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School Law Advisor

News and Notes for School Administrators

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Is MySpace at Your School?

What Happens When Students' Online Expression Crosses the Line?

Are you ready for the cyber-age of student discipline? As if teachers and school administrators had enough difficulty monitoring the hallways, millions of high school students have taken their trouble-making online. With the help of websites such as MySpace, Facebook, Friendster, and Xanga, teenagers are filling up the blogosphere with personal information, opinions, photographs – and unfortunately, even inappropriate comments about teachers, administrators, and each other.

The facts usually look something like this: a high school student, like most of his classmates, has created a personal profile on MySpace. In addition to his ramblings about music, movies, sports, and his friends, he has decided to share his thoughts about his biology teacher with the world. Those thoughts, inevitably, are not very kind, and are, in fact, degrading, derogatory, and untrue. Another student prints out the student's questionable attempt at candor and brings it to school. Once the teacher sees what the student wrote about her online, she is angry and demands the school discipline the student immediately. What can you do and how far can you go?

The answer relies upon an analysis of the student's free speech rights under the First Amendment. A key determinant is always: Did the student maintain his MySpace profile entirely away from school? Was it accessed at school? What was the effect *at school*, if any, to the posting?

The public school setting demands a special approach to the First Amendment's guarantee of freedom of speech. While schools and school officials must have the authority to provide and facilitate education and to maintain order, the Supreme Court has repeatedly held that "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 School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Accordingly, students retain the protections of the First Amendment, but the shape of these rights in the public school setting may not always mirror the contours of constitutional protections afforded in other contexts. See *Sypniewski v. Warren Hills Regional Board of Educ.*, 307 F.3d 243 (3d Cir. 2002).

These cases are governed by the Supreme Court's decision in *Tinker*. While *Tinker* has been narrowed by two more recent Supreme Court cases, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), neither of these decisions has altered *Tinker*'s core principles concerning the circumstances under which public schools may regulate student speech. See *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001).

Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language on school property. Under *Hazelwood*, a school may regulate school-sponsored speech on the basis of any legitimate peda-

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gogical concern. Neither of these directly applies to the most common MySpace issues, because the postings are typically not through a school-sponsored website or activity, or, if vulgar, not on school property. Instead, we must look to *Tinker*'s general rule: the school district may only regulate speech if it would create a substantial disruption of or material interference with school activities.

In order to discipline a student for items posted on a MySpace profile created entirely from his or her home computer, a school district must present evidence that the website caused actual disruption of the day-to-day operation of the school. See *Layshock v. Hermitage School District*, 412 F.Supp.2d 502 (W.D. Penn. 2006). If the school district has no direct evidence of normal classroom operations or other school activities being affected, even if the messages posted on the internet criticize, insult, or embarrass the school or school officials or employees, the school district may not limit them because doing so would likely be an impermissible attempt to regulate speech based solely on its content.

Of course, there are myriad ways in which students *and employees* can get into sticky situations online, not only by being critical or even defamatory of school officials, but also by divulging personal information. Both students and teachers can have their conduct called into question by posting photographs that might include alcoholic beverages, drug paraphernalia, or sexual content. While school employees also enjoy certain First Amendment protections for their online expression, those protections differ from the broad protections enjoyed by students – and it is student expression that currently seems to be causing the most severe administrator headaches. Also, students can get into trouble by posting fake or fraudulent profiles online, such as creating fake profiles for teachers or other school employees which include derogatory or inappropriate material.

With this legal framework in mind, what should a school district do when it receives a complaint about something a student has posted online? First, the school should determine whether a connection exists between the expression and the school. Did the student utilize a school computer, network, or email address to access the website? Was the site accessed at school, or does the school's internet-monitoring program filter sites such as MySpace and Xanga? If the school cannot prove that the activity was undertaken while at school, then it must look to *Tinker*'s material and substantial disruption test.

There has been at least one reported case in which the school district successfully proved a substantial and material disruption from a posting made on MySpace. In *Layshock v. Hermitage School District*, a student included a caricature of his high school principal on his MySpace profile. The U.S. District Court for the Western District of Pennsylvania found that the website could be considered a "material disruption" because other students had accessed the website so frequently at school that the entire computer network had to be shut down for more than one school day.

Courts have generally been more willing to find evidence of a disruption where the online expression constitutes a specific violent threat. Administrators are given more latitude to investigate and discipline students when the posting threatens teachers or students. On another note of interest, photographs posted online that might suggest that a student has broken a school's athletic code (e.g. photographs of students drinking alcohol) could likely be permissible evidence, depending on the particular facts and other evidence, to allow sanctions under an athletic code or team rule imposed by a coach, even where traditional student discipline is not appropriate.

As a final note, while students may not be subjected to school discipline in many of these types of cases, they may be liable in either a criminal or civil action. Fraudulent postings, defamatory statements, and other expressions have led to private suits against students, as well as criminal charges in a few cases. Even though a school district may not be able to impose sanctions for certain activities, consequences outside of school certainly exist.

With over 70 million registered users, it is likely that a large number of your students stop by MySpace regularly. As more and more students use online forums such as MySpace and Facebook to communicate with friends, share photographs and opinions, and post comments about their high school principals, school administrators should be prepared for the time when MySpace invades your school.

Changes in Open Meetings Act Sent to the Governor

The Illinois General Assembly has passed changes to the Illinois Open Meetings Act, clarifying the definition of a "meeting" under the Act and requiring the physical presence of a quorum at a meeting. The bill is SB-585, and while not yet law, has passed both Houses of the General Assembly and was sent to the Governor on May 3, 2006.

The new definition of "meeting" includes a gathering by a majority of the quorum of the public body in person or by "video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication."

Also, the changes to the Act require the physical presence of a quorum of board members at the location of a meeting. Other members who are not physically present at a meeting may participate in the meeting and vote on all matters by means of a video or audio conference. Furthermore, under the changes, if a quorum is physically present, a majority of the public body may allow a member to attend the meeting by audio or video conference because of: (1) personal illness or disability; (2) employment purposes or the business of the public body; or (3) a family or other emergency.

If a member wishes to attend the meeting by audio or video conference, he or she must notify the recording secretary before the meeting unless advance notice is impractical. The board must also adopt rules regarding such attendance that are consistent with, or that further limit, the provisions of the Open Meetings Act, likely in a board policy to that effect. The minutes of a meeting must also include whether the members of a public body were physically present or present by means of video or audio conference.

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Appellate Court Doesn't Require *Miranda* Warnings at School

In a recent decision by the Second District Appellate Court of Illinois, the court upheld the conviction of a student on drug charges. The court held that the school principal and dean of students were not acting as agents of police when they interrogated the student suspected of drug possession, and were thus not required to administer *Miranda* warnings. The school officials had already initiated an investigation into an allegation of drug possession when police officers arrived at school, and school officials asked the police officer to leave before interrogating the student outside the officer's presence and without the officer's assistance or direction. *People v. Pankhurst*, --- N.E.2d ----, 2006 WL 1302257 (Ill.App. 2 Dist. 2006).

Exceptions to TRS Penalties Around the Corner

A bill has been sent to the Governor that alters the provisions of the Illinois Pension Code enacted last spring by P.A. 94-0004. Under the new provisions, the following exceptions have been carved out of the 6% cap on salary increases, for a 5-year period ending June 30, 2011:

- The 6% cap would be calculated based upon full-time equivalency.
- Earnings increases from when the member was 10 or more years from retirement eligibility are excluded.
- Changes in employment under Section 10-21.12 of the School Code will be considered a change in employer (i.e. after an annexation, reorganization, or deactivation).
- Promotions to positions that require different certification or supervisory endorsements from the previous position are excluded so long as the position has existed and been filled for at least one year and the new salary is no greater than the lesser of (a) the average salary for similar positions within the district, or (b) the salary stipulated in the district's collective bargaining agreement.
- Payments to teachers from the State or the State Board of Education over which the employer does not have discretion.

For a more complete look at these provisions, see SB-49 on the Illinois General Assembly website, www.ilga.gov. The governor is expected to sign the bill.

Ready to Respond to RTI?

Upon the implementation of the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), it has been said that general educators ceased to exist—that all are special educators now. With the new emphasis on response-to-intervention ("RTI") in determining specific learning disabilities, that statement might not be too far from the truth.

The IDEIA describes RTI as "a process that determines if the child responds to scientific, research-based interventions as part of the evaluation procedures…" 20 U.S.C. 1414(b)(6).

While we still wait for final special education regulations at both the state and federal level, this much is clear: the U.S. Department of Education is prompting states to promote RTI as a means of determining the existence of a specific learning disability instead of IQ-discrepancy analysis. In comments to the proposed regulations, the DOE has gone as far as saying that the IQ-discrepancy criterion is "potentially harmful to students."

Under the proposed Illinois regulations, school districts may continue to use discrepancy analysis, provided that they *also* use RTI as part of the evaluation procedures to determine that a particular student has a learning disability.

As the new rules may become final before the start of the 2006-2007 school year, the entire regulation bears close study by school personnel involved in making eligibility determinations, but the following new requirements are especially noteworthy. The IEP must demonstrate that "prior to, or as part of the referral process, the child was provided appropriate, high-quality, research-based instruction in **regular education settings**…". *Proposed regulation 34 C.F.R. 300.309*.

Be on the look-out for more to come on RTI!

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