

PROFESSIONAL STANDARDS ON SOCIAL MEDIA: HOW COLLEGES AND UNIVERSITIES HAVE DENIED STUDENTS’ CONSTITUTIONAL RIGHTS AND COURTS REFUSED TO INTERVENE

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I. FACTS OF <i>KEEFE V. ADAMS</i>	602
II. <i>KEEFE</i> ’S DUE PROCESS CLAIM.....	605
III. THE DISTINCTION BETWEEN ACADEMIC AND DISCIPLINARY MISCONDUCT	605
IV. WHAT PROCESS IS DUE.....	609
V. <i>KEEFE</i> ’S FIRST AMENDMENT CLAIM	611
VI. SCHOOL SPEECH CASES AND THE FIRST AMENDMENT	612
A. <i>Tinker v. Des Moines Independent Community School District</i>	612
B. Post- <i>Tinker</i> School Speech Cases	613
VII. SOCIAL MEDIA AND THE FIRST AMENDMENT IN SCHOOL SPEECH CASES.....	614
VIII. THE <i>TINKER</i> LINE OF SUBSTANTIAL DISRUPTION CASES IN HIGHER EDUCATION	614
IX. PROFESSIONAL SCHOOL CASES AND THE FIRST AMENDMENT	616
A. <i>Tatro v. University of Minnesota</i>	616
B. <i>Ward v. Polite</i> and <i>Keeton v. Anderson–Wiley</i>	617
X. ADHERING TO VAGUE STANDARDS OF PROFESSIONALISM	618
A. “Narrowly Tailored and Directly Related”	618
B. Application of “Narrowly Tailored and Directly Related” to <i>Keefe</i>	619
XI. ON-CAMPUS AND OFF-CAMPUS SPEECH.....	621
XII. THE ROLE OF PROFESSIONAL SCHOOLS IN DETERMINING FITNESS...622	
XIII. SPEECH OCCURRING OUTSIDE OF A PROFESSIONAL CAPACITY	623

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XIV. THE EMPLOYMENT SPEECH CASES	623
XV. CONCLUSION	625

In an atmosphere dominated by social media, students increasingly communicate through smart phones designed to “post” at the touch of a button. Facebook, Twitter, Instagram, Vine, Foursquare and numerous other social media websites connect students with thousands of their closest friends and followers on a daily basis. The downside to such ease of communication and accessibility is that it can be difficult to control your intended audience. Most students attempt to limit their online presence to seem inoffensive to employers, grandparents, etc. However, the majority of social media users have at least one account rather kept “private”, meaning available only to approved friends and followers, not the general public. With privacy emerging as a relative concept in the age of social media, the question then becomes: in what circumstances are professional schools able to confront students for online speech never intended to reach the eyes of school administrators?

I. FACTS OF *KEEFE V. ADAMS*

The U.S. District Court of Minnesota was forced to answer that exact question in *Keefe v. Adams* in August 2014.¹ Craig Keefe was removed from the state-run Central Lakes College’s degree nursing program as a result of conduct deemed unprofessional by school administrators.² In response to his dismissal from the program, Keefe brought a §1983 action against college administrators, in their individual and official capacities, alleging that they denied him due process, violated his right to free speech, violated his right to be free from unreasonable searches and seizures, violated his right to privacy, and conspired to violate his constitutional rights.³

As part of his enrollment in the Fall 2012 semester, Keefe had received a handbook stating in relevant part that “[a]ll current and future students are expected to adhere to the policies and procedures of this student handbook as well as all policies of clinical agencies in which the student is placed.”⁴ Under “Student Removal from Nursing Program,” the handbook states that “students who fail to meet professional standards are not eligible to progress in the program.”⁵ Failure to meet professional standards includes be-

1. 44 F.Supp.3d 874, 888 (D. Minn. 2014). With respect to a § 1983 claim, a plaintiff must prove four elements: (1) actions taken under color of law; (2) deprivation of constitutional or statutory right; (3) causation; and (4) damages. 42 U.S.C. § 1983 (2012).

2. *Id.*

3. *Id.* at 876.

4. *Id.* at 877.

5. *Id.*

haviors that violate academic, moral, and ethical standards including, but not limited to, “transgression of professional boundaries” along with other behaviors described in the College Catalog Student Code of Conduct.⁶ One can infer from the Court’s discussion that the professional boundaries referred to in the student handbook are based upon the American Nurses Association (2001) Code for Nurses with Interpretive Statements (Code for Nurses).⁷

In November 2012, a student, who was enrolled in a lecture course with Keefe, expressed concerns to the instructor, Kim Scott, about statements Keefe had made on Facebook.⁸ Keefe’s posts included statements such as “[there is] not enough whiskey to control that anger” (in reference to frustration over a group project); wanting to “give someone a hemopneumothorax” (also known as a pneumothorax)⁹ with an electric pencil sharpener; claiming to “need some anger management;” calling another student a “stupid bitch” for reporting his posts; and calling out other students for having exam accommodations, claiming that the accommodations system is “sexist.”¹⁰ Although the posts did not name individual students, Keefe used offensive language to describe classmates and air grievances regarding school activities in which he participated at Central Lakes College.

The statements were brought to the attention of Connie Frisch, the College’s Dean of Nursing.¹¹ After reviewing the statements and confirming that Keefe had made them on his Facebook page, Dean Frisch contacted Kelly McCalla, the College’s Vice President for Academic Affairs.¹² In early December 2012, Dean Frisch set up a meeting between Keefe and Vice President McCalla.¹³ Dean Frisch did not tell Keefe that students had reported his Facebook posts.¹⁴ In response to an email from Keefe, Dean Frisch assured him that “he did not need to prepare in any way” for his meeting with Vice President McCalla and that “the topic of professional

6. *Id.* at 878.

7. *Id.* at 877.

8. *Id.* at 878.

9. *Id.* at 879. “A pneumothorax is a collapsed lung. Pneumothorax occurs when air leaks into the space between your lungs and chest wall. This air pushes on the outside of your lung and makes it collapse. In most cases, only a portion of the lung collapses. A pneumothorax can be caused by a blunt or penetrating chest injury, certain medical procedures involving your lungs, or damage from underlying lung disease. Or it may occur for no obvious reason. Symptoms usually include sudden chest pain and shortness of breath.” *Pneumothorax Definition*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/pneumothorax/basics/definition/con-20030025> (last visited April 13, 2015).

10. *Keefe v. Adams*, 44 F.Supp.3d 874, 878–79 (D. Minn. 2014).

11. *Id.* at 878.

12. *Id.* at 880.

13. *Id.*

14. *Id.*

boundary is central to the role of the nurse and I am sure you appreciate the delicacy of the topic.”¹⁵ During another conversation with Keefe, Dean Frisch again refused to discuss the issue further with Keefe via phone or email.¹⁶

Dean Frisch testified that she opened the meeting on December 5, 2013 by reading the disciplinary policy from the student handbook.¹⁷ Next, she explained the charge in terms of boundary issues and professionalism.¹⁸ According to Dean Frisch, Keefe was surprised that his statements were publicly available; he characterized at least some of the statements as a joke; and was not receptive to the message that his statements were unprofessional.¹⁹ She testified that based on Keefe’s “lack of remorse, lack of concern, and lack of recognition,” he decided to remove him from the associate degree nursing program.²⁰

Keefe appealed his decision through Central Lakes College’s appeal process. Keefe asserted in his appeal that his removal from the associate degree nursing program was too harsh; that he had “removed these offensive comments that offended individuals viewing [his] page as well as not displaying [his] professional image as a nursing student as well as CLC’s nursing program;” and that he had not previously been subject to any discipline at the college.²¹ He closed his appeal by apologizing for his “unethical and unprofessional behavior.”²²

Vice President McCalla reviewed Keefe’s appeal.²³ He testified that he was “reasonably sure” that he had also reviewed a nursing association’s professional standards.²⁴ At his deposition, he was unable to “recall the specific standards on the website if [he] did in fact go look at them.” He also testified that he “saw nothing in Mr. Keefe’s appeal that led [him] to believe that [Keefe] had not violated that professionalism standard.”²⁵ Vice President McCalla subsequently denied the appeal and Keefe filed suit in the district court.²⁶

15. *Keefe*, 444 F.Supp.3d at 880.

16. *Id.*

17. *Id.* at 881.

18. *Id.*

19. *Id.*

20. *Keefe*, 444 F.Supp.3d at 881.

21. *Id.* at 883.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Keefe*, 444 F.Supp.3d at 883.

26. *Id.*

II. KEEFE'S DUE PROCESS CLAIM

In regards to Keefe's claim that he was not accorded sufficient due process, the U.S. District Court of Minnesota, without extensive discussion, categorized Keefe's dismissal as academic, rather than disciplinary.²⁷ The court said that "the term 'academic' in this context is somewhat misleading" because "[c]ourts have frequently held that an academic dismissal may be properly based on more than simply grades."²⁸ The court cited cases where personal hygiene and timeliness,²⁹ lack of candor in the application process,³⁰ inability to interact with students in a professional manner (Ku),³¹ and refusal to seek treatment for mental illness (Shaboon)³² were important factors in categorizing the dismissal as academic.

The court went on to assess whether Keefe was afforded the requisite level of procedural due process accorded academic dismissals. In order to satisfy the Fourteenth Amendment, a student who is dismissed from a public college or university for academic reasons must be afforded "notice of faculty dissatisfaction and potential dismissal," and the decision must be "careful and deliberate."³³ A formal hearing is not required for an academic dismissal.³⁴ The Court ultimately held that there was a rational basis for the decision to dismiss Keefe from the program and that his dismissal from the program was not the product of arbitrary and capricious conduct.³⁵

III. THE DISTINCTION BETWEEN ACADEMIC AND DISCIPLINARY MISCONDUCT

The U.S. Supreme Court has distinguished academic from disciplinary situations, according greater respect for the professional's judgment in academic decisions.³⁶ In *Board of Curators of University of Missouri v. Horowitz*, the Court let stand a dismissal of a medical school student, Charlotte

27. *Id.* at 885.

28. *Id.* (quoting *Yoder v. Univ. of Louisville*, 526 F.App'x 537, 550 (6th Cir. 2013) (unpublished table decision)).

29. *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 91 n.6 (1978).

30. *Fenje v. Feld*, 398 F.3d 620, 625 (7th Cir. 2005).

31. *Ku v. Tennessee*, 322 F.3d 431, 435–36 (6th Cir. 2003).

32. *Shaboon v. Duncan*, 252 F.3d 722, 731 (5th Cir. 2001); *see also* *Monroe v. Arkansas State Univ.*, 495 F.3d 591, 595 (8th Cir. 2007) (student dismissed for failure to finish his coursework while seeking medical treatment).

33. *Keefe v. Adams*, 44 F.Supp.3d 874, 885 (D. Minn. 2014) (quoting *Richmond v. Fowlkes*, 228 F.3d 854, 857 (8th Cir. 2000)).

34. *Id.*

35. *Id.* at 887.

36. *Barbara A. Lee, Judicial Review of Student Challenges to Academic Misconduct Sanctions*, 39 J.C. & U.L. 511, 517–18 (2013) (quoting *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985)).

Horowitz, without a hearing based on her failure to meet institutional standards.³⁷ Justice Powell, concurring in Horowitz, explained that:

A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not. The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause. An academic judgment also involves this type of objectively determinable fact—e.g., whether the student gave certain answers on an examination. But the critical decision requires a subjective, expert evaluation as to whether that performance satisfies some predetermined standard of academic competence.³⁸

Similarly, in *Regents of University of Michigan v. Ewing*, a medical student, Scott E. Ewing, challenged his dismissal from medical school without a hearing.³⁹ The U.S. Supreme Court rejected his claims, noting:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.⁴⁰

As other commentators have noted, by refusing to grant relief in both Horowitz and Ewing, the Supreme Court differentiated academic from disciplinary sanctions.⁴¹ The Court did not, however, provide further guidance for determining whether a case is academic or disciplinary in nature.⁴² Instead, the Court appears to assume that the distinction between categories requires no explanation, when in reality, situations in which students face sanctions for misconduct often “occupy a spectrum ranging from the purely academic through the purely disciplinary.”⁴³

Some lower courts have attempted to further define the distinction between academic and disciplinary sanctions.⁴⁴ The Texas Supreme Court has held that “[a]cademic dismissals arise from a failure to attain a standard

37. *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978).

38. *Id.* at 96 n.5 (Powell, J., concurring).

39. *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985).

40. *Id.* at 223–25.

41. See generally Fernand N. Dutilleul, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619 (2003) (discussing academic versus disciplinary sanctions).

42. *Id.* at 625.

43. *Id.* at 626.

44. See *id.* at 628 for a more in-depth discussion of lower court opinions that attempt to articulate the distinction between academic and disciplinary sanctions.

of excellence in studies whereas disciplinary dismissals arise from acts of misconduct.”⁴⁵ The U.S. District Court of Minnesota has held that “academic decision is based upon established academic criteria.”⁴⁶ In holding that plagiarism was an academic, rather than a disciplinary offense, the New Jersey Appellate Court reasoned that:

Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement . . . Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making.⁴⁷

Thus, although some lower courts have attempted to define the differences between academic and disciplinary sanctions, these courts do not have much guidance in making their determination.

The U.S. District Court of Minnesota dismissed Keefe’s claim that he should have been afforded the more searching, procedural due process of a disciplinary dismissal, categorizing his dismissal as academic without much discussion.⁴⁸ However, the U.S. Supreme Court’s reason for accord-ing heightened deference to academic decisions — refusal to substitute the judgment of the courts for those whose job it is to assess academic performance — does not clearly apply in a situation like Keefe’s, where a professional school student is dismissed for failure to abide by professional standards. The decision was not a result of grades, performance, attendance or even cheating or plagiarism, which is frequently litigated and has usually been held to be disciplinary in nature.⁴⁹ Ultimately, Central Lakes College’s decision involved whether or not Keefe’s Facebook posts were so egregious as to violate professional standards. Therefore, it appears that the decision does not require an assessment of academic performance, but rather an assessment of the seriousness of Keefe’s offense.

In a recent case, *Walker v. President & Fellows of Harvard College*, the

45. *Id.* at 630 (quoting *Univ. of Texas. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 931 (Tex. 1995)).

46. *Hall v. Univ. of Minn.*, 530 F. Supp. 104, 108 (D. Minn. 1982).

47. *Napolitano v. Trustees of Princeton Univ.*, 453 A.2d 263, 275 (N.J. Super. Ct. App. Div. 1982).

48. *Keefe v. Adams*, 44 F.Supp. 874, 886–87 (D. Minn. 2014).

49. *See, e.g., Napolitano*, 453 A.2d at 263; *Jaber v. Wayne State Univ. Bd. of Governors*, 487 F.App’x 995 (6th Cir. 2012); *Katz v. Bd. of Regents of Univ. of State*, 924 N.Y.S.2d 210 (App. Div. 2011); and *Beauchene v. Mississippi Coll.*, 986 F.Supp.2d 755 (S.D. Miss. 2013) (examples of cases where plagiarism was treated as academic, rather than disciplinary, in nature).

United States District Court for the District of Massachusetts upheld Harvard College's decision to treat plagiarism in a draft of Megon Walker's journal note as a disciplinary offense.⁵⁰ Harvard is a private institution, and therefore, is not subject to the same Fourteenth Amendment requirements as Central Lakes College and other public institutions. Thus, Walker brought a breach of contract claim, among other unsuccessful claims, against Harvard.⁵¹ The court recognized the existence of a contract between Walker and Harvard in the student handbook, reasoning that a student "forms a contractual relationship with her university, and a disciplinary code can be part of that contract."⁵² Although her claim was ultimately dismissed, it is interesting to note that the court characterized the plagiarism as a disciplinary offense, and therefore, required that Walker's hearing comport with notions of basic fairness.⁵³

In a case similar to Keefe that did not involve professional standards, a student who was involved in verbal altercations with two university employees about the student's use of a staff van was categorized and subsequently treated as disciplinary.⁵⁴ In *Gorman v. University of Rhode Island*, two women complained to the University that Raymond J. Gorman, III had engaged in verbal abuse, harassment, and threats in violation of the university's student handbook.⁵⁵ Without debate, the First Circuit categorized the resulting dismissal as disciplinary and therefore, requiring a hearing where the student was given the opportunity to explain his version of the facts and to appeal the sanction that had been imposed on him.⁵⁶ While the Gorman decision is not binding precedent outside of the First Circuit, it serves as an example of how similar cases involving public college and university students have been treated. The same distinction between academic and disciplinary applies in professional school cases; therefore, similar conduct occurring at the university level should be treated similarly.

A recent case, *Al-Dabagh v. Case Western Reserve University*, involved a medical student, Amir Al-Dabagh, who allegedly came late to group discussions and asked the instructor to lie for him, behaved inappropriately towards two female students at a school dance, failed an internship and was convicted of driving while intoxicated.⁵⁷ As a result, Case Western Reserve University School of Medicine refused to certify him for graduation

50. *Walker v. President & Fellows of Harvard Coll.*, No. 12-10811-RWZ, 2014 WL 7404557, at *1 (D. Mass. Dec. 30, 2014).

51. *Id.* at *1.

52. *Id.* at *2 (quoting *Kiani v. Trs. of Boston Univ.*, No. 04-cv-11838-PBS, 2005 U.S. Dist. LEXIS 47216, at *15 (D. Mass. Nov. 10, 2005)).

53. *Id.* at *3.

54. *Gorman v. Univ. of R.I.*, 837 F.2d 7 (1st Cir. 1988).

55. *Id.* at 7.

56. *Id.* at 8.

57. *Al-Dabagh v. Case W. Reserve Univ.*, 777 F.3d 355, 357 (6th Cir. 2015).

and Al-Dabagh challenged the university's decision in court.⁵⁸ A federal district court found that Al-Dabagh had proven himself worthy of a diploma and ordered the university to give him one, disregarding the university's determination that he lacked the professionalism required to discharge his duties responsibly.⁵⁹ The Sixth Circuit reversed, stating in relevant part:

Case Western's student handbook supplies the contract's terms, as the parties agree, and makes clear that the only thing standing between Al-Dabagh and a diploma is the Committee on Students' finding that he lacks professionalism. Unhappily for Al-Dabagh, that is an academic judgment. And we can no more substitute our personal views for the Committee's when it comes to an academic judgment than the Committee can substitute its views for ours when it comes to a judicial decision.⁶⁰

The Sixth Circuit's reasoned that because the university made an overall, cumulative decision regarding whether Al-Dabagh possessed the professionalism required to enter the profession, the decision was academic in nature.⁶¹ If the decision had been the result of an isolated or specific incident, it likely would have crossed the line into the realm of disciplinary and Al-Dabagh would have been entitled to the heightened procedural requirements accorded a disciplinary dismissal.

IV. WHAT PROCESS IS DUE

The first step in evaluating the requisite due process is determining whether Keefe possessed a valid property interest in his enrollment at Central Lakes College. Courts have generally assumed that professional students attending a public college or university have a valid property interest in their enrollment.⁶² Therefore, the same due process requirements articulated by the U.S. Supreme Court in K-12 cases involving disciplinary suspensions and dismissals also apply in the professional school setting.⁶³

58. *Id.*

59. *Id.*

60. *Id.* at 358.

61. *Id.*

62. *See* *Monroe v. Ark. State Univ.*, 495 F.3d 591, 594 (8th Cir. 2007) (“[W]e assume without deciding that Monroe’s interest in pursuing his education constitutes a constitutionally protected interest.”); *Richmond v. Fowlkes*, 228 F.3d 854, 857 (8th Cir. 2000) (“Assuming, without deciding, the existence of a property or liberty interest, we conclude that Richmond received all the process that he was due.”); *Hennessy v. City of Melrose*, 194 F.3d 237, 249–50 (1st Cir. 1999) (“[T]he claim to such a property interest is dubious, and in this case it seems especially tenuous because Salem State did not expel the appellant, but merely precluded him from continuing in a particular program.” (citations omitted)).

63. The U.S. District Court of Minnesota assumed that Keefe had a valid property

If Keefe's dismissal had been categorized as disciplinary instead of academic, he would have at least been entitled to oral or written notice of the charges against him, an explanation of the evidence against him, and an opportunity to present his side of the story.⁶⁴ The U.S. Supreme Court described the reasoning behind these heightened procedural requirements for disciplinary sanctions in *Goss v. Lopez*, a case involving a number of Columbus, Ohio students reviewing their suspensions without a hearing:

Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.⁶⁵

Notably, the court in *Goss* also declared that longer suspensions or expulsions might require more formal procedures.⁶⁶

Dixon v. Alabama State Board of Education, a case that, like *Goss*, expanded the due rights of students, involved students at Alabama State College who protested the college's policy of segregation by participating in several sit-in demonstrations off-campus during the civil rights era.⁶⁷ As a consequence, they were expelled without notice or hearing.⁶⁸ The Fifth Circuit held that the Board of Education was required to give the accused students notice of the charges, explanation of the case against the student, and an opportunity to be heard in their own defense.⁶⁹

Moreover, notice must be such as is reasonably calculated to reach interested parties to afford them due process of law.⁷⁰ Keefe twice requested information from school officials regarding his upcoming meeting with the vice president of student affairs, was refused both times, and advised that "[he did] not need to prepare in any way" for the meeting.⁷¹ Keefe was not given written or oral notice of the charges against him until the meeting where the Vice President of Student Affairs determined, based on his responses, he should not be allowed to continue in the program. Thus, Keefe was not given the requisite notice for a disciplinary dismissal.

In order for the hearing requirement to be met, the student must have the

interest in his enrollment in the associate degree-nursing program.

64. *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

65. *Id.* at 580.

66. *Id.* at 583.

67. *Dixon v. Ala. State Bd. of Ed.*, 294 F.2d 150 (5th Cir. 1961).

68. *Id.* at 152.

69. *Id.*

70. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313–14 (1950).

71. *Keefe v. Adams*, 44 F.Supp.3d 874, 880(D. Minn. 2014).

opportunity to respond, explain and defend his or her position.⁷² Thus, courts require something more than an informal interview with an administrative authority of the college.⁷³ Prior to his dismissal from the program, Keefe had only an informal interview with the vice president of student affairs. After his dismissal, Keefe appealed the decision through the College's appeal process in a letter explaining his position; however, the Court has said that as a general rule, the hearing should precede removal of the student from school.⁷⁴ Thus, even if the appeal process allowed Keefe the opportunity to defend his position, Central Lakes College did not meet the hearing requirement for a disciplinary dismissal prior to Keefe's dismissal.

If Keefe's dismissal had been properly categorized as disciplinary in nature, his dismissal without notice and a hearing would be unconstitutional under the Fourteenth Amendment. One way to avoid violating due process rights is to police the line between academic and disciplinary sanctions. Multiple commentators have addressed the failings of such a poorly defined distinction between academic and disciplinary dismissals.⁷⁵ Just because a college or university categorizes certain conduct, such as unprofessional speech, as academic in nature in the student handbook does not mean that academic deference is warranted. Courts must develop criteria for assessing the distinction between academic and disciplinary misconduct. A clearer distinction would help colleges and universities give students the necessary due process. It would also encourage colleges and universities to provide definitions of academic and disciplinary misconduct to students, so that they might better understand the potential consequences of their actions.

V. KEEFE'S FIRST AMENDMENT CLAIM

Next, the court addressed Keefe's claim that his dismissal violated his First Amendment rights. Holding that Keefe's First Amendment rights had not been violated, the court reasoned that Central Lakes College's associate degree nursing program incorporated nationally established nursing standards into the student handbook.⁷⁶ The court said the college's ability to discipline students for a transgression of professional boundaries reflects the ability of the Minnesota Board of Nursing to "deny, revoke, suspend, limit, or condition the license and registration of any person to practice pro-

72. *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

73. *Dixon v. Ala. State Bd. of Ed.*, 294 F.2d 150, 158 (5th Cir. 1961).

74. However, "[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school." *Goss*, 419 U.S. at 582.

75. *See generally Lee*, *supra* note 36, at 517-18; *see also Datile*, *supra* note 41, at 625.

76. *Keefe*, 44 F.Supp.3d at 888.

fessional, advanced practice registered, or practical nursing” for “[e]ngaging in unprofessional conduct.”⁷⁷ The court believed “[g]reater specificity [was] not required.”⁷⁸ The court also noted that access to Keefe’s Facebook page was not restricted because Keefe’s privacy settings allowed the public to view his posts.⁷⁹

Courts have generally protected students’ First Amendment rights in K-12 cases unless the speech constituted a substantial disruption or otherwise fell into the category of an exception.⁸⁰ Courts have struggled with whether or not to extend the same analytical framework to college and university cases. Applying this analysis to professional school students has created further confusion, with the latest string of cases granting sweeping authority to public colleges and universities to limit professional student speech.⁸¹

VI. SCHOOL SPEECH CASES AND THE FIRST AMENDMENT

A. *Tinker v. Des Moines Independent Community School District*

Tinker was a landmark case involving sanctions for on-campus, K-12 school speech.⁸² Although *Tinker* has not yet been applied in a college or university setting by the U.S. Supreme Court, *Tinker* set an important precedent that cannot be ignored. In *Tinker*, administrators suspended two high school students and a junior high student in December of 1965 for wearing black armbands as symbols of opposition to the Vietnam War.⁸³ The U.S. Supreme Court held that the action violated the students’ First Amendment rights, famously declaring that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁸⁴ However, the Court also explained that First Amendment rights must be “applied in light of the special characteristics of the school environment.”⁸⁵ Since the sanction here was for “silent, passive expression of opinion, unaccompanied by any disorder or disturbance,” the speech “did not interfere. . . with the rights of other students to be secure and to be let alone.”⁸⁶ In short, students have a right to a

77. *Id.* (quoting Minn. Stat. § 148.261, subd. 1(6) (2012)).

78. *Id.* at 888.

79. *Id.*

80. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

81. *See, e.g., Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012) (discussed *infra* at pg. 22 and n. 97).

82. *Tinker*, 393 U.S. at 503.

83. *Id.* at 504.

84. *Id.* at 506.

85. *Id.*

86. Tracey Wirmani, Note, *Tinker Takes on Tatro: The Minnesota Supreme Court’s Missed Opportunity*, 65 OKLA. L. REV. 769, 772 (2013) (quoting *Tinker*, 393 U.S. at 508).

peaceful learning environment, but here, the Court found no substantial disturbance occurred.

As a result of *Tinker*, “a public high school may not” sanction “student speech unless the speech substantially interferes with the work of the school or intrudes upon the rights of others.”⁸⁷ Subsequent K-12 cases, however, distinguished *Tinker*, ultimately rejecting First Amendment arguments.

B. Post-*Tinker* School Speech Cases

In *Bethel School District No. 403 v. Fraser*, a high school student was disciplined for a nomination speech of a classmate that he delivered at a school assembly using an “elaborate, graphic, and explicit sexual metaphor.”⁸⁸ The U.S. Supreme Court contrasted the political message of the armbands in *Tinker* against the sexual nature of the respondent’s speech in *Bethel*.⁸⁹ Because of this marked difference between the expression of a “political viewpoint” and the “vulgar and lewd speech” in this case, the Court concluded that the First Amendment did not prevent the school from sanctioning speech that “undermine[s] the school’s basic educational mission.”⁹⁰

By the time *Hazelwood School District v. Kuhlmeier* reached the U.S. Supreme Court, it had already decided *Bethel*. In *Hazelwood*, the Court upheld the constitutionality of a public high school principal’s censorship of a student newspaper produced in a journalism class.⁹¹ The Court declared “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁹² The Court also noted that although public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” the “First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in its other settings.”⁹³ Thus, the Court identified a distinction between speech that occurred on school premises and speech that was communicated through a school newspaper.⁹⁴ The Court ruled that school

87. *Id.*

88. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678 (1986).

89. *Id.* at 680–81.

90. Emily Gold Waldman, *Returning to Hazelwood’s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 70 (2008) (quoting *Bethel*, 478 U.S. at 685).

91. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 258 (1988).

92. *Id.* at 273.

93. *Id.* at 266 (citations omitted).

94. Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1118 (2010).

officials could exercise greater control over the latter activity.⁹⁵

Finally, *Morse v. Frederick*, the U.S. Supreme Court's most recent K-12 speech case, involved a student disciplined for his failure to take down a banner with the message "BONG HiTS 4 JESUS," during an Olympic torch relay.⁹⁶ The banner was displayed at an off-campus, school-sponsored activity.⁹⁷ The Court, applying *Tinker*, held that schools might regulate off-campus speech that could be construed as encouraging illegal drug use.⁹⁸

VII. SOCIAL MEDIA AND THE FIRST AMENDMENT IN SCHOOL SPEECH CASES

The Third Circuit has specifically addressed the issue of speech on social media occurring off-campus. In *Layshock v. Hermitage School District*, parents of a high school student brought a § 1983 action alleging that the school violated the student's First Amendment rights by disciplining him for creating a fake MySpace profile and for posting statements posing as the student's high school principle.⁹⁹ The Third Circuit held that the First Amendment free speech clause prohibits a public school from reaching beyond the schoolyard to impose what otherwise might be appropriate student discipline.¹⁰⁰ The court reasoned that:

It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.¹⁰¹

The court also held that the school should not be allowed to treat the student's speech as on-campus speech just because it was aimed at the Principal and could be accessed on-campus.¹⁰² Thus, the Third Circuit refused to allow schools to discipline students for offensive, off-campus speech even when accessed on-campus.

VIII. THE *TINKER* LINE OF SUBSTANTIAL DISRUPTION CASES IN HIGHER EDUCATION

The U.S. Supreme Court has not explicitly applied the *Tinker* line of

95. *Id.* at 1118–19.

96. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

97. *Id.* at 397–98.

98. *Id.* at 410.

99. *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011).

100. *Id.* at 219.

101. *Id.* at 216.

102. *Id.*

substantial disruption cases in a post-secondary setting. In *Healy v. James*, the first post-secondary case decided after *Tinker*, the Court begins its discussion by quoting *Tinker*.¹⁰³ The Court, however, goes on to say, “because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”¹⁰⁴ Due to the lack of clarification over where *Tinker* applies, the Circuits, in varying degrees, have been reluctant to apply *Tinker* in a higher education setting.¹⁰⁵

Some courts have invoked the standard articulated by the U.S. Supreme Court in *Hazelwood*, *Tinker*’s progeny, in higher education settings.¹⁰⁶ The Eleventh Circuit applied *Hazelwood* in a case challenging the University of Alabama’s ability to limit student government campaign speech to a narrow electioneering window, concluding that the *Hazelwood* rationale permitted the university to regulate candidates’ speech even if the speech was not alleged to be unlawful or disruptive.¹⁰⁷ The Sixth Circuit applied *Hazelwood* in *Ward v. Polite*, where the court stated that:

[F]or the same reason this test works for students who have not yet entered high school . . . it works for students who have graduated from high school. The key word is student. *Hazelwood* respects the latitude educational institutions—at any level—must have to further legitimate curricular objectives . . . Nothing in *Hazelwood* suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one.¹⁰⁸

Thus, some courts have chosen to apply the *Tinker* framework amid confu-

103. “At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. ‘It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’ Of course, as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied ‘in light of the special characteristics of the . . . environment’ in the particular case.” *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (citations omitted)).

104. *Healy*, 408 U.S. at 180.

105. See generally Meggen Lindsay, Note, *Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students*—*Tatro v. University of Minnesota*, 38 WM. MITCHELL L. REV. 1470, 1480–83 (2012) (discussing the application of the *Tinker* line of substantial disruption cases to post-secondary cases).

106. See generally Frank D. LoMonte, “*The Key Word Is Student*”: *Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 333–41 (2013) (discussing *Hazelwood* invoked in a higher education setting).

107. *Ala. Student Party v. Student Gov’t Ass’n*, 867 F.2d 1344, 1347 (11th Cir. 1989).

108. *Ward v. Polite*, 667 F.3d 727, 733–34 (6th Cir. 2012) (citations omitted). For a further discussion of this issue, see *infra* notes 126–129 and accompanying text.

sion over whether it should apply in a post-secondary setting.

IX. PROFESSIONAL SCHOOL CASES AND THE FIRST AMENDMENT

Despite objections that college and university-aged students should be accorded greater protection for their speech, courts have generally rejected their First Amendment claims, declining to apply the *Tinker* line of substantial disruption cases in a post-secondary setting.¹⁰⁹ Courts have similarly declined to follow a strict application of these standards in professional school cases like *Keefe*, where the student has been sanctioned for failure to adhere to standards of professionalism.¹¹⁰ However, aggrieved students continue to bring First Amendment challenges, so courts must continue to decide whether the framework articulated in K-12 cases is appropriate in the professional school setting. The following provides an overview of the most recent decisions involving sanctions for misconduct in professional school programs and the articulated framework for deciding these cases.

A. *Tatro v. University of Minnesota*

The Minnesota Supreme Court declined to apply *Tinker* to the professional school setting in *Tatro v. University of Minnesota*.¹¹¹ In *Tatro*, Amanda Tatro challenged sanctions issued by school administrators at the mortuary science program at the University of Minnesota for comments posted on her private Facebook page.¹¹² A Facebook page is considered “private” if the user elects to control the audience for his or her posts, photos and information, disallowing the public from viewing his or her page. Tatro alleged that the University’s rules did not authorize the University to act and that its actions were arbitrary, lacked evidentiary support, and violated her constitutional right to free speech.¹¹³ The speech at issue included comments that she was looking forward to taking out her aggression during an upcoming embalming session; that she want[ed] to stab a certain someone in the throat with a trocar; and that she intended to spend the weekend updating her “Death List.”¹¹⁴ Tatro first exhausted the University’s appeals process, where the Provost’s Appeal Committee (PAC) upheld the sanctions in the University’s final determination.¹¹⁵ Next, Tatro appealed to the Minnesota Court of Appeals by writ of certiorari, raising several challenges

109. Lindsay, *supra* note 105.

110. Keefe v. Adams, 44 F. Supp. 3d 874 (D. Minn. 2014)

111. 816 N.W.2d 509, 511–19 (Minn. 2012).

112. *Id.* at 509.

113. *Id.*

114. *Id.* at 513.

115. *Id.* at 515.

to the University's imposition of disciplinary sanctions.¹¹⁶ The Court of Appeals affirmed the sanctions.¹¹⁷

On appeal, the Minnesota Supreme Court declined to apply Tinker's substantial disruption test because it "[did] not meet the purpose of the [university's] sanctions here."¹¹⁸ The Court reasoned that the University disciplined Tatro because her Facebook posts violated the mortuary program's rules, not because they created a substantial disruption.¹¹⁹ Upon enrollment in the mortuary science program, Tatro attended an orientation program addressing proper student conduct and signed a disclosure form agreeing to abide by University rules.¹²⁰ The rules prohibited "blogging" about the anatomy lab or cadaver dissection.¹²¹ Testimony from an instructor indicated that during orientation, students were told that blogging included Facebook and Twitter.¹²² The Court concluded that the University did not violate Tatro's free speech because the program rules were "narrowly tailored and directly related" to established professional conduct standards.¹²³ Finally, the Minnesota Supreme Court emphasized "its decision [was] based on the specific circumstances of the case."¹²⁴

B. *Ward v. Polite* and *Keeton v. Anderson–Wiley*

The Sixth and Eleventh Circuits recently addressed professionalism standards of students in counselor education programs. In both cases, the student was disciplined for failure to adhere to professionalism standards relating to willingness and ability to counsel clients of all sexual orientations. The Sixth Circuit case involved Julea Ward, a student who requested to refer a client to another counselor rather than "affirm" his same sex relationship.¹²⁵ Ward was ultimately dismissed from the counseling program after refusing to change her behavior due to her inability to conform to the program's requirements and the university's concern that her refusal to counsel clients involved in a same-sex relationship violated the American Counseling Association's (hereinafter the "ACA") Code of Ethics.¹²⁶ The lower court determined that the University had not violated Ward's rights in dismissing her from the counseling program.¹²⁷ The Sixth Circuit re-

116. *Tatro*, 816 N.W.2d at 515.

117. *Id.*

118. *Id.* at 520.

119. *Id.* at 512.

120. *Id.*

121. *Id.* at 513.

122. *Id.* at 510.

123. *Id.* at 521.

124. *Id.* at 524.

125. *Ward v. Polite*, 667 F.3d 727, 729 (6th Cir. 2012).

126. *Id.* at 730–31.

127. *Id.* at 732.

versed the lower court, holding that judgment in favor of the University was inappropriate because a jury could possibly conclude that the program impermissibly retaliated against Ward for the expression of her religious views.¹²⁸

The Eleventh Circuit case involved a student, Jennifer Keeton, with perceived difficulties in counseling gay, lesbian, transgender and gender-queer clients.¹²⁹ Keeton, as a result, was required by the University to complete a remediation program before enrolling in a clinical program.¹³⁰ The Eleventh Circuit ultimately upheld the lower court's decision to deny Keeton's request for preliminary injunction prohibiting her dismissal from the counselor education program.¹³¹ The Eleventh Circuit found that a counseling program can require its students to follow the ACA's Code of Ethics, and that Keeton's statements to professors and students had conveyed her intention to violate the ACA's Code of Ethics upon becoming a counselor.¹³²

X. ADHERING TO VAGUE STANDARDS OF PROFESSIONALISM

A. "Narrowly Tailored and Directly Related"

The Minnesota Supreme Court in *Tatro* declined to apply the *Tinker* line of substantial disruption cases, instead allowing the University of Minnesota to sanction student speech that was in violation of program rules that are "narrowly tailored and directly related" to professional conduct standards.¹³³ By upholding the university's decision, *Tatro* comes to an opposite result from *Tinker*, where the court determined that sanctions violated student First Amendment rights where the speech did not cause a substantial disruption.¹³⁴ The court in *Keefe* used a similar analysis to *Tatro*, holding that dismissal for failure to comply with professional standards did not violate *Keefe*'s constitutional rights.¹³⁵ In both cases, the college or university was able to categorize the misconduct as academic rather than disciplinary, and benefit from more lenient procedural protections.

The Court in *Keefe* concluded that the associate degree-nursing program incorporated nationally established nursing standards and that the college administrators could discipline students for failure to adhere to those standards.¹³⁶ Notably, neither the court nor the college administrators responsible

128. *Id.* at 741.

129. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 865 (11th Cir. 2011).

130. *Id.*

131. *Id.* at 879–80.

132. *Id.*

133. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 510 (Minn. 2012).

134. *Id.*; *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

135. *Keefe v. Adams*, 44 F. Supp. 3d 874 (D. Minn. 2014).

136. *Id.* at 888.

for Keefe's dismissal pointed to any specific established standard that Keefe violated, except to say that his behavior was simply "unprofessional."¹³⁷ In order to meet the standard articulated in *Tatro*, the program rules have to be "narrowly tailored and directly related" to professional standards.¹³⁸ "Narrowly tailored and directly related" requires more than formulating a program rule that generally prohibits unprofessional speech when no such rule exists in the corresponding professional standards. *Tatro*'s decision to post indiscreet comments about the cadaver on Facebook was a clear violation of professional standards. Unlike in Keefe, the speech in *Tatro* was directly linked to a specific conduct standard of the mortuary profession. Also unlike in Keefe, the speech at issue was expressly prohibited by the program rules.

In *Tatro*, the mortuary science program at the University of Minnesota expressly prohibited blogging about the anatomy lab and cadaver dissection.¹³⁹ Moreover, students were told that the term "blogging" was intended to be broad and extended to both Facebook and Twitter.¹⁴⁰ The *Tatro* decision does not conduct an in-depth analysis of the specific professional standards that relate to the prohibition against blogging. However, it is clear from the court's discussion that the prohibition against blogging directly relates to the professional standard requiring respect and discretion in handling cadavers.¹⁴¹ The University of Minnesota stressed in its brief that bodies donated to mortuary science must be treated with the "utmost respect and dignity" and that any conversation discussing a donor must be "respectful and discreet."¹⁴² Further, the instructor for the course testified that the primary reason for the rules is that "people who have volunteered to graciously donate their bodies for the purposes of anatomy education do so with the intent to teach anatomy, not for the purposes of public display for amusement and fascination."¹⁴³ These professional standards are widely accepted and followed within the profession and made clear to students upon their entrance into the program.

B. Application of "Narrowly Tailored and Directly Related" to *Keefe*

In contrast, the associate degree nursing program at Central Lakes College reserves the right to sanction students for transgression of professional

137. *Id.*

138. *Tatro*, 816 N.W.2d at 511.

139. *Id.* at 512.

140. *Id.*

141. *Id.*

142. Respondent's Brief at 5, *Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012) (No. A10-1440).

143. *Tatro*, 816 N.W.2d at 513.

boundaries as articulated in the student handbook.¹⁴⁴ Each student, including Keefe, was given a copy of the student handbook upon enrollment.¹⁴⁵ The student handbook does not elaborate on what constitutes a “transgression of professional boundaries.”¹⁴⁶ Students were not made aware of prohibited speech during orientation or informed that statements made on Facebook or other social media sites would constitute a violation.¹⁴⁷

Additionally, the boundaries referred to in Keefe’s student handbook are presumably based upon the Code for Nurses, which outlines “the goals, values, and ethical principles that direct the profession of nursing and the standard by which ethical conduct is guided and evaluated by the profession.”¹⁴⁸ However, no language in either the student handbook or the accompanying Code for Nurses prohibits the type of speech at issue in Keefe.¹⁴⁹ Even if Keefe’s speech constitutes a “transgression of professional boundaries” and is therefore, prohibited by the student handbook, the program rule prohibiting such a transgression is not narrowly tailored to any professional standard. The Code for Nurses broadly requires that the nurse, in all professional relationships, practice with “compassion and respect for the inherent dignity, worth, and unique attributes of every individual.”¹⁵⁰ In regards to professional boundaries, the Code for Nurses requires more specifically that when acting in a professional capacity, the nurse must “recognize and maintain appropriate personal relationship boundaries.”¹⁵¹ There is an argument that Keefe did not act with the requisite compassion and respect for his professional colleagues. However, it is unclear whether Central Lakes College considered his lack of compassion and respect in formulating the program rule, or in determining whether Keefe’s speech constituted a violation.

Finally, the potential for academic repercussions for speech on Facebook was never explained to Keefe. Central Lakes College claims that notice was provided to Keefe, and all other students, in the form of the student handbook. However, as discussed previously, the student handbook makes no mention of prohibited speech, even in the most general sense. The student handbook certainly does not refer to Facebook or other social media websites. As a result of this omission, most students may have failed to realize that these boundaries extended to social media.

144. Keefe v. Adams, 44 F. Supp. 3d 874, 877 (D. Minn. 2014).

145. *Id.*

146. *Id.* at 878.

147. *Id.*

148. *Id.* at 877.

149. CODE OF ETHICS FOR NURSES WITH INTERPRETIVE STATEMENTS, AMERICAN NURSES ASSOCIATION 1 (2015), available at <http://www.nursingworld.org/MainMenu/Categories/EthicsStandards/CodeofEthicsforNurses/Code-of-Ethics-For-Nurses.html>.

150. *Id.* at Provision 1.

151. *Id.* at Provision 2.4.

Moreover, if concerned about the content of Keefe's Facebook posts, Central Lakes College could have made a note in his academic file, so that any potential employer or licensure board would be notified of Keefe's speech. Central Lakes College could also have disciplined Keefe for the violent nature of his posts or the threats contained in them. However, the college chose not to focus on the threatening nature of Keefe's posts in determining the appropriate punishment. Finally, Central Lakes College could have disciplined Keefe for disrupting the learning environment of fellow students. In that case, determining Keefe's punishment would not have warranted an assessment of his ability to abide by professional standards. The focus would be on the effect Keefe's posts had on his fellow students and how disruptive to the learning environment at Central Lakes College his comments had been. Also in that case, it is likely that the analysis performed by the court would bear a closer resemblance to the Tinker substantial disruption line of cases. At the very least, Tinker would have been more applicable, if the court had chosen to utilize that analytic framework.

In sum, the holding in Keefe means that professional degree programs at public colleges and universities may sanction students for almost any speech deemed offensive under the guise of upholding standards of professional conduct. Under such a vague standard, these programs can punish students for almost any speech without having to reference a professional conduct standard prohibiting the speech. To warrant discipline, the student's speech must only be determined unprofessional by college or university administrators, whom the courts are hesitant to second-guess in their academic decision-making. There is no requirement that prohibited speech be explained to the students during orientation, that the rule be adequately described in a handbook, or even be "narrowly tailored and directly related" to an established professional conduct standard.

XI. ON-CAMPUS AND OFF-CAMPUS SPEECH

Tatro, Ward, Keeton, Al-Dabagh and Keefe all have factual differences, but are distinct from the Tinker line of substantial disruption cases because these cases occurred in a setting where part of the curriculum includes preparing students to enter into their chosen professions. Like most professions, counseling, mortuary science, medicine and nursing all have conduct requirements that must be met in order to obtain and maintain licensure. Among the primary stated reasons for disciplinary action in each of these cases included the recognition of a failure on the part of the student to meet the standards of conduct necessary for admission into the profession. Thus, the Tinker substantial disruption test was determined to be inappropriate for deciding whether the speech or conduct was protected.

If the substantial disruption test had been applied, it is likely that Keefe's speech would have been protected because it occurred off-campus. However, the distinction between off-campus and on-campus speech is less

meaningful when applied to a situation where, with the growth of social media, it is almost impossible to determine where the speech occurred. It is also less meaningful in a situation where the program is focused less on maintaining an atmosphere conducive to learning and more on preparation for a professional career. The responsibility of secondary schools to provide an environment conducive to learning is heightened by the fact that attendance is mandatory.¹⁵² The First Amendment rights of one student must be balanced against the rights of others to be free from disruption. In contrast, adults attend professional schools voluntarily, with the expectation of entering into the profession upon graduation. For these reasons, the colleges and universities have the additional responsibility of ensuring that each student can conduct him or herself in a professional manner.

XII. THE ROLE OF PROFESSIONAL SCHOOLS IN DETERMINING FITNESS

At least one commentator has argued that colleges and universities, to the extent that they allow the students in their professional degree programs to complete the program and graduate, are “signing off on their students’ fitness to enter the profession in question.”¹⁵³ Focusing on whether the program rules bear a connection to established standards of professional conduct allows for much broader control over student speech. If this level of control is warranted because of an increased responsibility to prepare students for a profession, perhaps these schools should be allowed to judge fitness using professional standards as guidance, without regard for First Amendment rights.¹⁵⁴ In some sense, bestowing a degree upon Keefe would signal Central Lake College’s belief in his fitness to enter into the profession. The argument then becomes that Keefe’s unprofessional speech signaled his lack of ability to meet the standards of the profession and that, therefore, his dismissal was warranted. It does not matter that the program rules were not “narrowly tailored and directly related” to the professional standards, or that Keefe’s speech was not a clear violation of program rules. All that would matter, in this instance, is that Central Lakes College no longer felt able to certify Keefe’s fitness to become a nurse.

If colleges and universities have the responsibility and discretion to determine fitness, Keefe’s speech would undoubtedly give the College pause. However, one might also argue that that decision is properly left to the state licensure board, not the college or university that issues the diploma. This argument is strengthened by the fact that Keefe may still enroll in another nursing program and become a licensed nurse. Central Lakes College does not have the “last word” on Keefe’s ability to enter the nursing profession.

152. Lindsay, *supra* note 105, at 1482.

153. Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 383 (2013).

154. *Id.*

In fact, even if his speech was reported to the appropriate authority, it is unclear whether Keefe would face sanctions. If Keefe's speech clearly prevented him from obtaining his nursing license, one could argue that allowing him to continue in the program would be a waste of time and resources. As is, Central Lakes College made a decision that is, arguably, not theirs to make.

XIII. SPEECH OCCURRING OUTSIDE OF A PROFESSIONAL CAPACITY

Courts should differentiate speech made in one's capacity as a professional and speech made privately in professional school cases. Speech made in one's capacity as a professional should be treated as subject to the standards of that profession. However, if a student speaks outside of his or her professional capacity, the expression should be insulated from punishment unless it is disruptive under the Tinker test. Here, the distinction between off-campus and on-campus speech has more relevance as an important factor in determining whether the speech was made in a professional capacity. Speech made on-campus that is reasonably related to professional subject matter is the most obvious example of unprotected speech. Determinations regarding off-campus speech would be more difficult, with discussions of confidential, professional subject matter (such as was the case in Tatro) falling in the category of unprotected speech. At the very least, some distinction should be made between speech made in a professional capacity and speech made privately that bears little relation to the student's professional work.

XIV. THE EMPLOYMENT SPEECH CASES

When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline.¹⁵⁵ The respondent in *Garcetti v. Ceballos*, an assistant district attorney named Richard Ceballos, filed a §1983 suit against his supervisors for alleged retaliation as a result of a memorandum that Ceballos wrote, recommending dismissal of a case prosecuted by the district attorney.¹⁵⁶ The U.S. Supreme Court held that the controlling factor was not that Ceballos expressed his views inside his office rather than publicly, or that the memo concerned the subject matter of his employment.¹⁵⁷ Instead, the controlling factor was that Ceballos' expressions were made pursuant to his official duties.¹⁵⁸ If Ceballos had written the memorandum as a private citi-

155. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

156. *Id.* at 414–15.

157. *Id.* at 420–21.

158. *Id.*

zen, his expressions may have been insulated from employer discipline.

In order to determine whether public employee speech is protected, courts first determine whether the employee spoke as a citizen on a matter of public concern.¹⁵⁹ If the answer is no, the employee has no First Amendment cause of action based on the employer's reaction to the speech.¹⁶⁰ If the answer is yes, the question becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public.¹⁶¹ Thus, courts weigh the interests of the employer against the First Amendment rights of the employee, performing a balancing test.¹⁶²

Courses of study aimed at training students for professions in counseling, law mortuary science, medicine and nursing often have a clinical component. When students move beyond the classroom into clinical training for regulated professions, adherence to professional standards does more than prepare that student for practice — it protects clients.¹⁶³ The analysis of First Amendment rights in a public employment context is an example of how courts can — and sometimes do — choose to analyze First Amendment challenges in a professional school setting. Although not completely analogous, the two situations bear similarities. In fact, the Eleventh Circuit in *Watts v. Florida International University*¹⁶⁴ and the United States District Court for the Eastern District of Pennsylvania in *Snyder v. Millersville University*¹⁶⁵ applied the Garcetti framework to students who brought free speech claims against their universities. *Watts* involved a student, John Watts, in a Masters of Social work program who was assigned to perform a practicum at a local hospital.¹⁶⁶ *Watts* was terminated from the hospital because of an incident in which he allegedly counseled a patient that “one place [she] could find a bereavement support group was church.”¹⁶⁷ *Snyder* involved a student, Stacey Snyder, enrolled in a Bachelor of Science in Education degree program who was assigned to teach at a local high school.¹⁶⁸ The principle of that high school barred her from

159. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

160. *Id.*

161. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563, 568 (1968).

162. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

163. William Bush, Note, *What You Sign Up For: Public University Restrictions on “Professional” Student Speech After Tatro v. University of Minnesota*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 547, 576–77 (2014).

164. *Watts v. Florida Int’l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007)

165. *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *14–15 (E.D. Pa. Dec. 3, 2008).

166. *Watts*, 495 F.3d at 1292.

167. *Id.* at 1293.

168. *Snyder*, 2008 WL 5093140, at *3.

campus for MySpace posts mocking her faculty supervisor.¹⁶⁹ In order to successfully assert a First Amendment claim under *Garcetti*, Snyder had to show that she was speaking as a public citizen on a matter of public concern, a difficult standard to meet.¹⁷⁰ The students in both *Watts* and *Snyder* argued that they should not be subject to this framework because they were students at a university, not public employees.¹⁷¹ The courts disagreed, stating that the students had essentially been acting in an employment context.¹⁷² Thus, these courts were able to analyze the student's claims under the established framework for First Amendment rights in a public employee setting. While this analysis is undoubtedly restrictive, it at least provided a coherent test for evaluating the student's First Amendment rights.

XV. CONCLUSION

The widespread use of social media has necessitated the development of a new framework for addressing First and Fourteenth Amendment claims in an educational setting. Under this framework, professional school students have experienced a particularly harsh result. Professional school students' constitutional rights have been greatly limited by the application of *Tatro*'s "narrowly tailored and directly related" standard. The court in *Keefe* further limited students' constitutional rights by allowing Central Lakes College to dismiss Keefe for Facebook posts, basing their decision on a student handbook rule that bears little relation to any professional standard. Other constitutional challenges brought by professional school students under this emerging framework have been summarily denied. In contrast, courts have generally protected speech made on various forms of social media in a K-12 setting as off-campus speech. Courts have also protected speech made by a public employee speaking as a private citizen when the speech relates to matters of public concern. If courts continue down the path of *Keefe*, professional schools at public colleges and universities will have the unfettered ability to sanction students for any form of speech deemed unprofessional by administrators without regard for their constitutional rights.

169. *Id.* at *8.

170. *Id.* at *14.

171. *Id.* at *15; *Watts*, 495 F.3d at 1293.

172. *Id.* at *15; *Watts*, 495 F.3d at 1294.

