

## Uphold conduct codes while respecting students' free speech rights

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For higher ed administrators, upholding conduct codes while respecting students' free speech rights is a tricky tightrope to walk. A recent court case (*Serodio v. Rutgers, The State University of New Jersey*, No. 09-2221, D.N.J. June 13, 2014) provides a useful roadmap to help higher ed administrators manage this balancing act. A medical student alleged that the New Jersey Medical School of Rutgers University suspended him in retaliation for exercising his First Amendment rights to free speech. The student had written a racially charged op-ed piece in which he declared himself a "white African-American," which was published in the student newspaper. The student also claimed the university discriminated against him as a "white African-American" and failed to address a racially hostile environment.

In this case, the court granted summary judgment to Rutgers. The court concluded that the student failed to establish a genuine issue of material fact regarding Rutgers' motivation for suspending him.

### Track conduct violations

The evidence demonstrated that Rutgers didn't initiate disciplinary proceedings against the student in response to his newspaper article. Rather, more than a month later, the student had violated the medical school's code of professional conduct and electronic systems policy by misusing the school's intranet to post a set of lecture notes containing lewd and sexually explicit material on a student-run website.

The student's lecture notes also were misleading because they appeared to be approved by the professor who had delivered the lecture. However, the student added the offensive material after the professor had reviewed and approved the proposed notes for publication on the website.

After Rutgers initiated the disciplinary process, the student again violated Rutgers' code of conduct and electronic use policy by posting a second set of lecture notes containing extraneous images and commentary, ultimately resulting in Rutgers' decision to suspend the student.

The court also found no evidence that Rutgers treated the student differently than similarly situated students who didn't self-identify as "white African-Americans." That is, Rutgers hadn't imposed lesser sanctions — or no sanctions — on any other students for the same or similar offenses as those committed by the student in this case. And the student didn't provide any proof that he reported to university officials any incidents of alleged student harassment, let alone that Rutgers acted with deliberate indifference to an alleged hostile environment.

### Differentiate extracurricular, curricular speech

The *Serodio* case highlights the importance of identifying the levels of protection afforded to different types of student speech. A student-written article in a campus newspaper, for example, is entitled to a high degree of constitutional protection — and can't be a "substantial or motivating" factor in an

institution's decision to discipline a student — because it qualifies as extracurricular speech independent from the institution's primary educational aim.

Unless an institution can show that publication of an article in a campus newspaper somehow interferes with its ability to educate, administrators should be wary of disciplining students for such speech. Indeed, Rutgers didn't suspend the student in response to his racially charged op-ed piece in the campus newspaper.

On the other hand, institutions have broad discretion to discipline students based on curricular speech — that is, speech forming an integral part of the classroom-teaching function. Institutions may impose legitimate pedagogical standards on students' curricular speech without violating their First Amendment rights

As such, Rutgers acted lawfully when it disciplined the student for posting multiple sets of lecture notes containing unprofessional and extraneous material to the school's intranet. The more that student speech contributes to the classroom-teaching dynamic, and the more that it appears to be sanctioned by the educational institution, the more likely that it qualifies as curricular speech subject to university-imposed standards of professionalism.

### Provide advance notice

In order to actually impose discipline for curricular speech, an institution is best served by providing advance notice to students of its standards of professional conduct and policies governing use of its electronic systems. Any such policies should be as precise as possible, and be made available to students both online and in published university codes of conduct.

Thus, Rutgers had unambiguous policies in place that it identified during the disciplinary hearings that the student had violated. The clearer an institution's professionalism standards and electronic use policies, the more consistent it will be in meting out discipline based on those standards and policies, and the less vulnerable it will be to charges of discrimination.

Finally, in enforcing clear standards and policies, an institution must ensure due process for its students. For instance, upon the student's violations, Rutgers sent him a letter identifying the policies that he had violated, notified him of a campus disciplinary hearing, and provided an internal appeals process. By adopting and following these measures, college and university administrators can rest assured they're taking the right steps along the constitutional tightrope of upholding codes of conduct without violating students' free speech rights. ■

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