly limited; anxiety about social media and hysteria about bullying or drug use have only been exacerbated by the post 9/11 authoritarianism that permeates our culture and our courts.

The robust, optimistic affirmation of student speech rights in *Tinker v. Des Moines*, the 1968 Supreme Court decision upholding the right to wear armbands to school in an anti-war protest, has given way to a darker vision of student speech rights as threats to student welfare. Trivial teenage incivilities are condemned as soul destroying bullying. Jokes about marijuana are treated as gateways to drug abuse:

In *Morse v. Frederick*, the Court upheld the power of school officials to punish a student for holding a nonsensical "bong hits for Jesus" banner at an extra-curricular event.

Still, while student rights are limited, they're not supposed to be non-existent. School officials are not supposed to enjoy unfettered discretion to enforce vague prohibitions on "inappropriate" or "offensive" speech. There is no "categorical harassment exception" to the First Amendment, the Third Circuit Court of Appeals ruled in *Saxe v. State College Area School District*, a 2001 case striking down an over-broad public school harassment policy.

It's worth noting that then Circuit Court Judge Alito wrote for the majority in *Saxe*, although he is generally no champion of the First Amendment, as his solitary dissents in *Snyder v. Phelps* and *U.S. v. Stevens* show. But he has championed the First Amendment rights of conservative Christians. In *Saxe*, he upheld a challenge brought by a Christian family to a school policy that could have barred disapproval of homosexuality, and in *Christian Legal Society v. Martinez*, he dissented from a decision denying a conservative Christian student group the associational right to exclude gay students. This result-oriented appreciation of free speech rights is lamentable, but it's preferable to no appreciation at all.

Alito's opinion in *Saxe* includes a strong endorsement of speech rights that you don't have to be a Christian to enjoy: There is "no question," he wrote "that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs." While schools are required by federal civil rights law to protect students from peer-to-peer harassment, as *Saxe* notes, this requirement is not *carte blanche*, much less a mandate, to ignore the First Amendment.

The former Griffith students expelled for their Facebook chatter had not, therefore, been stripped of all speech rights by virtue of their status as students, and those rights should easily prevail over any professed concerns about harassment. Their speech didn't qualify as harassment, even under the broadened, [potentially censorious standards](#) issued by the Obama Administration. It was not "severe, pervasive, or persistent" and apparently presented no bar to any student's access or opportunities.

There are other factors empowering schools to punish student speech, but none of them appear to be present in this case. The speech was not disruptive of school activities (officials have generalized power to punish substantially disruptive speech), and it did not, pursuant to any reasonable view of intimidation, constitute an actionable threat. As the complaint in *S.M. v Griffith* stresses, jokes exchanged between friends ("routine teenage banter") not intended or likely to terrorize anyone do not qualify as "true threats," excluded from constitutional protection.

But while the students in this case should prevail on their First Amendment claims, the Griffith Student Handbook also raises some serious due process questions. Schools do enjoy "very broad" authority to "prescribe and enforce standards of conduct," the Supreme Court has [observed](#), but it "must be exercised consistently with constitutional safeguards," including due process protections of the right to a public education. School policies need not be nearly as clear or precise as public laws, but Griffith school rules are especially, absurdly vague, providing no notice of prohibited speech and behavior. Bans on "inappropriate material," or "derogatory writing," for example, can mean everything or nothing, depending on the subjective opinions of individual officials. This is a "we know it when we

see it" speech code, and it makes arbitrary enforcement unavoidable.

The ACLU lawsuit does not include a facial challenge to Griffith's handbook; it simply seeks damages for the three expelled students, who are all pursuing their educations elsewhere. So even if they win their case, as I hope they do, Griffith students will remain under the shadow of the school's unpredictably harsh, repressive rules, which they and their parents are required to acknowledge in writing and agree to obey, accepting penalties for whatever school officials determine to be violations. Students at Griffith Middle School and other anti-libertarian public schools across the country may not be taught regard for civil liberty, but some will acquire it the hard way.

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