

Collaborate

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STUDENT DISCIPLINE  
AND CYBER SPEECH

Public schools play an important role in American democracy. In addition to their core educational mission, they teach students democratic values of pluralism, civic engagement, tolerance, and they prepare students to function as active citizens in a constitutional and diverse democracy. This democratizing function of public schools complements the educational mission of schools.

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Given this nationally important mission, the rapid growth of online social networking among K-12 students and the growth of online journals (also known as web logs or "blogs") has brought to the surface conflicts and tensions between schools and students. The conflict is in the area of the students' First Amendment right of free expression and the countervailing duty of school districts to assure that students learn to comport themselves in a civil and respectful manner and not engage in speech or conduct that is hostile, demeaning or gender stereotyping. This is especially true as it affects other students in the educational community, as well as members of protected categories such as racial and ethnic minorities, gay and lesbian students, religious groups and the disabled. The clash occurs when students publish online comments that demean others

within the school community or when students publish lewd or hate material while at home but the material makes it to the school premises.

Online social networking consists principally of interactive biographical profiles of individuals. Individuals post profiles of themselves and create profiles of interest groups, which other users may join voluntarily or by invitation. Users may post comments on the profiles, while blogs provide a platform for bloggers to publish news and opinions. Examples of social networking web sites are myspace.com and facebook.com. Because these web sites are largely self-regulated, users may engage in protected speech that could interfere with the pedagogical mission of the school. One possible area of interference is when students post racially-charged, insulting, derogatory, threatening, or lewd pictures online. Administrators must then confront the question of whether and when a school may discipline a student for cyber speech.

This question is more compelling now that school districts are reporting an increase in incidents of students posting racially intolerant, rude, or hate language on blogs and social networking sites. These postings, of course, collide with a school's mission to teach tolerance and pluralism to students. Furthermore, this question attains more urgency because school administrators need to understand how to respond when students use web sites to publish threats about future violence on campus.

Existing law permits a school to forbid and/or punish student speech that occurs inside the school when it materially disrupts school activities, or has the potential to materially disrupt school activities. Furthermore, where the speech occurs off-campus, the United States Supreme Court has held that a school may regulate speech in a school-sponsored forum, if the regulations are "reasonably related to [the school's] legitimate pedagogical concerns." (*Hazelwood School Dist. vs. Kuhlmeier*, 484 U.S. 260, 273 (1988).) Together, these legal rules form a useful

framework for school administrators' use in deciding whether a student may validly be punished for internet speech (published off-campus or on-campus). A school may regulate a student's off-campus speech, if: (A) the speech has a nexus to the school; and (B) the speech materially disrupts school activities or it raises a reasonable fear of interference, fear of interference with, or material disruption of, school activities. If the off-campus speech does not have a nexus with school activities, school officials do not have jurisdiction to discipline students regardless of how repugnant or inconsistent the speech is with a school district's overall mission.

Commentators are divided over whether a school may punish a student for speech inconsistent with educational values and which takes place off-campus. Some have argued that off-campus speech is off-limits to school authority, while others contend that abusive personal attacks should not be excluded from school authority simply because a student speaks off-campus. However, without a concrete factual nexus with school activities, school officers are on a "slippery legal slope" if they attempt to discipline without a showing of (1) nexus, and (2) substantial disruption.

Whenever schools are confronted with an incident involving a student's online activities, administrators must ask two questions derived from the above principles: (A) where did the speech take place, that is, how is the speech related to the school? and (B) was there a material or substantial disruption to school activities as a result of the speech?

On-campus speech establishes a sufficient nexus to permit schools to regulate, prohibit or punish speech. A school district may punish a student by establishing that the student's speech materially disrupted school activities or the speech created a reasonable fear of such interference. To this end, courts have upheld disciplinary action against students for off-campus speech where the evidence showed that the speech materially disrupted school activities.

A nexus to the school is established if the speech took place off-campus but the speech was brought onto school premises. That nexus can be established when a student creates a website off-campus but then accesses the site from a school computer and shows another student. The act of accessing the website on-campus and showing another student provides the link necessary for a school district to take action.

Moreover, because students sometimes use web sites to foretell future acts on school premises, a school may be able to argue that exigent circumstances compelled it to intervene. Here, the school must show that the student's cyber speech constituted a threat. A true threat is a form of speech that is unprotected by the First Amendment and is speech that gives the listener a legitimate fear of future harm within a factual context.

Where the speech does not meet the requirements of a nexus and disruption, school officials need not ignore the offensive speech. Rather, school officials may simultaneously fulfill the educational and democratizing missions by holding a

forum for students, faculty, staff, and parents to voice their disagreement or concerns. A forum teaches pupils that debate is important in a vibrant democracy and dissenting voices may speak without fear of retribution. The forum would also function as a valve for offended listeners to let off steam. By offering an alternative to punitive action against the student, it may also be an effective way to avoid potentially vexatious lawsuits, which could hamper the school's ability to perform its legitimate duties.

The growing ubiquity of the internet and the proliferation of social networking sites ensure that schools will confront more disciplinary problems posed by student speech online. Before schools punish students, administrators need to make sure that the speech had a nexus to the school, constituted a "true threat", and or materially disrupted school activities, or was reasonably likely to cause such material disruption. Schools should also consider less punitive and less costly alternatives to punishing students with suspension. □ C. Ruiz & O. Ajayi

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**TREND WATCH:**  
**SPEECH AFTER**  
**BONG HiTS 4 JESUS**

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This past summer, the United States Supreme Court ruled in *Morse v. Frederick*, 127 S.Ct. 2618 (2007), commonly referred to as the BONG HiTS 4 JESUS case, that a school district did not violate a student's First Amendment rights when the principal confiscated a drug-related banner that was brought to a school-sanctioned event and suspended the student. In the wake

of this case, courts across the country face the challenge of interpreting and applying the Supreme Court's ruling to determine the limitations of student free speech rights.

**CALIFORNIA.** A District Court in California invoked BONG HiTS 4 JESUS when it ruled that school officials did not violate a lesbian student's rights to free speech when they disciplined her for inappropriate public displays of affection. In *Nguon v. Wolf*, 517 F.Supp. 2d 1177 (C.D. Cal. 2007) Charlene Nguon was suspended, resulting in the disclosure of her sexual orientation to her mother after repeated warnings from school administrators about her inappropriate public displays of affection towards her girlfriend.

The court ruled that Nguon's public displays of affection were not protected speech. The court pointed to the Supreme Court's reiteration in BONG HiTS 4 JESUS that school officials may restrict student speech that is inconsistent with the school's basic educational mission, even though the government would lack the authority to restrict similar speech outside of the school environment. The court reasoned that inappropriate displays of public affection can be inconsistent with the mission of the school. Therefore school officials may legitimately regulate that conduct, even though it is expressive. The school's prohibition on inappropriate public displays of affection did not seek to eliminate expression of "gay sexuality."

**FIFTH CIRCUIT.** In *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5<sup>th</sup> Cir. 2007) the appeals court for the Fifth Circuit ruled that school

officials did not violate a student's free speech rights when they disciplined him over entries in his personal journal referring to mounting a "Columbine" style attack on his school.

E.P., a high school sophomore, kept a diary that included writings on the creation of a pseudo-Nazi group on campus. The diary described incidents involving the pseudo-Nazi group attacking homosexuals and "colored" people, setting another student's house on fire, and "brutally murder[ing]" his dog. The diary also provided details of the group's plan to commit a "Columbine shooting" attack on the high school or a coordinated attack at several of the district's schools at the same time.

The existence of the diary was brought to the attention of the assistant principal at the school. After a review of the contents of the diary, the assistant principal determined that E.P.'s writing posed a "terroristic threat" to the safety and security of the students on campus and suspended him for three days, recommending that he be placed in an alternative education program. E.P. and his parents maintained that his diary was merely a creative work of fiction.

The Court ruled that E.P.'s speech was not protected. Relying on BONG HiTS 4 JESUS, the court stated that if school administrators were allowed to prohibit student speech that advocated illegal drug use, it "defies logical extrapolation" to hold administrators to a stricter standard when they are attempting to react to threats of violence and mass deaths. Based on the incidents at Columbine and Jonesboro, the court

stressed that threats of attacks at schools must be taken seriously. As a result, the court stated that "administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance." □ M. Nakano

**NEWS FLASH**  
**RACE-BASED ADMISSIONS UPHELD!**

Los Angeles Unified School District can continue to base admissions to its popular magnet school system on students' race. Superior Court Judge Paul Gutman held that such admission criteria does not violate Proposition 209.

**SPEECH IN**  
**THE PUBLIC SECTOR**

The California Supreme Court granted the California Teachers Association's petition for review in *San Leandro Teachers Association v. Governing Board of the San Leandro Unified Sch. Dist.*, 154 Cal. App. 4th 866 (App. Ct. 2007). In that case, the appellate court held that the school district was not required to allow its teachers' unions to distribute a newsletter containing political endorsements via the district's internal mail system.

The supreme court affirmed the school district's mailbox policy, which parallels Education Code section 7054: "No school district . . . funds, services, supplies or equipment shall be used for the

purpose of urging the support or defeat of any ballot measure or candidate . . .", because the mailbox system was a nonpublic forum, and the restriction on the unions' access to school district mailboxes for purposes of political advocacy was reasonable and viewpoint-neutral. Although the unions' writ petition was premised on Article I, section 2 of the California Constitution, which provides broader speech protections than the First Amendment of the federal Constitution, the court applied a federal forum analysis based on state case law involving freedom of expression in the educational context.

In addition to the constitutional issues, the court examined the district's policy in light of the access provisions of the Educational Employment Relations Act (EERA). That statute grants an exclusive bargaining representative "the right of access at reasonable times to areas in which employees work, the right to use institutional bulletins, mailboxes, and other means of communication, subject to reasonable regulation . . ."

The court found that the school district's policy was a "reasonable regulation" under the EERA, because it served the valid public purpose of limiting the district's involvement in political activity. This finding is consistent with Public Employment Relations Board (PERB) decisions, where employers have regulations that limit unions' access, and such regulations are "properly related to justifiable concerns about disruption" and "narrowly drawn to avoid overbroad and unnecessary interference with the exercise of statutory rights." □ C. Ruiz

**PUBLIC RECORDS ACT:  
NEW DISCLOSURE  
REQUIREMENT**

The California Supreme Court has recently decided that individual public employees' salary information is not exempt from disclosure under the Public Records Act. Newspapers sued the City of Oakland, seeking disclosure of records showing public employees' salary information, including peace officers, who earn \$100,000 or more annually. The court based its decision on the strong public policy of governmental transparency that underlies the Public Records Act; the public employees' diminished expectation of privacy in the amount of their salary; and substantial evidence in that case that disclosure of the requested records would reveal impropriety in government operations, such as favoritism, nepotism or financial mismanagement. (*Intern'l Federation of Prof. and Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 64 Cal. 4th 319 (Cal. 2007).) □ O. Shim

**YEAR IN REVIEW  
DISABILITY LAW**

**U.S. SUPREME COURT.** The United States Supreme Court held that parents are entitled to prosecute Individuals with Disabilities Education Act (IDEA) claims on their own behalf. Parents of an elementary school student with autism sued the school district under the IDEA, challenging their child's proposed individualized education program (IEP). The Court reasoned that since various provisions of the IDEA give parents independent, enforceable rights at the

administrative stage, it would be inconsistent to prevent them to assert those rights in court. (*Winkelman v. Parma City Sch. Dist.*, 127 S.Ct. 1994 (2007).)

**NINTH CIRCUIT.** Parents must exhaust administrative remedies under the IDEA before bringing a civil action. The parents argued that they were not required to exhaust administrative remedies, because IDEA provides administrative remedies for the claims of children, not their parents, and exhaustion would have been futile because their injuries could not have been redressed by a due process hearing. The court disagreed, holding that the parents did not adequately show futility and applied the *Winkelman* decision (above), that IDEA's administrative remedies apply to parents as well as children. (*Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162 (9th Cir. 2007).)

A police officer's Americans with Disabilities Act (ADA) and Section 1983 claims were barred, because she signed a waiver of all claims arising out of the investigation into her background as part of her employment application. The court found that she possessed sufficient education and experience to understand the waiver. Although the plaintiff did not have an attorney read the waiver before she signed it, "there was no evidence she was discouraged or precluded from doing so." The court held, however, that the plaintiff did not waive her Title VII claim, because that claim was not based on the city's employment application investigation, and thus, fell outside the scope of the waiver. (*Nilsson v. City of Mesa*, 503 F.3d 947 (9th Cir. 2007).)

**RECENT VICTORIES**

- R&S represented a school district in a complex litigation matter involving the design/construction of multiple school modernization and construction projects. The matter was settled for substantially less than an architect/engineer's multi-million dollar claim for additional fees, and we recovered significant damages on the district's counterclaim for negligent design.
- R&S negotiated a favorable settlement for a school district. The settlement covered a lawsuit pending before *PERB* and preserved the District's authority to involuntarily transfer teachers under the *NCLB* Act and the California Immediate Intervention/Underperforming Schools Program.

Alleged derogatory comments by co-workers, including managers, about an employee's ability to do his job were not actionable harassment or an adverse employment action, even though the employer had threatened to fire the employee for grooming issues. The plaintiff argued that he suffered disability-based harassment and an adverse employment action when his co-workers made derogatory remarks to him regarding his ability to do his job. The court held that such comments alone were not adverse employment actions and could not be considered collectively with the threat of termination, because the employer's threat of termination was unrelated to Lewis's injury. The co-workers' comments were not pretext hiding disability discrimination, because they were made by different people. In addition, the plaintiff failed to show that the comments were so severe or pervasive as to be harassment, and any threats to fire him could not be regarded as harassment, because they were "personnel management actions" necessary to carry out such duties. (*Lewis v. United Parcel*

*Services, Inc.*, 2007 WL 3226154 (2007).)

**CALIFORNIA.** A city fire department captain failed to show that he suffered from an adverse employment action when the department refused to assign him to a command station after he lost his leg during a work-related accident. An adverse employment action consists of discrimination regarding compensation, terms, conditions or privileges of employment, and disparate treatment in employment. Because the captain continued to receive promotions after his injury, and had equal opportunities for promotions to higher job classifications, exclusion from assignment to the command station was merely contrary to his preferences and not an adverse employment action. (*Malais v. Los Angeles City Fire Dept.*, 150 Cal. App. 4th 350 (App. Ct. 2007).)

□ P. B. Shukla

**EMPLOYERS' CHECKLIST:  
SEXUAL HARASSMENT  
PREVENTION TRAINING**

Employers with 50 or more employees must provide sexual harassment training and education to all supervisory employees every two years. California's Fair Employment and Housing Commission recently issued regulations that require all sexual harassment prevention training to include:

- ✓ A definition of "unlawful sexual harassment."
- ✓ FEHA and Title VII statutory provisions and case law principles concerning the prohibition and prevention of unlawful sexual harassment, discrimination, and retaliation in employment.

- ✓ Types of conduct that constitute sexual harassment.
- ✓ Remedies available for sexual harassment.
- ✓ Strategies to prevent sexual harassment in the workplace.
- ✓ Practical examples, such as factual scenarios used as the basis for role plays, case studies and group discussions.
- ✓ The limited confidentiality of the complaint process.
- ✓ Resources for victims of unlawful sexual harassment, such as identifying to whom they should report alleged sexual harassment.
- ✓ The employer's obligation to conduct an effective workplace investigation of a harassment complaint.
- ✓ Training on what to do if the supervisor is personally accused of harassment.
- ✓ The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed.
- ✓ Dissemination of the anti-harassment policy to each supervisor, requiring that each supervisor read and acknowledge receipt of the policy.

Remember, these are the minimum requirements that all supervisor sexual harassment training must meet to be in compliance with the law. Employers are always encouraged to provide training that exceeds these requirements. □ M. Nakano

**ARE YOU DUE FOR A TRAINING?**

Please call JP Mercado (510)-594-7980 for more information on setting up a sexual harassment prevention training with Ruiz & Sperow, LLP.