

# GENERAL COUNSEL'S CORNER

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## Student Social Media and Free Speech on Campus

Free speech on campus—and off—has become a flashpoint for U.S. colleges and universities. Students' ability to post their comments and concerns online, to forward messages to others for whom they may not have been intended, and to record the speech of faculty and staff or other students and post what may have been considered private speech have created conflict on campus, in the media and sometimes in state legislatures. Particularly for public colleges and universities, Constitutional protections for nearly all speech create challenges for administrators and faculty who prioritize creating a supportive educational environment for their students.

In June 2021, the U.S. Supreme Court issued a decision in *Mahanoy Area School District v. B.L.*<sup>1</sup> that has made it nearly impossible for public institutions to punish students for disruptive social media speech, unless it falls within a few very narrow exceptions such as actual threats against an identified individual or college office, or actionable libel or slander. In that case, the Court ruled 8-1 that student speech on social media made outside of school hours and when the student was not under the control of the school was protected speech under the First Amendment. And although this case involved a high school student, it is likely that First Amendment protections would be even stronger for college students, particularly if the disruptive social media speech is made when the student is not in class or participating in official college activities. And even then, the protections would very likely be substantial.

In addition to the constitutional protections afforded to the speech of students at public institutions, students at private institutions may enjoy similar protections by state legislative action. Most notable in this regard is the protection afforded to speech of such students under California's "Leonard Law."<sup>2</sup> The law prohibits private colleges and universities from disciplining students for speech that would be protected from state action by the First Amendment if made off campus<sup>3</sup> and creates a private right of action for students seeking injunctive or declaratory relief.<sup>4</sup> While courts have yet to address the Leonard Law's application to student social media, such application would be consistent with its purpose.

Absent specific legislation protecting student speech, private college and university students have sometimes sought protection under their state constitutions and general laws. For example, in the well-publicized case of *Abramowitz v. Boston University*,<sup>5</sup> undergraduate students challenged the university's enforcement of its residence hall policy prohibiting the posting of signs on windows. They alleged that

<sup>1</sup> 141 S. Ct. 2038 (2021)

<sup>2</sup> Cal. Educ. Code § 94367

<sup>3</sup> *Yu. V. Univ. of LaVerne*, 196 Cal. App. 4th 779, 788-89 (2011)

<sup>4</sup> *Supra* nt. 2 at (b)

<sup>5</sup> CIV No. 82680 (Mass. Sup. Ct. Suffolk Div., Dec. 2, 1986); see <https://www.nytimes.com/1986/12/04/us/4-boston-students-win-a-test-on-free-speech.html>; see also *New Jersey v. Schmid*, 423 A.2d 615 (N.J. 1980) (opining that state constitutional protections of free speech are available against unreasonably restrictive conduct by private entities that have assumed an obligation not to abridge such speech based on the public use of their property).

university officials selectively enforced the policy to stifle their protest of the university's stock holdings in companies that conducted business in apartheid South Africa. Relying on the state's civil rights law, the court agreed, holding that the university had violated the free speech rights of its students when it threatened to evict them for hanging political banners out of their residence hall windows.

Rather than rely on state law, students at private institutions more frequently cite institutional policies and codes of conduct to protect their interests in freedom of speech, inquiry and expression. Such policies customarily affirm such freedoms, thereby affording students' rights enforceable under breach of contract or other similar theories. Likewise, the culture of the academy recognizes a student's implied right to freedom in academic pursuits, analogous to that of faculty.<sup>6</sup> Thus, both the language of institutional policies and institutional norms necessitate scrupulous handling of student speech issues, even on social media and even at institutions not subject to first amendment scrutiny.

Issues of student speech pose a particular challenge to religious institutions which must harmonize the interest of free expression with the tenets of their religion. Such institutions often address this intersection in their academic freedom policies. For example, Baylor University, which is affiliated with the Baptist General Convention of Texas, states that it expects its faculty to educate students "within the framework of Christian culture;" and also describes freedom of expression as "vital to the university." By contrast, Dharma Realm Buddhist University acknowledges its religious affiliation, but asserts in its statement of academic freedom that, "No student is subject to any pressure, overt or otherwise, to subscribe to a particular ideology."<sup>7</sup> The academic freedom policy of Brigham Young University, which is owned by the Church of Jesus Christ of Latter-day Saints, expressly integrates the institution's religious mission in its concept of academic freedom, distinguishing between individual and institutional freedoms and placing limitations on both constructs.<sup>8</sup>

Some religious institutions refrain from even mentioning religious affiliation in their academic freedom policies. For example, the academic freedom policy of Yeshiva University makes no mention of its religious affiliation with Modern Orthodox Judaism, prohibiting only communication that is unlawful.<sup>9</sup> The correlative policy at the University of Notre Dame, a Catholic institution, mentions only that the university itself "lives in the tradition of Christian belief," without any discussion of how that may, or may not, impact the regulation of student speech.<sup>10</sup> Given the wide variety of approaches adopted by religious institutions, such institutions should exercise particular care in ensuring that those responsible for responding to objectionable speech on social media understand how the institution's religious identity might, or might not, inform the institutional response.

Religious affiliation aside, for certain academic programs institutions may be able to restrict student speech on social media through the use of rules for students enrolled in professional programs, particularly those leading to occupational licensing. For example, institutions have fended off challenges to disciplining students for inappropriate speech on social media that is related to their studies in teacher training programs, mortuary science programs and nursing. In *Snyder v. Millersville*

6 See e.g., AAUP Statement on Professional Ethics ("As teachers, professors encourage the free pursuit of learning in their students... They protect their academic freedom") available at <https://www.aaup.org/report/statement-professional-ethics>

7 Dharma Realm Buddhist University Statement on Academic Freedom, available at <https://drbu.edu/about/mission-and-educational-objectives/statement-academic-freedom>

8 Brigham Young University Academic Freedom Policy, available at <https://policy.byu.edu/view/academic-freedom-policy>

9 Yeshiva University Policy on Academic Freedom, available at <https://www.yu.edu/sites/default/files/inline-files/January%202022%20Faculty%20Handbook.pdf>

10 University of Notre Dame Policy on Academic Freedom and Associated Responsibilities, available at <https://facultyhandbook.nd.edu/>

*University*,<sup>11</sup> a student was removed from student teaching by a school district for posting a photo on social media that she shared with her high school students of herself apparently drinking a beer. Because she could not complete her student teaching requirement for a teaching degree, the university refused to award the teaching degree. She sued the university, claiming free speech, but the court backed the university. In *Keefe v. Adams*,<sup>12</sup> a student was removed from a nursing program after posting threats against his fellow students on a public Facebook page. The court rejected his claim that the removal violated his First Amendment rights, agreeing with the institution that the Nurses Association Code of Ethics requires nurses, including those in training, to comply with its professional standards. And in *Tatro v. University of Minnesota*,<sup>13</sup> a student enrolled in a mortuary science program was disciplined for posting on social media disrespectful comments about the cadaver she had been assigned and making apparent threats against an unknown individual. She alleged violations of her free speech rights. Again, the court pointed to ethical requirements and professional standards in the mortuary science occupation and upheld the discipline.

On the other hand, public colleges and universities have lost challenges related to bias response teams, a mechanism designed to respond to harassment and bullying by fellow students, often appearing on social media. Students have challenged these teams, and the policies they enforce, as suppressing their free speech rights and potentially subjecting them to discipline for speech that is constitutionally protected.<sup>14</sup> The University of Michigan, University of Texas and University of Illinois have faced legal challenges to their bias response teams, as have the University of Central Florida, Iowa State University and Virginia Tech. Although the University of Illinois prevailed in the litigation and Iowa State's lawsuit was settled, courts ruled against certain policies related to allegedly biased speech at the University of Michigan, the University of Texas/Austin, the University of Central Florida and Virginia Tech. It is likely that many, if not most, public colleges and universities have policies related to discriminatory speech; these policies should be reviewed by legal counsel and administrators implementing these policies need to understand the legal constraints of enforcing them.

And finally, the social media app Yik Yak appears to be returning to campus, albeit reportedly with "guardrails" to attempt to reduce its use to engage in anonymous cyberbullying and hate speech.<sup>15</sup> Public colleges and universities will need to be sensitive to the serious impacts of such speech, although attempts to control or respond to such speech pose legal challenges, as noted above. However, not responding to student complaints about abusive or threatening speech on Yik Yak spelled legal trouble for at least one institution<sup>16</sup> which lost a Title IX lawsuit brought by women students who were threatened with physical harm over Yik Yak.

In short, colleges, both public and private, walk a narrow line between responding to hateful speech and bullying of their students on the one hand, and compliance with constitutional and legislative free speech requirements on the other. Should administrators have questions about how to respond, conferring with counsel can help keep them on the litigation avoidance path.

<sup>11</sup> 2008 U.S. Dist. LEXIS 97943 (E.D. Pa. December 3, 2008)

<sup>12</sup> 840 F.3d 523 (8th Cir. 2016)

<sup>13</sup> 816 N.W. 2d 509 (Minn. 2012)

<sup>14</sup> See Barbara A. Lee, "Bias Response Teams: No Easy Answers," *General Counsel Corner*, February 1, 2022, available at [Bias Response Teams - No Easy Answers \(bsk.com\)](#).

<sup>15</sup> Jonathan Franklin, "YikYak, the Anonymous App that Tested Free Speech, is Back." August 17, 2021, <https://www.npr.org/2021/08/17/1028402237/yik-yak-anonymous-app-free-speech-returns>

<sup>16</sup> Feminist Majority Foundation v. Hurley, 911 F.3d 674 (4th Cir. 2018)

*General Counsel's Corner is a publication presented by one of Bond's former general counsels and academic administrators of higher education institutions: [Monica Barrett](#) (Rutgers); [Sandra Casey](#) (SUNY and Siena College); [Shelley Sanders Kehl](#) (Pratt Institute); [Barbara Lee](#) (SVP for Academic Affairs at Rutgers); [Sarah Luke](#) (Governors State University); [Gail Norris](#) (University of Rochester); and [Jane Sovern](#) (CUNY). In each issue, a different attorney from this team will share with you recent legal developments, tips, strategies and useful information to assist you with your daily work on campus.*



This post is brought to you by [Barbara A. Lee, Ph.D.](#), and [Sarah A. Luke](#) in our New York City office. Barbara previously served as Senior Vice President for Academic Affairs at Rutgers University where she continues on as a Distinguished Professor of Human Resource Management. She is a former director for the National Association of College and University Attorneys (NACUA), and a prolific author, speaker and editor. Barbara is also the former chair of the New Jersey Bar Association's Higher Education Committee. Sarah served as General Counsel and Vice President of Governors State University, a regional public university in south suburban Chicago. She has held in-house positions at Wayne State University in Detroit, Michigan and at Rutgers, the State University of New Jersey.

