

2014 School Law Update

SOCIAL MEDIA

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Social Media

- Nash Grier—most followed Vine account **in the world**
- 2014 study by Variety: teens more enamoured with stars of social media than they are mainstream celebrities
 - Top 5 “most influential”—all online stars

Social Media

- Vine
 - Users post and watch looping six-second video clips
 - Potential issues:
 - Full of inappropriate videos—nudity, drug use, etc.
 - Videos, follows, comments public by default

Social Media

- **Kik messenger**
 - App-based alternative to standard texting
 - Potential issues:
 - No message limits, character limits or fees
 - Allows communication with strangers who share Kik usernames to find people with whom to chat
 - Kik community blog where users can submit photos and screenshots
 - Displays usernames

Social Media

- **Yik Yak**
 - Free, location-aware app that allows users to post “anything and everything” anonymously through brief posts
 - Posts distributed to geographically nearest 500 people who are also signed in
 - Potential issues:
 - By default, shares physical location
 - Widely known for cyberbullying, explicit sexual content, drugs, alcohol, etc.
 - Also a popular venue for threats

Social Media

- **Omegle**
 - Chat site and app that connects two strangers via text chat or video chat room
 - Includes “interest boxes” so users can filter chat partners
 - Potential issues:
 - No registration required
 - Users get paired with strangers
 - Filled with people looking for sexual chat
 - Links to porn sites

Social Media

- **Whisper**
 - “Confessional” app—post whatever is on teen’s mind, paired with an image
 - Potential issues
 - Anonymous
 - Often sexual in nature—“confessions” of desire, etc.
 - Dark content—depression, substance abuse, suicide
 - Although anonymous, encourages users to exchange info via “Meet Up” section

Social Media

- 1. Cyberbullying
- 2. School Connection
- 3. Monitoring
- 4. Threats
- 5. Teachers Gone Wild
- 6. Sexting

Cyberbullying

- “Examination of the Change in Latent Statuses in Bullying Behaviors Across Time” School Psychology Quarterly(2014):
 - As students age, verbally/physically bullied less, but cyberbullied more
 - Bullied students:
 - Frequent victim—11%
 - Occasional traditional victim—29%
 - Occasionally cyber victim—10%
 - Infrequent victim—50%

Cyberbullying

- “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%
 - Bullying victimization & perpetration decreases over time, **but there is an increase from 5th to 6th grade**
 - Call for focused interventions—age and gender

Cyberbullying

- Title VI, Title IX, Section 504, IDEA
 - Deliberate indifference
 - Deprive victim of educational opportunities
- Section 1983
 - Plaintiff must show school conduct that is so egregious or outrageous that it “shocks the contemporary conscience”
- State negligence claim

Cyberbullying

- *Kowalski v. Berkeley County Schools*, (4th Cir. 2011)
 - *Tinker* analysis:
 - She may have pushed the computer keys at home, “but she knew that the . . . response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.”
 - There was no substantial disruption; but:
 - 1. Nexus between the speech and the school’s pedagogical interests
 - Targeted, vulgar speech directed by student(s) at student(s)
 - Potential for continuing and more serious harm had school not acted
 - 2. Foreseeable or likely that speech will—or may reasonably—disrupt school
 - 3. Some entrance on school grounds of the offending speech

Cyberbullying

- 4 part test (IF no actual & substantial disruption):
 - 1. Does the speech relate to school?
 - Is the school a target?
 - Is a student, coach or teacher the target?
 - 2. Is the speech directed to students of the school?
 - 3. Did the speech reach the school?
 - Accessed
 - Administrators or teachers involved
 - 4. Is a disruption foreseeable?
 - Sexual content?
 - Mean, lewd, vulgar, etc.?

School Connection?

- Not always bullying activity
- Twitter, Instagram, etc. full of references to drugs, alcohol, etc.
- Recent situation in Louisiana:
 - Principal receives Instagram photos of candidate
 - Photos of candidate with and smoking marijuana cigarette
 - Student admits photos, marijuana use
- What should the school do?

School Connection?

- Vulgar, lewd, obscene or plainly offensive
- Advocates illegal drug use
- School-sponsored speech that is inconsistent with school's basic educational mission
- Material and substantial disruption
- True threat

School Connection

- *S.J.W. v. Lee's Summit R-7 Sch. Dist.* (8th Cir, 2012)
 - ACLU: All speech which occurs off campus is outside the reach of public schools (rejected by court)
- Portland, OR “sportsmanship and social media” policy
 - Prohibited participants from saying anything negative on social media about teams
 - Also prohibited criticism in private communications
 - \$25,000 in legal fees

Monitoring

- Washington County, Maryland
 - Social Sentinel
 - “Geofencing”—determines when students are on school grounds and scans their Twitter, Facebook, etc. accounts for posts regarding violent threats, harassment, or drug/alcohol use
 - Flagged post forwarded to administrator who will assess the post and determine what action is necessary
 - 4 other school districts utilizing
 - \$20,000 per year

Monitoring

- Important for students to know:
 - Some colleges track/monitor social media accounts of applicants
 - Especially true for potential scholarship athletes
 - Some recruiting forms ask for students' social media screen names or addresses
 - Things considered by colleges:
 - Vulgar language
 - Partying pics
 - Number of posts

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

- *United States v. Enonis* (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

- *United States v. Enonis* (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 set for December 1, 2014
 - Could provide significant insight on how the court views social media communications

Employees



Employees

- 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.”

Employees

- 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
- Sexting and/or improper contact

Sexting

- Still a problem, still prosecuted
- *United States v. Nash* (N. D. Ala., March 5, 2014)
 - An odd day arises when a young man, who could legally have consensual sex with his sixteen-year-old girlfriend, will forever be labeled a sex offender for receiving provocative pictures of her that she sent him via text message. Such is the day of modern technology; a day when we not only combat the despicable perversion of child pornography, but also must account for the rampant proliferation of "sexting" . . . This court, and other district courts across the nation, bear the burden of taking into account these realities of this age of technology, while still imposing a sentence that is 'sufficient, but not greater than necessary' . . .

Sexting

- But, not free speech (probably)
- *S.B. v. Pearland Independent Sch. Dist.* (S. D. Tex, May 28, 2014)
 - Significant portion of the case law runs counter to the student's argument that the First Amendment protects her right to send and receive lewd images of her friends

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