Social Media Posts
By Kim Pacelli, M.Ed., J.D., Associate, TNG and Brett A. Sokolow, J.D., President, ATIXA

I am seeking any advice on how you all respond to student social media posts? I understand that there’s nothing we can do since it is their freedom of speech, but how have other institutions been handling students who disclose potential Title IX concerns through social media, aside from reaching out individually to the students? Are there any other best practices? Are there any social media policies that can be shared?

Kim Pacelli: It’s a bit unclear from your question whether you’re talking about students utilizing social media as a tool to perpetrate sexual harassment or whether they are self-disclosing on social media harassment they have experienced. But in either case, I’m glad to try to help explain some good guidelines for an institutional response.

When the institution is on notice of information on social media – even anonymous information – you need to assess whether there are some steps that the institution can do to “stop, prevent, and remedy.” In my experience, this doesn’t mean you need to be monitoring and “catching” everything on social media, but if someone brings something to your attention, you need to review it and decide whether and how you can reach out. At a minimum, the Title IX Coordinator should reach out to the person to ensure they understand campus procedures, law enforcement options, protective measures, supportive resources, etc.

There was recently a fairly prominent 4th Circuit Court ruling against the University of Mary Washington for the shortcomings of their response to anonymous harassing social media postings (on YikYak, may it rest in peace). Several prominent student leaders were subjected to substantial harassment and threats on YikYak. The 4th Circuit rebuffed UMW’s claims it didn’t have “control” over YikYak. Instead, the court found that much of the harassment occurred “on” campus (on university networks to access YikYak), it targeted UMW students, and it was likely done by UMW students (due to YikYak’s geographic nature).

The court suggested a number of things UMW could have done: attempted to identify the harassers (UMW did not try), disable YikYak on university networks, taken a more active and vocal role in disclaiming the harassment, trained students better, or ask YikYak to identify the harassers. Basically, UMW needed to take some steps to investigate and try to identify the harassers, even when the speech was anonymous. Back in the era of Juicy Campus, OCR took the position that a university should take steps to determine whether speech on social media creates a sexually hostile environment on campus by taking steps to try to investigate and respond (admittedly, in the Obama-era OCR).

Your question references First Amendment concerns. I don’t think that’s the starting point of the analysis, even for a public institution. Remember that true threats are not protected by the First Amendment. But even if you’re not clearly dealing with a “true threat,” you still need to do your best to try to investigate and then apply your hostile environment analysis to determine whether speech is severe, persistent or
pervasive, and objectively offensive to create a hostile environment. Your free speech analysis can then come in at the end if you have clear tensions with academic freedom or other free expression concerns.

Here’s a link to the UMW opinion: https://tinyurl.com/y5h4gqu7. I’ve always been a bit on the fence about whether I think this topic merits its own policy or whether institutions should just apply their standard harassment policies to social media cases.

**Brett Sokolow:** Great suggestions, Kim. I think we can tend to go right to discipline as remedy too quickly, and forget that the ATIXA mantra is that you always investigate. Then, we can see what the investigation indicates as far as formal or informal action, discipline, and/or remedy. Not all speech is protected, as Kim noted, and there may be compelling reasons to try to address online speech. Cases like Layshock v. Hermitage SD and J.S. v. Blue Mountain SD can be instructive about some of this boundaries and a *Tinker* speech analysis.