

Student, Personnel and Technology Issues

2014 NCSA PRINCIPALS' CONFERENCE

PRESENTED BY:

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The Plan

- Single gender classes/activities
- Cell phones
- Threats
- Bullying
- Threats
- Searches and interrogations
- Opt-outs
- Who are our students?
- Employee and EEOC issues
- Cloud computing

Single-Sex Classes & Activities



Single-Sex Classes & Activities

- **December 1, 2014 “Dear Colleague” letter:**
 - Received a number of questions about the legality, under the Department’s regulations implementing Title IX of the Education Amendments of 1972 (Title IX), of single-sex elementary and secondary classes and extracurricular activities
 - Does not address interscholastic, club, or intramural athletics in this document (but, far behind????)
 - OCR does authorize single sex classes or extracurricular activities under certain circumstances
 - A **specific, individual justification** (demonstrating the recipient’s objective and the substantial relationship between the objective and the single-sex nature of the class or activity) is necessary for each single-sex class or activity

Cell Phones

- ***Cain v. Owensboro Public Schools* (W. D. Ky. 2011)**
 - Cain was a troubled student with a history of drug abuse
 - At numerous times in 2009, he was caught using his phone in violation of school rules
 - After one such violation, an administrator checked the text messages for that day due to Cain’s “previous expression of suicidal thoughts, drug use, and anger issues”—she feared he may harm himself or others
 - **Cain was disciplined for using the phone, not for anything found on his phone**
 - Naturally, he sued

Cell Phones

- ***Cain v. Owensboro Public Schools* (W. D. Ky. 2011)**
 - He claimed school officials violated his Fourth Amendment right to be free from unreasonable searches
 - Viewed under *New Jersey v. TLO* standard of reasonable suspicion
 - 1. Justified at inception
 - 2. Limited in scope
 - Court compared this standard as “a moderate chance of finding evidence of wrongdoing.”
 - **Improper use of cell phone justified the limited search**

Cell Phones

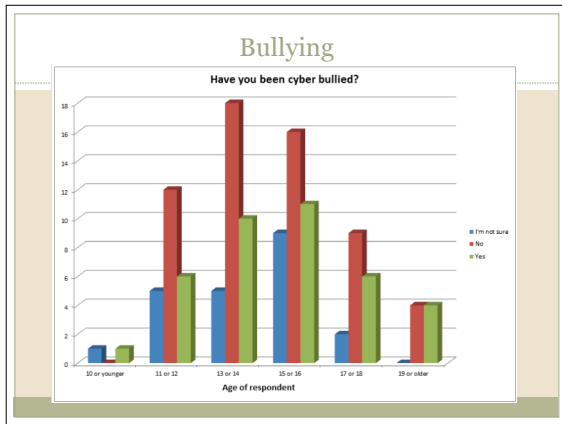
- ***Cain v. Owensboro Public Schools* (W. D. Ky. 2011)**
 - Appealed to 6th Circuit Court of Appeals
 - Cain claimed the school's search of his phone secondary to those violations was an invasion of his privacy
 - *Klump v. J.W. v. Desoto County School District*
 - In its brief, the school district argued that the search was justified—use and reasonable suspicion
 - Limited Search
 - School lost
 - 6th Circuit: "using a cell phone on school grounds **does not automatically trigger an essentially unlimited right enabling a school official to search** any content stored on the phone that is not related either substantively or temporally to the infraction."

Cell Phones



Cell Phones

- ***Riley v. California*, 134 S. Ct. 2473 (2014)**
 - Involved a search "**incident to arrest.**"
 - "The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.
 - "One of the most notable distinguishing features of modern cell phones is their immense storage capacity . . .



- ### Bullying
- “Examination of the Change in Latent Statuses in Bullying Behaviors Across Time” School Psychology Quarterly(2014):
 - Bullies:
 - Frequent perpetrator—5%
 - Occasional perpetrator—26%
 - Infrequent perpetrator—69%
 - Frequent victim—11%
 - Bullying victimization & perpetration decreases over time, **but there is an increase from 5th to 6th grade**
 - Call for focused interventions—age and gender

- ### Cyberbullying
- Parents **may** be held financially liable for what their kids post on Facebook
 - *Boston v. Athearn* (Ga. App. October 10, 2014)
 - Parents may be negligent for failing to get their son to delete a Facebook profile that defamed a classmate
 - “Fat Face” app, “parody” account—**2011**
 - Target found out, parents complained to school
 - School punished the student **and alerted his parents**
 - But, page stayed up and was not deleted until Facebook deactivated the account at urging of the target’s parents

Cyberbullying

- ***Boston v. Athearn* (Ga. App. October 10, 2014)**
 - “Given that the false and offensive statements remained on display, and continued to reach readers, **for an additional eleven months**, we conclude that a jury **could find** the [parents’] negligence proximately caused” some of the injuries claimed by the targeted student
 - Court, though, dismissed claim that parents were responsible for allowing the page to exist in the first place
 - Likely appealed to state supreme court

Social Media

- **General/emerging rule:**
 - Upholding punishment for off-campus conduct that reached or impacted school grounds
 - Student “pushed her computer’s keys in her home, but she knew that the electronic response would be . . . published beyond her home could be reasonably expected to reach the school or impact the school environment.” *Kowalski v. Berkely County Schools* (2011)
 - “Targeting”
 - *S.J.W. v. Lee’s Summit R-7 Sch. Dist.* (8th Cir. 2012)
 - *Bell v. Itawamba Cnt. Sch. Bd.* (2012)
 - *Rosario v. Clark County Sch. Dist.* (2013)

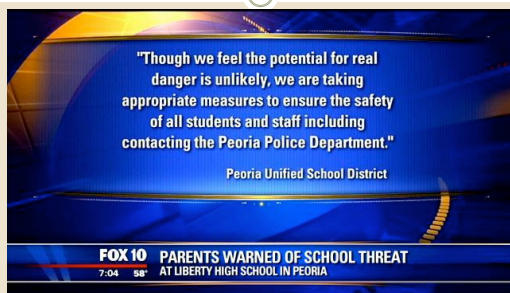
Social Media

- ***Nixon v. Hardin Cnty. Bd. of Educ.* (W.D. Tenn., December 27, 2013)**
 - Student tweets:
 - “Shoot her in the face”
 - “I hate her . . . I’ll kill her.”
 - Some disruption at school?
 - School became involved and determined student would spend 45 days in an alternative school

Social Media

- **Nixon v. Hardin Cnty. Bd. of Educ. (W.D. Tenn., December 27, 2013)**
 - Court: "Here, the speech had no connection to [the school] whatever other than the fact that both the speaker and the target of the speech studied there."
 - "Speech not made at school, directed at the school, or involved the use of school time. **No disruption of school activities or impact on the school environment has been shown.**"
 - Immediately "certified" the question to the Third Circuit Court of Appeals

Threats



Threats



Threats

- **August 18, 2014**
 - 15 year old post threats on **Instagram** of “huge” shooting in California school
- **September 13, 2014**
 - 16 year old makes social media threat to “shoot up” Louisiana high school
- **September 16, 2014**
 - 15 year old arrested for posting shooting and bombing threats via **Yik Yak** in New York

Threats

- ***Wynar v. Douglas Co. [NV] School District* (9th Cir. 2013)**
 - Sophomore who collected ammunition and reported owning various rifles; also a fan of Hitler
 - Online posting on April 20th about shooting/killing classmates
 - Friends, who occasionally joked with him about school violence, **reported these posts to school officials**
 - Arrested . . . Suspended . . . Sued School

Threats

- ***Wynar v. Douglas Co. [NV] School District* (9th Cir. 2013)**
 - Issue: **off campus communication among students involving a safety threat to the school and brought to the school’s attention by a fellow student, not the speaker**
 - No need for one-size fits all approach
 - “When faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*.”
 - Even if student is “joking,” reasonable for school to proceed as though he was not

Threats

- 79-267

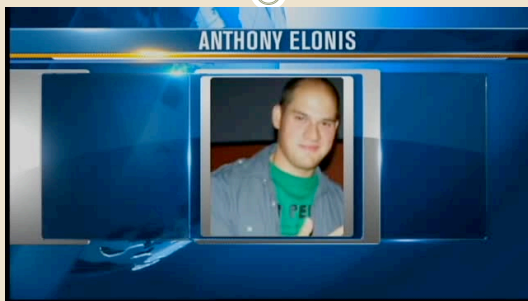
- The following student conduct shall constitute grounds for long-term suspension, expulsion, or mandatory reassignment when such activity occurs on school grounds, in a vehicle owned, leased, etc. by a school used for a school purpose . . . or at a school-sponsored activity or athletic event

Threats

- *Doe v. Pulaski* (8th Cir. 2002)

- Student wrote a letter about killing his former girlfriend
- **Objective standard**—would a reasonable person interpret it as a serious expression of an intent to cause harm or injury?
 - ✦ Reaction of those who heard the comment;
 - ✦ Whether the threat was conditional;
 - ✦ Whether the person who made the alleged threat communicated it directly to the object of the threat;
 - ✦ Whether the speaker had a history of making threats against the person purportedly threatened; and
 - ✦ Whether the recipient had a reason to believe that the speaker had a propensity to engage in violence

Threats



Threats

- *United States v. Elonis* (3rd Cir. 2013)
 - Facebook posts:
 - . . . would have smothered you, dumped you in a creek, made it look like a rape and murder
 - There's one way to love you but a thousand ways to kill you . . .
 - Provides details on how to "attack" ex-wife's home
 - Threatens to slit throat of FBI agent
 - Threatens school shooting
 - Argued that Supreme Court requires a defendant to subjectively intend to threaten an individual
 - Conviction upheld—facing 4+ years in federal prison

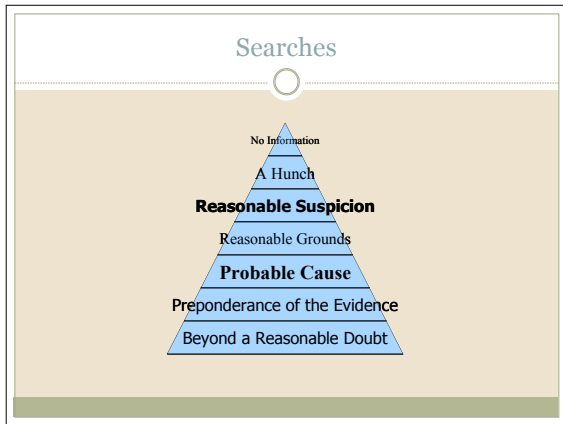
Threats

So the next time you knock, you best be serving
a warrant
And bring yo' SWAT and an explosives expert
while you're at it
Cause little did y'all know, I was strapped wit'
a bomb
Why do you think it took me so long to get
dressed with no shoes on?
I was jus' waitin' for y'all to handcuff me and
pat me down
Touch the detonator in my pocket and we're all
goin'

[BOOM!]

Threats

- *United States v. Elonis* (3rd Cir. 2013)
 - Appeal taken by Supreme Court
 - Free expression advocates:
 - Asked Court to review the case in light of "the emergence of social networking and other modern communication modes that . . . underlie the vast majority of contemporary threat cases."
 - "Nature of the medium" and true threats
 - Oral argument on December 1, 2014
 - Could provide significant insight on how the court views social media communications
 - Justices did not appear particularly taken with arguments of appellant



- ### Searches
- Reasonableness
 - Factors include:
 - » child's age, history, and record in the school;
 - » prevalence and seriousness of the problem necessitating the search;
 - » need to make the search without delay;
 - » probative value and reliability of the information used to justify the search; and
 - » type of search to be conducted.

- ### Searches
- Backpack
 - Locker
 - Car
 - Person
 - Drug dog
 - Drug test
 - Video footage
 - Electronic

Interrogations on School Grounds

- Generally, schools are not required to allow law enforcement officials to interview students on school grounds.
 - Schools do not exist to serve as a convenient forum for police investigations
- Along these lines, strong consideration should be given to notifying parents of police questioning of student at school
 - Exception where suspected child abuse is basis for the interrogation
 - Exception for warrants, etc.

Working with Law Enforcement

- So, what are schools to do?
 - Require parental consent, court order, warrant . . .
 - Agreement with law enforcement and state officials?
- Law generally does not require or prohibit school from contacting parents
 - Balancing act
- Directives
 - From police to not contact parents
 - From parents before child is interviewed

Opting Out



Opting Out

- Testing
- Military recruiters
- Pledge of allegiance



Our Students

- U.S. DOE & DOJ "Fact Sheet"
 - May require proof that student lives within the school district, e.g. phone bill, lease agreement
 - May NOT ask about citizenship or immigration status to establish residency within a district
 - May request copy of birth certificate (But see Rule 19)
 - May NOT prevent child from attending school because of a foreign birth certificate

Our Students

- Where student resides.
- If at least one of the student's parents resides in the school district.
- Any homeless student.

Our Students

- May allow a student whose **residency ceases** to continue for remainder of the school year.
- May admit **nonresident** pursuant to a **contract** with the student's resident district; shall collect tuition pursuant to the contract.
- May admit a student who is a **resident of another state**; shall collect tuition in advance at a rate determined by the school board.

Our Students

- <http://www.education.ne.gov/sped/technicalassist.html>
- Residency Guidance: Wards (PDF 2011)
- Residency Guidance: Non-Wards (PDF 2011)

Personnel



Personnel

- **Pregnancy**

- EEOC Guidelines July 14
 - Light duty accommodations (even if a normal pregnancy)
 - Lactation—a pregnancy-related condition
 - *Young v. UPS* (S.Ct.)
- FLSA:
 - Breaks to express milk (for classified staff)
 - EEOC—failure to allow violates PDA

Personnel



Firestorm? An Arkansas teacher is under fire for bringing her infant baby to class and even breastfeeding it while students study

Personnel



Personnel

- **UPS Case—*Young v. UPS***
 - 1976: Employer that does not include pregnancy in disability plan is **not** discriminating based on gender
 - Congress quickly amended the law, but most courts have interpreted the law narrowly
 - Young—limited to light duty (20 lbs v. 70 lbs)
 - UPS—we don't accommodate light duty for off-work incidents
 - Young sued under Pregnancy Discrimination Act
 - UPS—we treated her like any other employee who couldn't lift up to 70 lbs

Personnel

- ***Young v. UPS***
 - UPS argument
 - » No animus toward pregnant women; it has a generally applied policy that does not accommodate disabilities that occur off the job
 - Young argument
 - » Drivers who lost their licenses were assigned light duty until they could get their licenses back — in other words, that non-pregnant workers with temporary disabilities were treated more favorably than pregnant workers

Personnel



Mrs. Hodges @Kree49

So happy to be done w/school for 10 days, but especially to be away from the ones who truly try my patience & make my trigger finger itchy.

California, USA

RETWEET 1 FAVORITES 3

3:25 PM · 18 Apr 2014

Personnel



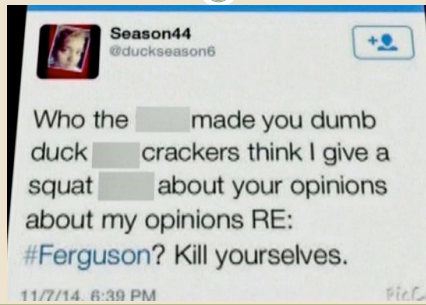
Personnel

- Speech as an Employee--Not Protected: “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”
- Speech on Matters that are Not of Public Concern--Not Protected: If a school employee does not speak “on a matter of public concern . . . the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech.”

Personnel

- Speech as a Citizen on Matters of Public Concern--Sometimes Protected: If the school employee speaks “as a citizen on a matter of public concern” “the possibility of a First Amendment claim arises.” The employer must show it “had an adequate justification for treating the employee differently from any other member of the general public.”
- Generally, an employee may be disciplined for speech that:
 - Impairs ability perform duties
 - Undermines supervisory authority
 - Destroys working relationships

Personnel



Personnel



Personnel

- Suspended
- Confirmed writing the tweets
- School district: can take disciplinary action — including dismissal — if an employee's use of electronic media "interferes with the employee's ability to effectively perform his or her job duties"
- District found out about the tweets when the issue exploded on social media. People took to Twitter to demand that the school district take action.
- What would you do?

What is “The Cloud”?

- “The cloud, simply, refers to software and services that run on the Internet instead of your computer. Apple iCloud, Dropbox, Netflix, Amazon Cloud Drive, Flickr, Google Drive, Microsoft Office 365, Yahoo Mail -- those are all cloud services.” David Goldman, *What is the Cloud?*, CNN Money (Sept. 4, 2014)
- “Cloud computing is the capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself.”
 - *Riley v. California*, 134 S. Ct. 2473, 2491 (U.S. 2014).

Top services or applications moving to the cloud:*

Small business	Medium business	Large business	Federal govt.
1. Storage (40%) 2. Conferencing & collaboration (37%) 3. Messaging (36%)	1. Storage (35%) 2. Messaging (33%) 3. Office & productivity suites (32%)	1. Conferencing & collaboration (40%) 2. Storage/business process apps (35%) 3. Messaging/compute power (34%)	1. Conferencing & collaboration (39%) 2. Messaging (37%) 3. Business process apps (31%)
State/local govt.	Healthcare	Higher education	K-12
1. Storage (19%) 2. Conferencing & collaboration (17%) 3. Messaging/business process apps/compute power (15%)	1. Conferencing & collaboration (29%) 2. Compute power (26%) 3. Office & productivity suites (22%)	1. Storage (31%) 2. Messaging/conferencing & collaboration (29%) 3. Compute power (25%)	1. Storage (40%) 2. Conferencing & collaboration (36%) 3. Office & productivity suites (33%)

*Source: CDW's 2013 State of the Cloud Report

What are the concerns?

- **Data loss**
 - Examples:
 - Sending email to wrong person(s)
 - Posting information on public website
 - No passwords / weak passwords
 - Access by unauthorized employees
 - 2014 Park Hill School District (Kansas City, Missouri) (“Inappropriate downloading by a former employee . . . resulted in sensitive information for more than 10,000 individuals being temporarily accessible online.”)
 - 2014 Lewisburg Area School District (Pennsylvania) (internal computer file containing student addresses, phone numbers and social security numbers was accessed)

What are the concerns?

- **Data breach**

- By Cloud Provider
- Usually result of “hackers”
 - ✦ Lax/weak security protocols
 - ✦ Unknown loopholes/vulnerabilities in “firewalls”
 - ✦ Viruses/trojans/worms
- Could result from “insider”
 - ✦ Former, disgruntled employee
 - ✦ Employee negligence/misunderstanding

FERPA

- “Other school officials” include:

- Contractors, consultants, volunteers, or *other parties to whom a school has outsourced* institutional services or functions
- Performs an *institutional service or function* for which the school would otherwise use employees
- Has *legitimate educational interests* in the records
- Under the *direct control* of the school with respect to the use and maintenance of education records
- *Subject to requirements* governing the use and redisclosure of PII of education records

FERPA

- “Direct control”?

- Requires **schools to ensure** that outside parties “do not maintain, use, or redisclose education records except as directed by the [school] that disclosed the information.”
- “Schools outsourcing information technology services, such as web-based and e-mail services, should make clear in their *service agreements or contracts* that the *outside party may not use or allow access to personally identifiable information from education records*, except in accordance with the requirements established by the educational agency or institution that discloses the information.”
 - 73 FR 74806, 74816 (Dec. 9, 2008)

FERPA

- **Service contracts with outside Cloud/Service Providers**
 - **Identify purpose** for disclosing education record to vendor
 - **Use and redisclosure restrictions**
 - Disclaimer of warranties / limitations of liability / limitation of damages???
 - Insurance / indemnification???

What can schools do?

- **District policy / procedure / protocol**
 - District-wide approach to use of Cloud/web-based apps/software/services?
 - Do you have/need a technology “point person”?
- **Staff education**
 - When is it “OK” to use cloud/web-based apps/programs?
 - Procedures for review/approval?
 - “Red flags” to be aware?
- **Due diligence regarding providers**
- **Contract review/negotiation**

Questions?



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