

## FREE SPEECH & SOCIAL MEDIA:

*Implications for Student and Teacher Discipline*

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## In the News

- CA special education teacher was forced to resign after making this Facebook post:  
"Well I have an annual IEP this morning with lawyers and crazy parents. The student is a hot mess but so sweet! So after work I'm hitting happy hour at least I have something to look forward too!!! (sic) Deep breath ... I'm going in."
- In 2010, after a student from her school died in a drowning accident at the beach, a teacher was fired for posting on Facebook:  
"After today, I am thinking the beach sounds like a wonderful idea for my 5th graders? ... I HATE THEIR GUTS! They are all the devils spawn!"

## In the News

In 2012, a Memphis teacher posted the following:

- In response to two kids in her class fighting:  
"How bout I blasted both of them. The girl in my class hair is nappy almost every day and the boy wears dirty clothes, face nasty and can't even read. They didn't bother nobody else when I got through with them."
- Another post: "If another parent tell me it's my job to teach their children, it's gonna be po po time."
- And (on how to handle disputes): "What do you think you're supposed to do? Bang! Bang! Shoot 'em up dammit! Just kidding!! For real tho - slap their ass back then Bang! Bang! Shoot 'em up dammit,"

## In the News

- Last year, a Florida teacher was forced to resign after principal discovered teacher was using her Facebook page to promote her side career – as a bikini model
- Last year, a Colorado teacher was fired for posts about drug use:



*"First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."*

*Tinker v. Des Moines Independent Community School District, 393 U.S. 503*

Three paragraphs later....

*“On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”*

*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503

## Why a Constitutional Issue?

- Relationship is not just employer/employee, or educator/student
- Also is as government/citizen, and First Amendment free expression protection means government cannot take adverse action based on a citizen's speech or expression

## Public Employee Expression

*Pickering v. Board of Education* – (US 1968)

- Teacher wrote letter to the editor critical of school board's proposed tax increase referendum
- Teacher was fired for the letter that in Board's view

*“unjustifiably impugned the 'motives, honesty, integrity, truthfulness, responsibility and competence' of both the Board and the school administration.”*

- US Supreme Court: The teacher's interest as a citizen in making public comments must be balanced against the State's interest in promoting the efficiency of its employees' public services.
- Because tax issue was a matter of public concern, and there was no disruption to school operations, teacher had a First Amendment right to communicate his views on matter of public concern.

## Public Employee Expression

*Connick v. Myers* – (US 1983)

- Assistant District Attorney opposed a transfer to a new division and circulated a survey to other ADA's, asking for input on others' views of the workplace.
- ADA Myers was fired and sued, claiming her speech was on a matter of public concern, since it dealt with operation of the DA's office.
- Supreme Court concluded speech was not a matter of public concern, since it dealt with her employment.
- Even if it was of public concern, speech could have caused disruption to workplace, causing Pickering balancing test to tilt in favor of employer.

## Public Employee Expression

*Montone v City of Jersey City* – (3<sup>rd</sup> Cir. 2013)

- Police officer complained of sexual harassment in the police department
- Officer then got involved in a campaign for mayor, against incumbent
- Incumbent won; officer later denied promotion
- Officer claimed the denial of promotion was retaliation for her speech (both the speech relating to sexual harassment and the political activity)
- Third Circuit allowed the case to move forward, concluding that complaints of harassment in a public workplace can be considered “matters of public concern” that outweigh any employer interest in efficiency.

## Teachers and Social Media

Cases applying *Pickering* analysis to teachers and social media

- *Spanierman v. Hughes* – (D. Conn. 2008)
- *Snyder v Millersville University* – (E.D. Pa. 2008)
- *Richerson v. Beckon* – (9th Cir., 2009)

## Teachers and Social Media

*Spanierman v. Hughes* – (D. Conn. 2008)

- Teacher's MySpace post teased student about his girlfriend. Student responded:  
"dont be jealous cause you can't get any lol!"
- Spanierman replied:  
"What makes you think I want any? I'm not jealous. I just like to have fun and goof on you guys. If you don't like it. Kiss my brass! LMAO."
- Teacher was fired, brought free speech claim
- Court: speech "was likely to disrupt school activities." Teacher failed "to maintain a professional, respectful association with students," communicated with students "as if he were their peer, not their teacher." Such conduct, "could very well disrupt the learning atmosphere of a school."

## Teachers on Social Media

*Snyder v Millersville University* – (E.D. Pa. 2008)

- Student Teacher's MySpace post included a picture of her with the caption:

"Drunken Pirate"



## Teachers on Social Media

*Snyder v Millersville University* – (E.D. Pa. 2008)

- After being warned that she should not talk with students about her MySpace profile, Snyder posted:

"I have nothing to hide. I am over 21, and I don't say anything that will hurt me (in the long run). Plus, I don't think that they would stoop that low as to mess with my future. So, bring on the love! I figure a couple of students will actually send me a message when I am no longer their official teacher. They keep asking me why I won't apply there. Do you think it would hurt me to tell them the real reason (or who the problem was)?"

- Fired from student teaching assignment and unable to finish education degree
- Snyder sued Millersville, alleging free speech violation
- Court: speech was of a personal nature and not related to a matter of public concern.

## Teachers on Social Media

*Richerson v. Beckon* – (9th Cir., 2009)

- Curriculum Specialist demoted to classroom teacher after personal blog post, describing another administrator as follows:

"I met with the new me today: the person who will take my summer work and make it a full-time year-round position. I was on the interview committee for this job and this guy was my third choice . . . and a reluctant one at that. I truly hope that I have to eat my words about this guy. . . . But after spending time with this guy today, I think Boss Lady 2.0 made the wrong call in hiring him . . . . He comes across as a smug know-it-all creep. And that's probably the nicest way I can describe him. . . . He has a reputation of crapping on secretaries and not being able to finish tasks on his own. . . . And he's white. And male. I know he can't help that, but I think the district would have done well to recruit someone who has other connections to the community. . . . Mighty White Boy looks like he's going to crash and burn."

## Teachers on Social Media

*Richerson v. Beckon* – (9th Cir., 2009)

- Richerson challenged her demotion on First Amendment grounds
- Court concluded, with little analysis, that the speech was on a matter of public concern...
- But concluded that "legitimate administrative interests of the School District outweighed Richerson's First Amendment interests."

## Teachers on Social Media

### Takeaways

- Social media makes it easier to distribute an employee's speech, so it is easier to show the kind of disruption necessary to tip the *Pickering* balance in favor of the District.
- First Amendment is not the only consideration.
  - Collective Bargaining Agreements may impact a school district's ability to discipline
  - School Code provisions limit a school district's ability to terminate employees
  - Anti-discrimination and other labor laws prohibit retaliation

## Teachers on Social Media

### Takeaways

- Districts can and should regulate, through policy, employee use of social media
  - Be precise – i.e. not overbroad. (prohibit or limit contact with students, for example, while not completely prohibiting all use of social media)
  - Be prepared to articulate the disruption that has occurred or can occur as a result of teacher/student communication or other social media activity deemed inappropriate
  - Follow the policy. Uniformly.
  - Use PSEA as resource

## Student Expression

- Students stand in different position than employees
- Students are not as able to remove themselves from objectionable situations, due to compulsory attendance laws
- Student behavior outside of school is less likely to have an impact on the school, due to the fact that students are not the role models that employees are.

## Student Expression

### *Tinker v. Des Moines Indep. Comm. S.D.* (US 1969)

- Students wore black arm bands to protest the Vietnam war
- School policy prohibited the arm bands
- Students were suspended for several weeks, until they stopped their protest and were allowed to return to school
- Court: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
- Court: In order to discipline for student speech, school must show speech would "materially and substantially interfere" with the operation of the school.
- No actual disruption occurred here

## Student Expression

### *Bethel SD v. Fraser* (US 1986)

- Student made nominating speech for student council VP:

"I know a man who is firm - he's firm in his pants, he's firm in his shirt, his character is firm - but most [of] all, his belief in you the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts - he drives hard, pushing and pushing until finally - he succeeds. Jeff is a man who will go to the very end - even the climax, for each and every one of you. So please vote for Jeff Kuhlman, as he'll never come [long pause] between us and the best our school can be. He is firm enough to give it everything."

## Student Expression

### *Bethel SD v. Fraser* (US 1986)

- Student was suspended for the sexual innuendo
- Based on *Tinker*, lower courts found that lack of disruption meant District could not discipline
- Supreme Court: Schools can prohibit vulgar and lewd speech, as inconsistent with the "fundamental values of public school education."
- *Easton SD* – "I [heart] Boobies" case – "Under *Fraser*, schools may restrict ambiguously lewd speech only if it cannot plausibly be interpreted as commenting on a social or political matter."

## Student Expression

### *Hazelwood v. Kuhlmeier* (US 1988)

- Student journalism class published a regular newspaper
- District paid for printing, supplies and advisor's salary
- Advisor sought review by Principal of each issue before printing
- Principal objected to two stories in one issue:
  - Story on teen pregnancy that might contain identifying information about students who had been pregnant or might contain information unsuitable for younger students
  - Story on divorce that quoted a student talking about her father and the impact of divorce on her family
- Because advisor did not have time to get parental consent for the divorce story, issue was published without those stories

## Student Expression

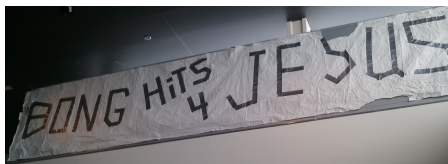
*Hazelwood v. Kuhlmeier* (US 1988)

- Student authors claimed violation of free speech rights
- Court: Districts can regulate student speech in school-sponsored activities "so long as their actions are reasonably related to legitimate pedagogical concerns."
- Court: "The question whether the First Amendment requires a school to tolerate particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."
- Applies to newspapers, yearbooks, theatrical productions, etc.

## Student Expression

*Morse v Frederick* (US 2007)

- Students were released from school to attend Olympic Torch relay
- While across street from school, student displayed banner:



- Student was suspended

## Student Expression

*Morse v Frederick* (US 2007)

- First issue: Is this even "school speech"?
- A: Yes, because Frederick was attending a school event
- Second issue: Can school punish this speech?
- A: Yes, because school has a legitimate interest in discouraging illegal drug use
- Note: this likely is a narrow decision. Not enough just to say that the speech is 'objectionable.'

## Student Expression

*Layschock v Hermitage SD / J.S. v Blue Mountain SD*  
(3<sup>rd</sup> Cir. 2011)

- Students created fake MySpace profile of principals, containing arguably lewd or offensive language, or at least portraying principals in unflattering light
- Students were disciplined and sued
- Court: neither District had authority to discipline, even if content of speech was vulgar or lewd, since speech occurred outside of school and there was no nexus between the speech and the school.

## Student Expression

Hypothetical #1:

After an exciting homecoming football game, several members of the high school football team celebrate with a few beers. One student shares on Instagram a picture of several other team members, each holding a beer. Principal sees the photo.

Q: Can principal suspend each student?

A: No. There is no nexus/disruption

(Why doesn't *Morse* permit discipline for celebrating alcohol?)

## Student Expression

Hypothetical #1:

After an exciting homecoming football game, several members of the high school football team celebrate with a few beers. One student shares on Instagram a picture of several other team members, each holding a beer. Principal sees the photo.

Q: What about discipline relating to participation in sports only?

A: That may be ok, since there is no constitutional right to participate in extracurricular activities.

## Student Expression

### Hypothetical #1:

After an exciting homecoming football game, several members of the high school football team celebrate with a few beers. One student shares on Instagram a picture of several other team members, each holding a beer. Principal sees the photo.

Principal interviews students shown in the picture, in order to determine who else was in the photo and who provided the alcohol. The interviews took a significant amount of the principal's time, and caused students to miss significant instructional time.

Is there a material and substantial disruption?

NO

## Student Expression

### Hypothetical #2:

Student Jane maintains a personal Facebook page. Another student Sally, consistently comments on photos and other posts made by Jane, criticizing Jane's appearance, and generally ridiculing Jane.

Q: Can school, on these facts, discipline Sally for cyberbullying?

A: No. There is no material and substantial disruption here.

Q: Can the school do *anything*?

A: Yes. Watch the students. Talk to students (involved and bystanders) and parents. Notify teachers, coaches, etc.

## Student Expression

### Hypothetical #3:

Students are watching the weather report, hoping for a snow day the next morning. When one student becomes impatient, he tweets, "the stupid moron we call a superintendent better get his head out of you know where and cancel school already."

Q: Can the student be disciplined for being disrespectful?

A: No. Not school speech; no disruption

Q: What about "hey, @Superintendent, come on and cancel school already, or do I need to call in a bomb threat to cancel it?"

A: Is it a threat? If so, is a threat actionable if made while outside of school? (see *Wynar v. Douglas County School Dist.*, 9th Cir., 2013)

## Student Expression

### Hypothetical #4:

District offers technology class that teaches social media marketing. As part of the course, the class maintains the school's official Facebook page and Twitter account. John, a student in the class, posts on the official accounts a message congratulating another high school student in the district on the birth of her baby. School officials worry that the post encourages sexual activity.

Q: Would District discipline violate the 1<sup>st</sup> Amendment?

A: No. Those accounts are the school's. Legitimate educational concerns may permit editorial control by teacher.

## Student Expression

### Hypothetical #5:

John, the student from Hypothetical 4, maintains a public Facebook page entitled "Inside Scoop" where he posts news, gossip and commentary about activity in the High School. Over the last week, he posted messages congratulating another student on the birth of her baby, criticizing the new dress code, and complaining about how bad the music teacher is and calling for her to be fired.

Q: Is there any basis for discipline here?

A: No. Unlike in the prior hypo, this speech occurs on his own page and his own time.

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