Social Media: Teachers, Kids, Parents
2014 School Law Conference
The Hungerford Law Firm, LLP

For years, school administrators have struggled with the issue of when it is appropriate and permissible to discipline students for actions and events that take place off of school time and away from the school campus. As the numerous types of electronic and on-line communication have increased, there has been an increase in the number of situations in which what happens off-campus impacts the school environment and potentially merits some for of discipline.

Electronic forms of communication that are increasingly causing issues include:

- Text messaging
- E-mails
- Social networks, including Facebook and Myspace
- Instant messaging
- Twitter

As is true with any issue involving the regulation of student speech, this question is addressed in light of the First Amendment of the United States Constitution. The "free speech" protections provided by the First Amendment are somewhat limited when applied to students in the school context, but nonetheless are substantial and often implicated by school disciplinary efforts.

Generally speaking, the standards for addressing off-duty speech are no different than the standards that have been applied for decades, namely under the *Tinker* framework:

- The restriction on speech must be based on something more than a mere desire to avoid the discomfort and unpleasantness that may accompany an unpopular viewpoint.

- The school can discipline a student for speech that would substantially interfere with the work of the school; or

- Speech that would cause material and substantial interference with schoolwork or discipline; or

- Speech that might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.

- Speech that collides with the rights of other students to be secure and to be let alone in the school environment.

Utilizing the standards set forth in *Tinker*, federal courts have recently decided several cases, and in doing so have demonstrated the difficulty in determining whether a specific situation is one in which a school may take action based on student speech.

D.J.M. v. Hannibal Public School Dist. (8th Cir., August 1, 2011). D.J.M., a student at Hannibal High School, sent an instant message on his home computer during non-school time to a classmate. The message, sent to her home computer, stated that D.J.M. was going to get a gun and kill certain students. The recipient of the instant message alerted school authorities, who suspended D.J.M. for the remainder of the school year.

The U.S. Court of Appeals for the Eighth Circuit rejected D.J.M.'s First Amendment claim on two grounds. The Court first held that his instant message constituted a "true threat," and therefore was not speech that is protected by the First Amendment. Accordingly, the school could not have violated the First Amendment when it disciplined him for that speech. The Court further found that, even if the speech in question did not constitute a "true threat," the school acted legally in disciplining him for it. Relying on *Tinker*, the Court found that D.J.M.'s speech produced a material and substantial disruption to the school environment because it had caused numerous concerned parents to call in and threaten to remove their students. His speech had also led to the school significantly increasing its security efforts. (See also *Wisniewski v. Weedsport Central School District*, 494 F.3d 34 (2nd Cir., 2007), in which a school was found to have acted lawfully in disciplining a student for an off-campus internet message that depicted a drawing of a pistol firing a bullet at a person, who was identified as a teacher at the school.)

Kowalski v. Berkeley County Schools, (4th Cir., July 27, 2011). Student Kowalski created a MySpace page on her home computer called S.A.S.H. – Students Against Sluts Herpes. The site targeted a specific student at her high school, S.N.. Approximately 100 members joined the page, and several posted false and derogatory comments and altered photos about S.N. Kowalski posted approving statements about the disparaging comments. The school investigated, and ultimately gave Kowalski a 10-day school suspension and a 90-day "social suspension" for violating the school's bullying/harassment policy.

Kowalski filed suit alleging violations of the U.S. Constitution. She argued that, because the case involved off-campus, non-school related speech, the school had no power to discipline her. The U.S. Court of Appeals for the Fourth Circuit, citing *Tinker*, held that schools have a compelling interest in regulating student speech that interferes with or disrupts the work and discipline of the school. The Court also referenced the numerous authorities that have recognized student-on-student harassment and bullying as a major concern facing schools, and that schools have a legal obligation to prevent such conduct. The Court found a sufficient nexus between the off-campus speech and the school environment, and concluded that the speech was disruptive and caused interference with the school environment. The Court cited the fact that S.N. missed school as a result of the harassment, and that further abuse at school was created by the off-campus cyber bullying.

J.S. v. Blue Mountain School District, (3rd Cir., June 13, 2011). A middle school student, J.S., created a fake MySpace profile of James McGonigle, the principal of Blue Mountain Middle School on her home computer. The fake profile included a picture of McGonigle taken from the school's website, and depicted him as a pedophile and sex addict. The profile also contained the following description of McGonigle:

"HELLO CHILDREN[.] yes. it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[.] I have come to myspace so i can pervert the minds of other principal's [sic] to be just like me. I know, I know, you're all thrilled[.] Another reason I came to myspace is because—I am keeping an eye on you students (who[m] I care for so much)[.] For those who want to be my friend, and aren't in my school[,] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs)"

While the profile was created off-campus, news of it soon spread throughout the school, creating a "buzz." Several students commented about the profile to teachers, and some teachers reported excessive talking in their class about the profile. However, the school's computers block access to MySpace, so no Blue Mountain student was ever able to view the profile from school. J.S. received a ten-day suspension as a result of the incident, as well as a visit from the state police department.

The U.S. Court of Appeals for the 3rd Circuit originally ruled that the school district had not violated J.S.' free speech rights. The Third Circuit, however granted a motion for an *en banc* review and withdrew that original ruling. The Court held that the school had violated the student's constitutional right to free speech, finding that there had been no substantial disruption as required by *Tinker*. In fact, the school had not even alleged that a substantial disruption had occurred. This ruling was based, in part, on the Court's opinion that the "profile was so outrageous that no one could have taken it seriously, and no one did." The Court further ruled that the so-called "*Fraser*" exception, which permits the restricting of speech that is lewd, vulgar, and offensive, cannot be relied upon to sanction speech that originates off-campus and during non-school hours.

Laychock v. Hermitage School Dist. (3rd Cir., June 13, 2011). High school student J.L. created a fake MySpace profile of his high school principal on his home computer during non-school hours. The profile included a photo of the principal, and included the following description of him:

Birthday: too drunk to remember
Are you a health freak: big steroid freak
In the past month have you smoked: big blunt
In the past month have you been on pills: big pills
In the past month have you gone Skinny Dipping: big lake, not big dick
In the past month have you Stolen Anything: big keg
Ever been drunk: big number of times
Ever been called a Tease: big whore
Ever been Beaten up: big fag
Ever Shoplifted: big bag of kmart
Number of Drugs I have taken: big

Under "Interests," J.L. listed: "Transgender, Appreciators of Alcoholic Beverages." Justin also listed "Steroids International" as a club the principal belonged to. J.L. provided access to the profile to other district students by listing them as "friends" on the MySpace website. While the school undertook efforts to limit the use of computers by students at school, news of the profile soon reached most if not all of the school's students. J.L. was given a ten-day suspension, a placement at the alternative education program, and a ban on all extracurricular activities.

The U.S. Court of Appeals for the 3rd Circuit ruled, en banc, that the school had violated J.L.'s free speech rights guaranteed by the First Amendment. The school district had acknowledged that it's disciplinary action was not supported by the substantial disruption standard set forth in *Tinker*, but argued that it was justified in disciplining J.L. based on the vulgar, lewd, and offensive nature of the speech (the so-called *Fraser* exception). The Third Circuit disagreed, finding that a school may not regulate a student's "out of school expressive conduct" on the basis that it is vulgar, lewd, and offensive.

Bell v. Itawamba County School Board (N.D. Miss., 2012). A high school student composed, sang and posted a rap song on his Facebook page. In clearly vulgar language, the rap song criticized two coaches at the school and insinuated that they had improper contact with female students. The relevant portions of the lyrics to the song were as follows: "looking down girls' shirts/drool running down your mouth/messing with wrong one/going to get a pistol down your mouth."

Students at the high schools confirmed to the coaches that they had heard the song. One said his teaching style was impacted after knowledge of the song had spread because he perceived that students were wary of him. The other coach reported that he felt that female students were fearful of him. The court found that the Tinker material disruption standard applied to off-campus behavior, and that the lyrics caused a material and/or substantial disruption at school and that it was reasonably foreseeable that the speech would cause such a disruption. The court held that, "[i]t is reasonably foreseeable that a public high school student's song that levies charges of serious sexual misconduct against two teachers using vulgar and threatening language and is published on Facebook.com to at least 1,300 "friends," many of who are fellow students, and the unlimited internet audience on

YouTube.com, would cause a material and substantial disruption." This case is currently on appeal.

C.R. v. Eugene School District 4J (D. Ore, 2013). Plaintiff was among a group of male students that were walking home from school when they engaged in harassing behavior aimed at two disabled students. The perpetrators made comments to a female hearing impaired 6th grader and an autistic male 6th grader that contained references to oral sex. The female student reported that she understood what the sexual references were, and that she felt unsafe because of the comments. The boys received a two-day suspension.

The court in holding for the district recognized that in some instances the location of the speech would make a difference. However, it relied upon the ruling in Tinker, in which the Supreme Court held that, "conduct by the student in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." Accordingly, the court held, the test is still the same – whether school officials may forecast substantial disruption of or material interference with school activities or whether speech collides with the rights of other students to be secure and to be let alone in the school environment.

The court went on to find that the school officials were reasonable in their belief that substantial disruption could occur. The district reasonably believed that bullying and harassment could lead to more problems and substantial disruptions, and that failure to discipline harassing behavior could create a climate welcoming to such behavior in school. Further, "no reasonable trier of fact could conclude that the district did not reasonably find that he did" engage in harassment of another student.

Practice Tips – Student Off-Campus Speech

1. Identify and demonstrate a material and substantial disruption to the school environment.

The courts that have reviewed off-campus student speech involving electronic communications have, whether they upheld the discipline or not, universally applied the standard set forth by the United States Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In that case, the Supreme Court ruled that a school may take action in response to student speech that "would materially and substantially disrupt the work and discipline of the school," or that "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." Subsequent court decisions have relied upon this holding, whether the speech in question is on-campus or off.

2. What type of events signify a material and substantial disruption?

The case law provides no clear picture as to what conditions will constitute a material and substantial disruption, and which will not. The following events, taken alone or in combination, have in specific cases been held to demonstrate such a disruption:

- A teacher who had been threatened in the communication in question asked to be reassigned.
- A large number of students had to be interviewed by school officials during class time to determine the culprit.
- Involvement of staff and students in a police investigation.
- A high volume of calls to the school from concerned parents, along with threats to remove their students from school.
- Significant increase in security measures by the school.
- A student or students are harmed in the school environment by the speech – harassed, belittled, etc.

What is not going to qualify as a material and substantial disruption? Again, it is difficult to determine based on the wide variation in the case law. However, courts have typically held that the mere knowledge of the offending electronic communication by students at the school will not suffice. Nor will the fact that there was widespread discussion of the

electronic communication at school, even to the point of becoming a topic of conversation during class time.

3. Ensure that student handbook provisions are broad enough to cover off-campus behavior that impacts the school environment in a negative way.

While not specifically addressed in recent cases, it is well established that, in order to initiate disciplinary action against a student, the school must be able to identify a known rule or rules that has been violated. The handbook needs to say: "Conduct that violates the Student Conduct Code, as indicated above, but which occurs off-campus and outside the school day may still result in the same consequences if it results in or can reasonably be predicted to result in substantial disruption and/or material interference with school activities or if it interferes with the rights of other students to be secure in the school environment."

4. Off-campus speech that includes a threat of violence will almost always be the subject of school discipline.

Perhaps no other type of speech gives school authorities as wide of latitude to take disciplinary action than threats made against fellow students or staff members. Whether such threats are made on-campus or off, the courts have recognized the right of schools to take action. Such speech may be considered a "true threat," and therefore not protected by the First Amendment. Furthermore, it is typically much easier to demonstrate a recognized material and substantial disruption to the school environment when there has been threatening speech. Note that speech may be considered a threat even in instances where local law enforcement does not consider it an actual threat or initiate any criminal proceeding, or where mental health professionals deem the student to not have been serious about the threat. If the threat involves a list of students to whom the writer predicts or incites harm, the parents of those students must be notified within 12 hours by phone, and with a follow-up letter within 24 hours of the school's knowledge of the threat.

5. Off-campus speech that targets another student or that may constitute bullying and/or harassment will more likely than not be sufficient for school disciplinary action.

Courts have typically recognized the problems and impact of cyber-bullying and other electronic speech that is directed at a particular student. Even

when this speech takes place off-campus and not on school equipment, schools are likely to be able to identify a material and substantial disruption to the school environment. The student who is targeted often withdraws socially or experiences a negative impact on his/her grades or participation. In addition, when the electronic speech includes a large number of students it is almost inevitable that there will be a carry-over into the school environment.

6. Courts are less likely to support disciplinary action taken against students whose speech is critical or even extremely negative toward teachers or administrators.

While the courts have been sensitive to the impact of off-campus speech directed against another student, they have been less likely to support disciplinary action taken in response to off-campus speech targeting a teacher or administrator. Unless that speech rises to the level of a "true threat," the courts have often found it insufficient to constitute a material and substantial disruption. This has been true even where it has been shown that numerous students viewed or received the electronic speech at school, and where there has been widespread knowledge and discussion of the speech at school.

7. Sexting is the new "hot" issue regarding social media.

"Sexting" (sending pictures of a person's nude or scantily-clad body or sexual acts as texts) has emerged as a new and troublesome part of social media issues for school administrators. Sexting is usually reported to school administrators by parents (who have been informed by their children or discover the pictures in examining their child's cell phone) or reported by students, or occasionally discovered accidentally when a lost cell phone is turned into the office and is examined to determine who is the owner. Among the questions that must be answered:

--Who initiated the sending of a "sext"?

--Did a student who sent a nude or scantily-clad picture of himself/herself do so because of pressure from a girlfriend or boyfriend

--Was the picture voluntarily sent from Student A to B with an understanding that B would keep it confidential, but B then sends it to C, D, E, etc.?

IMMEDIATELY INVOLVE LAW ENFORCEMENT because in almost all cases there is reason to believe that a child abuse claim needs to be reported. Unless prohibited by law enforcement, immediately notify the parents of the student pictured and the student(s) who can be determined sent or received the picture.

Involve student leaders and parent groups in planning an education campaign. In some cases (not in Oregon), sexting has resulted in the criminal prosecution of students for sending pornography over email or cell phone.

Consider adding a specific provision to the Student Conduct Code warning students that sending a nude or sexually suggestive picture of themselves or another student may result in school disciplinary action, up to and including expulsion, and possible criminal prosecution.

Search and Seizure Considerations – Personal Electronic Devices and Social Media

While it is the Fourth Amendment, and not the First Amendment, that is implicated when dealing with the acceptable scope of search and seizure with regard to students, the two are closely connected. In many instances, the ability or need to regulate student speech is contingent upon obtaining proof that speech which falls outside the protections of the First Amendment has occurred.

While emerging technology, and specifically the proliferation of personal electronic devices, has certainly created a changing landscape with respect to student search and seizure, the basic principles are the same as those applying to any search of a student.

1. The search must be reasonable in its inception. That is, there are reasonable grounds to suspect that the search will turn up evidence of a violation of the law or school rules.

2. The search is reasonable in scope. That is, the manner in which the search is conducted is reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

Remember that the reasonableness standard need not be met if one of the following exceptions applies:

- The student consents to the search
- The search is a general search of areas under the school's control
- The search is minimally intrusive
- Exigent or emergency circumstances exist

J.W. v. DeSoto County School District (federal district court – Mississippi).
* Broadest latitude given
* Administrators conducted search with assistance of local law enforcement
* Initial transgression was simply being observed with his phone when school had rule banning cell phone use

* Search by administrators/law enforcement included review of photos stored on phone
* Mere fact that the student had the phone at school provided reasonable suspicion of violation of other school rules.

"Upon witnessing a student improperly using a cell phone at school, it strikes this court as being reasonable for a school official to seek to determine to what end the student was improperly using that phone. For example, it may well be the case that the student was engaged in some form of cheating, such as by viewing information improperly stored in the cell phone. It is also true that a student using his cell phone at school may reasonably be suspected of communicating with another student who would also be subject to disciplinary action for improper cell phone usage."

Klump v. Nazareth Area School District (federal district court – Pennsylvania)

* Older case
* School had a rule allowing carrying a phone but not use or display during school hours - cell phone fell out of his pocket and came to rest on his leg
* Teacher confiscated the phone and principal began calling others listed in the phone to see if they were using their phones, as well - principal also searched text messages and voice mail, and even held an IM conversation pretending to be the student
* Drug-related text was discovered

The court held that, using the reasonableness standard, the search violated the 4th Amendment. The mere fact that the phone was seen in possession of the student does not provide a reasonable basis to believe that a secondary violation of school rule was occurring, especially since he wasn't even using it.

Mendoza v. Klein Independent School District (federal district court – Texas)

* Narrowest latitude
* Administrator observed group of students viewing a cell phone contrary to school policy
* Administrator confiscated phone and turned it on to determine if the student who owned the phone had used it during school hours

* After determining that text messages had been sent during school hours, administrator searched further, opening a file and finding a nude photo of the student, which had been sent to another student

Using the reasonableness standard, the court found the search in violation of the 4th Amendment. The administrator went beyond the search's reasonable scope by viewing the contents of the text messages and looking at other folders in the phone. "A continued search must be reasonable and related to the initial reason to search or to any additional ground uncovered during the initial search."

G.C. v. Owensboro Public Schools (6th Circuit)

***** Highest court to review cell phone search and most recent case (March 2013)

* Student had disciplinary history – tardiness, fighting, insubordination
* Student had admitted to prior drug use and suicidal thoughts
* Student was seen texting in class in violation of school policy - teacher confiscated the phone and took it to principal, who read text messages, allegedly see if he was having suicidal impulses so she could help him

The court applied the reasonable suspicion test: "A search is justified at its inception if there is reasonable suspicion that a search will uncover evidence of further wrongdoing or of injury to the student or another. Not all infractions involving cell phones will present such indications. Moreover, even assuming that a search of the phone was justified, the scope of the search must be tailored to the nature of the infraction and must be related to the objectives of the search. Under our two-part test, 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." The court ruled that there was a violation of the 4th Amendment.

Questions asked by the Court:

- What did the school officials know at the time of the search of the phone?
- What was the nature of the infraction?
- Was the additional search of the phone necessary to corroborate that particular infraction, or did additional information become known to warrant a further search?

School Employees and the First Amendment

While the boundaries of student speech in the schools was set forth in Tinker and its progeny, the question of what First Amendment rights staff members have in the school environment is entirely another matter. The relationship is vastly different – staff members are school employees, who are acting as agents of the school and their activities may be more closely regulated. On the other hand, they are not children, and the quasi-parental relationship that serves as the rationale for limiting student speech is not present. What is the extent, then, that a school district may restrict or limit the speech of its employees?

The Pickering Test

The constitutionality of restrictions on government employee speech was first set forth in the case of *Pickering v. Board of Education* in 1968. As was true with respect to students in *Tinker*, the Court in *Pickering* recognized that the employment relationship creates different free speech expectations – "The State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general."

In determining whether a government employer, such as a school district, may limit the speech of an employee, the following questions must be answered:

1. Is the employee's speech related to a matter of public concern? Or is it merely a matter of personal interest?

   - If it is the former, the speech may be protected. If it is the latter, the speech is not protected and may be regulated within the scope and context of the employment relationship.

2. If the speech is related to a matter of public concern, how is it balanced against the State's interest, as an employer, in promoting the efficiency of the public services it performs through its employees?

   - In other words, the interests of the employer must be weighed against the First Amendment rights of the employee. This so called "balancing test" will determine whether the speech qualifies for First Amendment protection.

What is a matter of public concern?

- "A subject of general interest and of value and concern to the public at the time of publication."
- Speech that "attacks policy decisions or that exposes public malfeasance."
- "Issues of community importance" that can be "fairly considered as relating to a matter of political, social or other concern to the community."
- Speech made to a public audience, outside the workplace, and involving content largely unrelated to government employment indicates that the employee speaks as a citizen, not as an employee, and speaks on a matter of pubic concern.

"[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

What factors are considered in balancing the interests of the employer and the employee?

- Manner, time, and place of the employee's expression are relevant.
- Whether the statement impairs discipline by superiors or harmony among co-workers.
- Whether the speech has a detrimental impact on close working relationships or which personal loyalty and confidence are necessary.
- Does the speech impede the performance of the speaker's duties or interfere with the regular operation of the enterprise?
- Speech and conduct that occur outside the office walls are less likely to detrimentally impact the employer's operation.

The *Garcetti* Exception – Speech made pursuant to official duties

For several decades, Pickering served as the guiding law with respect to speech by public employees. That guiding law was significantly modified in 2006 in the case of *Garcetti v. Ceballos*. While the case did not involve a school employee, it had far reaching implications for all public employees and their prospective First Amendment rights.

The Garcetti Rule: *Pickering* does not apply, and there is no First Amendment protection, when a public employee's speech is made pursuant to his or her official duties. In that circumstance, no balancing occurs and the governmental employer is free to regulate the employee's speech without any First Amendment concern.

"Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."

- The federal courts are split as to whether teacher classroom speech constitutes the official speech of a teacher as a public employee, and thus is covered by *Garcetti*. The Ninth Circuit, which governs Oregon, has held that *Garcetti* does not apply to teaching and academic writing that are performed pursuant to official duties of a teacher and professor. Accordingly, such speech is not covered by *Garcetti* and is protected under the First Amendment, and the *Pickering* analysis must be applied.
- Other speech engaged in by public school teachers and employees would still be covered by *Garcetti* – examples would include a special education teacher speaking about whether the district was in compliance with IDEA, or a custodian who was head of the safety committee speaking about the school being out of OSHA compliance.

Beyond the Constitution - Other Sources of Speech Protection for Employees

In some specific situations, it is not the First Amendment that necessarily protects an employee's right to free speech. Instead, one of the following may apply:

Union-related Speech –

Protected under state and federal law, including Oregon's Public Employees Collective Bargaining Act.

Examples: Protesting alleged contract violations, advocacy for a fellow member, going on strike.

Whistleblowing –

Protected under numerous state and federal laws. However, "whistleblowing" that is centered around a subject that is part of the employee's official duties will not necessarily be protected.

Examples: Teachers raising Title IX concerns; staff raising health and safety violations.

Academic and/or Personal Freedom Provisions –

Found in many collective bargaining agreements, primarily for licensed employees.