

Social Media Use and Abuse by Students and Employees

2018 Region V Spring Meeting

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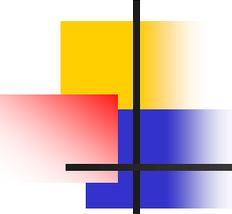
Examples of Students' Bad Online Behavior Impacting a School

- Student posts “for those who go to school with me... you should be very very afraid,” and other posts or memes about slaughter and ticking time-bombs
- Sexting– students sending naked or sexually explicit pictures of other students
- Students posts rap video he made to protest sex harassment of female students by coaches and includes comments about doing violence to specific coaches
- **CYBERBULLYING!**



Examples From Employees

- School employee in tiny town posts about “disrespectful little s%*#” who works at the only grocery store in town and parents are teachers at the school and want employee fired
- Teacher posts derogatory statements based on sexual orientation, race or immigration status
- Employee posts criticism in local online newspaper of the district’s use of bond funds
- Employee calls boss a jerk online



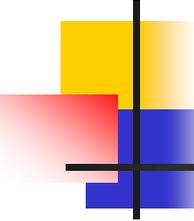
What Student Behavior may Administration control/discipline ? NMAC 6.11.2

Jurisdiction over students. All officials, employees and authorized agents of the public schools whose responsibilities include supervision of students shall have comprehensive authority within constitutional bounds to maintain order and discipline in school. In exercising this authority, such officials, employees and authorized agents of the public schools may exercise such powers of control, supervision, and correction over students as may be reasonably necessary to enable them to properly perform their duties and accomplish the purposes of education. This authority applies whenever students are lawfully subject to the schools' control, regardless of place. During such periods, public school authorities shall have the right to supervise and control the conduct of students, and students shall have the duty to submit to the school's authority.

What does your policy state about authority over student conduct?

NMAC 6.11.2

Local school board authority: Local school boards have both the authority and the responsibility to ensure that suitable rules of student conduct and appropriate disciplinary processes are established within their school districts. Within legal limits ..., and subject to the minimums prescribed in this rule, local boards have discretion to develop such rules, regulations, policies and procedures as they deem appropriate to local conditions, including policies which afford students more protection than the minimums established here.



Cyberbullying

- Willful and repeated harm inflicted through the use of computers, cell phones and other electronic devices.
- Posting or sending cruel, vicious or threatening messages on the internet.
- Includes:
 - Ridicule of another person
 - Hate lists
 - Hot or not lists
 - Circulation of shaming or private photos
 - Impersonation in order to get a person to share personal information.
- Generally posted from computers off-campus
- Causes disruption on campus, as well as humiliation of the target



NMAC 6.12.7: Bullying Prevention

“Cyberbullying” means electronic communication that:

- (1) targets a specific student;
- (2) is published with the intention that the communication be seen by or disclosed to the targeted student;
- (3) is in fact seen by or disclosed to the targeted student;
and
- (4) creates or is certain to create a hostile environment on the school campus that is so severe or pervasive as to substantially interfere with the targeted student's educational benefits, opportunities or performance.

NMAC 6.12.7



NMAC 6.12.7:

Cyberbullying Policy Requirements

- District is required to have policy addressing Cyberbullying, including as a disciplinary matter.
- Policy must contain:
 - an absolute prohibition on Cyberbullying
 - the method for disseminating the policy to everyone
 - Procedures for reporting incidents, confidentiality for reporters, and protection for victims and witnesses



NMAC 6.12.7: Cyberbullying Policy Requirements (cont'd)

- Policy must contain:
 - Consequences of Cyberbullying
 - Consequences for knowingly making false reports
 - Procedures for Investigating reports
 - Requirement that Employees report Cyberbullying
 - Requiring that anti-bullying be part of the health education curriculum



NMAC 6.12.7: Requires a Cyberbullying Prevention Plan

Cyberbullying Prevention Plan Requires:

- All licensed employees to be trained in cyberbullying prevention
- All licensed employees to report reasonable suspicion of cyberbullying to principal
- Any administrator who receives a report to take steps to ensure prompt investigation
- Administrators to take swift disciplinary action for confirmed cyberbullying BUT:
 - Discipline must be by the least restrictive means necessary to address a hostile environment on the campus and may include counseling, mediation, or discipline consistent with the legal rights of everyone involved.

What is “sexting”?



Sexting, *v.* (a combination of sex and texting) is the act of sending sexually explicit messages, photos, and/or videos electronically, primarily between cell phones.

How is sexting material distributed?



- Material can be distributed via:
 - Text messages
 - Downloads onto laptops/computers
 - E-mail
 - Downloads onto
 - YouTube
 - iTouch
 - iPhones / iPads
 - Smart phones
 - MP-3 players
- Posts on social networking sites: MySpace, Facebook, Twitter, etc.



Criminal implications of sexting under New Mexico law

- N.M. Stat. Ann. § 30-6A-3 (2007): It is a felony to:
 - Possess sexually explicit pictures or video of minors
 - Manufacture sexually explicit pictures or video of minors
 - Distribute sexually explicit pictures or video of minors



Close connection between sexting and bullying/cyberbullying

- There is a close connection between sexting and bullying/cyberbullying.
- School districts should be sensitive to social/emotional interventions with students who initiate sexting and/or are victims of bullying as a result of sexting.



Serious consequences of student sexting:

- Hope Witsell – suicide at age 13
- Jessica Logan – suicide at age 18

Devastating and permanent
consequences....



Liability of School District for Online Harassment of Students

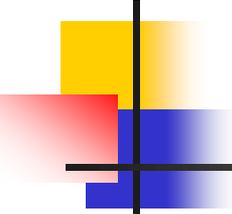
- Peer-to-peer sexual harassment can result in Title IX liability to school officials if they have actual knowledge of harassment that is so severe, pervasive, and objectively offensive that it deprives the victim of access to educational opportunities, but school officials remain deliberately indifferent.
- The harassment must take place within the district's control.

The First Amendment:

Tinker v. Des Moines Sch. Dist. (U.S. 1969)

Key Quotes and Takeaways

- “Congress shall make no law... abridging the freedom of speech.”
- Also applies to states, municipalities and other government actors aside from Congress, including you as public school board members or officials.
- “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
- In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.



Student speech: The Legal Framework

The *Tinker* standard - School district must establish a relationship between a student's speech/expression and a material and substantial disruption in the operation of the school.

The *Fraizer (Bethel)* standard - School may regulate offensively lewd and indecent speech.

The *Kuhlmeier (Hazelwood)* standard - Editorial control over style and content if actions are reasonably related to legitimate pedagogical concerns.

The *Morse v. Frederick* standard - School district may regulate speech/expression that promotes illegal drugs.



Reasonable forecast of substantial disruption

- Disruption need not actually occur. School may act to prevent problems if the situation might *reasonably* lead school authorities to forecast substantial disruption or interference with rights of others.

Key word “reasonably”

- Forecast must be reasonable. Officials may not restrict speech based on unsupported fear, or on a mere desire to avoid unpleasantness accompanying an unpopular viewpoint.



Reasonable forecast of substantial disruption (cont'd.)

- For a school's forecast to be reasonable, courts generally require that it be based on a concrete threat of substantial disruption.

- A silent, passive expression that merely provokes discussion in the hallway would not constitute such a threat.



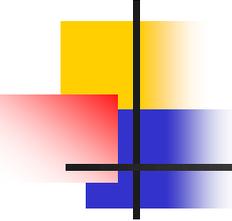
Social Media Posts Usually Off-Campus, Outside School Hours. Can Your Regulate?

- Apply the **legal framework**, e.g., *Tinker* standard – Can the school show:
 - The speech “materially and substantially interfered” with the educational process; or
 - The speech is reasonably forecasted to materially and substantially interfere with the educational process.
- Courts differ on standard for “substantial disruption.”



Some First Amendment questions about student social media use

- Is it speech (including expressive conduct)?
- If it is speech, is it private speech or school-sponsored speech?
- Does the speech contain a credible threat of violence?
- Is the speech lewd and offensive?
- Is the speech so directed at one person that it limits their ability to get an education?



Some First Amendment questions about student social media use (cont'd.)

- Is the speech disruptive? If so, how substantial is the disruption?
- Is there a nexus between the speech and the school?
- Does the speech violate any applicable state law requirements?
- The Supreme Court has never ruled on online, off-campus speech.



Student Online Free Speech Cases

- *Bell v. Itawamba* (5th Cir. 2015)– student recorded and posted rap video accusing coaches of sexual misconduct. Included: “I’m going to hit you with my rueger,” and “going to get a pistol down your mouth.” He admitted that he intended the video to be viewed by the school community.
- Court finds jurisdiction to regulate off-campus speech where student “intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher...”



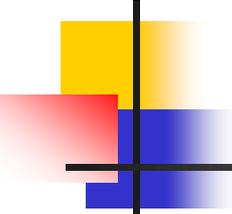
Student Online Free Speech Cases (cont'd)

- *Snyder v. Blue Mountain School District* (3rd Cir. 2011)-- Student posted a MySpace parody of principal as sex addict and pedophile. Court stated that the speech was so outlandish that it couldn't be taken seriously, and that district could not discipline for it since it was off-campus and did not substantially disrupt.
- *Layschock v. Hermitage School District* (3rd Cir. 2011)- Student created a fake MySpace profile off-campus that ridiculed Principal. Court found that speech did not create a substantial disruption, rejected claims that there was a sufficient "nexus" to the School, and overturned discipline.



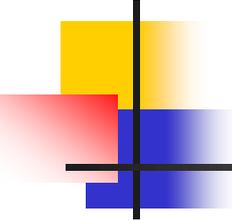
Student Online Free Speech Cases (cont'd)

- *Kowalski v. Berkeley County Schools* (4th Cir. 2011)– Student created a MySpace page that implied that another student had herpes. She was suspended from school for violating bullying policies. Court stated that “where (bullying) speech has sufficient nexus with the school, the Constitution is not written to hinder administrator’s good faith efforts to address the problem.”



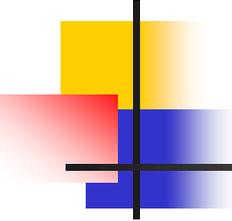
True threats are not protected speech

- High school student D.J.M. used his home computer's "instant messaging" program to send message to his friend, C.M. *D.J.M. ex rel. D.M. v. Hannibal Public School Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011).
- Messages included statements that D.J.M. wanted to go to school and shoot several classmates and himself. He named five specific students whom he said "would go" or "would be the first to die," and he referred to these students using hate-filled and discriminatory language.
- D.J.M. was depressed at the time because he had been rejected by a romantic interest.



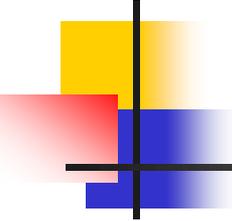
True threats are not protected speech (cont'd.)

- D.J.M.'s messages talked about using a 357 magnum that could be borrowed from a friend.
- D.J.M. told C.M. that he "wanted Hannibal [School District] to be known for something."
- C.M. was concerned and reported D.J.M.'s messages to the school principal. School principal and superintendent called the police and suspended him from school.
- Numerous parents called principal asking what the school was doing to address D.J.M.'s threats and whether their children were on a rumored hit list.



True threats are not protected speech (cont'd.)

- D.J.M.'s parents sued the school district, alleging that his suspension had violated his First Amendment right to free speech. D.J.M. claimed the instant messages were intended as a joke.
- Although D.J.M. did not communicate any threatening statements to the students targeted in his messages, he intentionally communicated them to his friend, C.M.
- The district court found that because C.M. was a classmate of the targeted students, D.J.M. knew or should have known that the classmates he referenced could be told about his statements.



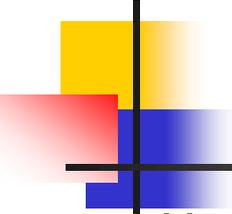
True threats are not protected speech (cont'd.)

- Court found that D.J.M.'s statements were true threats not subject to First Amendment protection.
- D.J.M.'s depression and access to weapons made his threats believable. The juvenile court judge had ordered him to have a psychiatric evaluation, and no one who became aware of D.J.M.'s message thought he was joking.
- The Eighth Circuit court found that school district did not violate D.J.M.'s First Amendment rights by notifying the police about his threatening instant messages and suspending him after he was placed in juvenile detention.



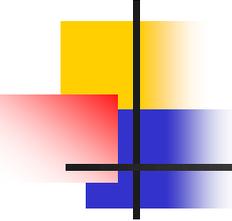
True threats are not protected speech (cont'd.)

- The school district was not required to see whether D.J.M. carried out his talk about taking a gun to school and shooting certain students.
- The Eighth Circuit stated that school officials would have exposed the District to what reasonably appeared to them as a serious risk of harm to students and disruption of the school environment if no action had been taken in response to D.J.M.'s threatening instant messages.
- D.J.M.'s conduct probably would violate New Mexico's new cyberbullying law.



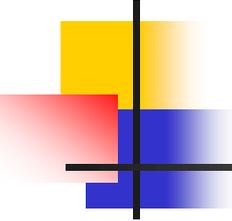
Cell Phone Searches

- Use same analysis as other searches: Search must be “justified at its inception” and “reasonable in scope.”
- A search is justified at its inception when there is “reasonable suspicion” that the search will turn up evidence that a student has violated the laws or rules of the school.
 - School may be able to search phone based on witness stating that he received a sext from another student, or saw a sext from that student on someone else’s phone.
 - Likely not a reasonable search if based solely on rumors that the student sent the sext; Not reasonable to search multiple students’ phones based on knowledge that “someone” in the class sending sexts. The reasonable suspicion to justify a search has to be focused on a particular student.



Cell Phone Searches (cont'd.)

- Search is Reasonable in Scope when the measures adopted are reasonably intrusive in light of the age and sex of the student and nature of the infraction.
 - If reliable information indicates that student broke rules by texting sexual images, or confessed to committing a crime in a text, District may be able to search text messages on phone but not browser history, Facebook page, or locker.

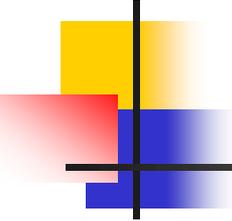


Change the culture at your school

- Make the change in culture and enforce all student discipline rules on bullying and cyberbullying.

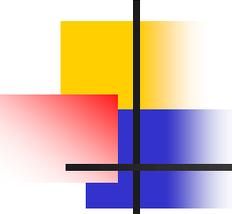


STOP!
BLOCK!
TELL!



Change the culture at your school (cont'd.)

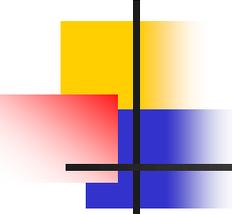
- Shift the discussion from “acceptable use” to reinforce positive behaviors. Add and highlight **responsible technology use** messages in all field trip and overnight trip permission slips.
- Let users know that activity on school district equipment will be monitored, and that misuse will result in consequences.
- Educate parents and students regarding cyberbullying and student privacy issues.



How should districts respond to student behavior that is not harassing, lewd, offensive, or disruptive but is nonetheless inappropriate in a school environment?

Schools have many options in situations where discipline may not be constitutionally permissible:

- Talk to the student.
- Talk to the parents.
- Set up a meeting with the student, parents, and the principal.
- Refer the student to counseling.
- Restrict student's participation in extracurricular activities.
- Encourage mediation between students where appropriate.
- Incorporate appropriate boundaries for students' electronic communications into the curriculum.

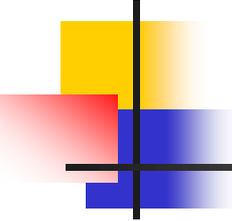


Employee Speech: The Legal Framework

The *Pickering* standard - Court created a balancing test to weigh the interest of “a citizen, in commenting upon matters of public concern and the interests of the state, as an employer in promoting the efficiency of the public services it performs through its employees.”

The *Connick* standard – Court distinguished between private matter (personal gripes) and public concern.

The *Garcetti* standard – Speech made as part of official duties (and not as a citizen) was not protected.

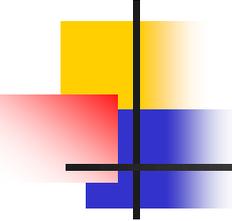


Employee Speech: The Legal Framework

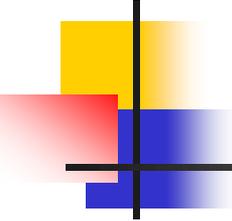
Landmark case is a public school case: *Pickering v. Board of Ed.* (1968)

Pickering was a HS teacher who wrote a letter to the editor criticizing the Board and Superintendent's handling of a bond issue. He was terminated for conduct "detrimental to the efficient operation and administration of the schools."

Pickering Balancing Test (cont'd.)

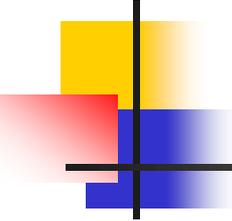


- Court found that the question of whether the district needs additional funds is a matter of public concern about which teachers are likely to have informed opinions.
- Court found no evidence that the letter “impeded the teacher’s proper performance of his duties in the classroom or... interfered with the regular operations of the schools.”
- Court decided the balance tipped in Pickering’s favor.



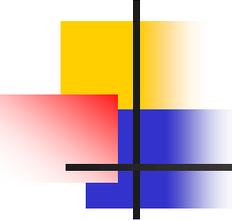
Same Principles Apply to Online Speech

- *Richerson v. Beckon* (9th Cir. 2009)– mentor teacher was demoted for online blog in which she posted negative comments about employer and co-workers.
- Court found that her position required her to have trusted mentor relationships with newer teachers and her posts impeded her ability to do that to the detriment of the school.



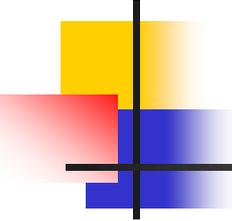
Bland v. Roberts (4th Cir. 2013)

- Deputy sheriffs were terminated for “liking” the Sheriff’s election rival’s Facebook page.
- 4th Circuit held that the “likes” were protected speech, and since the deputies were not engaged in policy-making, they could not be fired for expressing their political views.



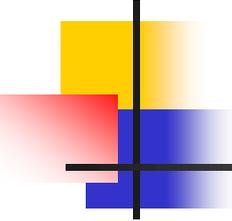
Czaplinski v. Board of Education (D.N.J. 2015)

- School security guard fired after off-duty social media posts about the killing of a police officer.
- She called the killers “black thugs” and stated that “all white people should start riots and protests and scare the hell out of them.”
- Court held that the speech was on a matter of public concern but that the speech undermined her ability to resolve disputes and maintain peace as a security guard. No 1st Amendment violation.



Munroe v. Central Bucks School District (E.D. Pa 2014)

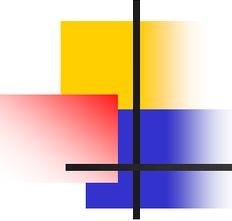
- HS teacher fired for blog posts negative comments about her students and their parents. Though she did not specifically identify them, they were identifiable to readers.
- Used descriptions of students like “frightfully dim,” “whiny, simpering grade-grubber,” and “ratlike.”
- The main focus of comments was complaints about students living up to her expectations, as opposed to “larger discussions about educational reform, pedagogical methods or school policies.”
- The Court found that blog-entries weren’t protected by 1st Amendment.



Policy takeaway case

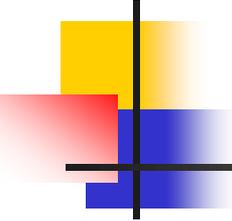
In re Tenure Hearing of Jennifer O'Brien, No. A-2452-11TA
(N.J. Super. Ct., App. Div. Jan. 2013)

O'Brien posted two comments on Facebook casting her first grade students in a derogatory light, including a reference to her first graders as "future criminals," resulting in numerous parent complaints. The administration found the Facebook activity was probable cause for termination. O'Brien argued that her Facebook "speech" was protected by the First Amendment because she had addressed a matter of public concern.



Policy takeaway case (cont.)

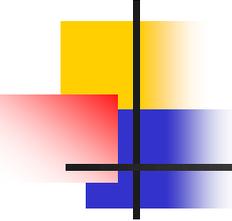
The Administrative Law Judge (ALJ) determined the comments were “a personal expression” of O’Brien’s dissatisfaction with her job. The ALJ held that even if O’Brien’s comments were on a matter of public concern, her right of expression was outweighed by the school district’s need to efficiently operate schools. **The ALJ stated “in a public school setting thoughtless words can destroy the partnership between home and school that is essential to the mission of the schools.”** The ALJ also concluded that the evidence supported the charge of conduct unbecoming of a teacher because O’Brien **failed to maintain a safe, caring, nurturing, educational environment.**



Policy takeaway case (cont.)

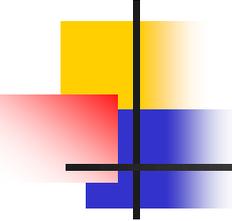
Give the Judge something to hang his/her hat on:

Vision and/or mission statement, policy, and staff and student handbook provisions that emphasize the role, value and importance of **“the partnership between home and school that is essential to the mission of the school”** and the public school employees’ role to **“maintain a safe, caring, nurturing, educational environment.”**



The Public Employee Free Speech Standard

- a public employee's speech is protected when he or she (1) speaks as a private citizen upon (2) a matter of public concern and (3) the employee's interest in exercising his or her First Amendment rights are greater than the employer's interest in the efficient operation of the public agency."
- If speech has no "nexus" or connection with the school, it is less likely that speaker may be disciplined.
- Each case is different and courts look to the totality of the circumstances in performing the balancing.



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