

Spring Law Update

April 27, 2011

MICHIGAN
Association of
Secondary School
PRINCIPALS

Lisa L. Swem



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Caution

- These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations
- Future legal developments may affect these topics
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Topics

- Employee Misconduct
- Teachers and Social Media
- Bullying, Harassment and Hazing
- Student Discipline in the Digital Age
- Student Searches
- Ask Lisa



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Supplemental Documents

- *Off-Campus Conduct* (Nov. 2001)
- *The Tinker Decision* (June, 2005)
- *Sticks and Stones in Cyberspace* (Aug, 2006)
- *Student Discipline Checklist* (Aug, 2009)
- *Hazing: A Dangerous Rite* (Nov. 2000)
- *OCR "Dear Colleague" Letter* (Oct. 2010)

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Supplemental Documents - Searches

- *Canine School Searches* (March 1997)
- *Searches of Students by School Liaison Officers* (April 1998)
- *Strip Searches* (Feb. 1999)
- *Miranda Rights* (Sept. 2001)
- *Random, Suspicionless Searches* (Sept. 2004)
- *Strip Searches Unconstitutional* (May, 2005)
- *Searching Student Cell Phones* (Feb. 2008)
- *Supreme Court Ruling: Strip Search* (Oct. 2009)

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Investigating Employee Misconduct

- Collect information
- Examine documents
- Interview witnesses
- Review personnel file
 - Warnings/Reprimands
 - Evaluations
 - IDPs
- Identify disputed facts and follow up



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Meet with Employee

- Follow CBA provisions
- Union representation
- Another administrator
- Direct employee to provide truthful responses
- Engage the conversation
 - Start broadly
 - Eventually narrow
- Pursue "I don't recall"



7

NLRB v Weingarten 420 US 251 (1975)

- Employee has right to union representation at investigatory interview which might reasonably result in disciplinary action
- MERC has same standard
- Violation is an unfair labor practice of "interference" with union activity



8

Employee Status

- Will presence at work interfere with investigation?
 - Paid administrative leave
 - Not disciplinary
- No communication directive



9

Consider Other Actions

- Reports
 - Child Protection
 - Law Enforcement
- Contact others
 - Parents
 - Co-workers



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Documentation

- *Who is your audience?*
 - Employee
 - Other administrators
 - Future decisionmakers
 - FOIA requesters
- *What is your purpose?*
 - Inform
 - Defend
 - Provide "just cause" to discipline



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Disciplinary Memorandum

- Summarize allegation/response
 - Accurate quotes
- Reference meeting(s)
 - Dates
 - Participants
- Make finding(s)
 - Substantiate facts
 - Note factual disputes
 - Policy/legal standards
 - Previous issues



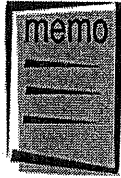
12

Disciplinary Memorandum

- Identify discipline
- Describe assistance
- Warn about further conduct
- Acknowledgment

I have received a copy of this memorandum and understand that it will be placed in my personnel file. This acknowledgement does not indicate my agreement with the memorandum's content.

- Copy to personnel file



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What Discipline Is Appropriate?

- "Reasonable and just cause"
- "Progressive discipline"
- "Demote" under Tenure Act

"Reduce compensation for a particular school year by more than an amount equivalent to 3 days' compensation...." MCL 38.74

- What will it take for the employee to "get the message"?



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Describe Assistance

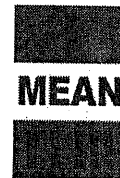
To assist you with these issues, you are also required to complete by June 30, 2011, two days of professional development focusing on _____. The District will pay for the cost of the professional development and will arrange for a substitute teacher to cover your classes while you attend the training.



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Consequences

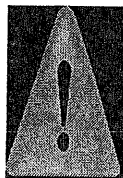
Failure to complete this mandatory training will be considered insubordination and will warrant further discipline. Additionally, we will also meet at a later date to develop an Individualized Development Plan (IDP) to provide you with further focus and support to address these issues.



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Warning

It is my expectation that you will learn from this incident and engage in the necessary professional growth to ensure that such conduct never happens again. Nonetheless, you are placed on notice that any further act of _____ will be cause for more severe disciplinary action, up to and including discharge.



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Bullard-Plawecki Employee Right to Know Act, MCL 423.501

- Defines personnel record
- Excludes some information from personnel record
- Provides employee right to
 - Review
 - Copy
 - Attach written statement
- Restricts divulging discipline to 3rd party
- Proscribes certain uses



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"Personnel Record" Defined

"[A] record kept by the employer that identifies the employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action."



MCL 423.501(1)(c)

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Exclusionary Rule

"Personnel record information which was not included in the personnel record but should have been as required by this act shall not be used by an employer in a judicial or quasi-judicial proceeding."

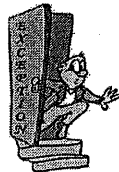


MCL 423.502

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Exception to Exclusionary Rule

"However, personnel record information which, in the opinion of the judge...or ... hearing officer...was not intentionally excluded in the personnel record, may be used by the employer in the judicial or quasi-judicial proceeding, if the employee agrees or if the employee has been given a reasonable time to review the information."



MCL 423.501

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Right to Review Personnel Records

"An employer, upon written request which describes the personnel record, shall provide the employee with an opportunity to periodically review at reasonable intervals...the employee's personnel record...."



MCL 423.503

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Right to Copy of Personnel File

"[A]n employee may obtain a copy of the information or part of the information contained in the employee's personnel record. An employer may charge a fee for providing a copy of information contained in the personnel record."



MCL 423.504

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***Bradley v Saranac Community Schools* 455 Mich 285 (1997)**

- FOIA's privacy exemption applies only to information that "reveals intimate or embarrassing details of an individual's private life"
- Does not automatically apply to
 - Evaluations
 - Complaints
 - Discipline



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Don't Panic – Follow These Steps

1. Read the grievance
2. Review the contract
 - Cited provisions
 - Grievance procedures
 - Note timelines
3. Gather facts
4. Inform Superintendent



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Determine Timelines

- "Occurrence" of grievance
- Step 1
- Conference
- Response
- Follow the CBA!



26

How to Count "Days"

- Look to CBA
- School days/calendar days
- Summer vacation



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Time Extensions

- If you ask for one, be prepared to reciprocate
- *Always* "put it in writing"
- If compensation is at risk, don't delay



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Prepare for Conference

- Gather facts
- Review documents
- Talk to other administrators
 - Past practice
 - Similar circumstances



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Grievance Conference

- Have another administrator present
- Review facts, noting areas of
 - Agreement
 - Dispute
- Review *each* alleged CBA violation



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Grievance Conference

- Review "kitchen sink" allegation ("all other applicable CBA provisions")
- Explore, don't confront
 - *Help me understand...*
 - *How does that violate...*
- Inquire about past practice
- Review request for relief
- Confirm timelines



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Other Considerations

- Untimeliness
- Board rights
- Other CBA language
- Past practice
- Prohibited bargaining subject which creates "substantive arbitrability" issues



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PERA Section 15, MCL 423.215

- Group insurance benefit policyholder
- Starting day for school year
- Pupil contact time for state aid
- Composition of school improvement team
- Open enrollment decisions
- Authorizing body for PSA
- 3rd-party noninstructional contracts



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PERA Section 15, MCL 423.215

- Volunteers for school services
- Technology for educational programs and services, and staffing for that technology
- Compensation or assignment to reimburse employee for monetary penalty under PERA (strike)
- Stay tuned . . . more to come?



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Response

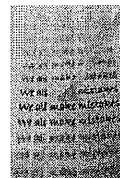
- Was the CBA violated?
 - If so, fix the problem
 - If not, prepare to defend
- Consult superintendent



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If CBA Violation

- Requested relief is not automatic
- Be very careful not to grant a "greater fix" than required
- Consult superintendent



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School Code § 1230b(6)

- The board or a school official **shall not** enter into an agreement that *"has the effect of suppressing information about unprofessional conduct of an employee or former employee or of expunging information about that unprofessional conduct from personnel records."*
- *"Any provision of a contract or agreement that is contrary to this subsection is void and unenforceable."*

MCL 380.1230b(6) 37

School Code § 1230b(6)

"This subsection does not restrict the expungement from a personnel file of information about alleged unprofessional conduct that has not been substantiated."



MCL 380.1230b(6)

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Written Decision - Procedure

- Dates
 - Occurrence
 - Grievance filed
 - Conference
- Note time extensions, if any
- Persons present at conference



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Written Decision - Factual Summary

- Review factual premises
- Note areas of
 - Agreement
 - Dispute



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Written Decision - CBA Provisions

- Review *each* cited article
 - Address "kitchen sink" claim
 - Consider past practice
- Explain findings
- Note timeliness issues
- Include management rights
- Address relief sought



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Teachers Gone Wild?

- Inappropriate behavior and comments
 - Drinking
 - Sexual promiscuity
 - Sarcastic statements about work
- Disclosure of confidential information
- Invading boundaries/predatory grooming
- And ... the "butt painter" website

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"E-Brain" (Not Thinking) Online

- You're not in college anymore
- Misunderstanding about privacy settings for social network sites
- Inability to control postings by others
- Failure to monitor



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School District Concerns

- Disruption to school setting
- Teacher as proper role model
- Disclosure of confidential information
- Defamation of co-workers
- Embarrassment to school district



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Teachers as Role Models

"[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values."

Amback v Norwick
441 US 68 (1979)



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High Standard of Conduct

"A professional teacher entrusted with forming the moral and social values of our young people must accept the reality that he is held to a high or strict standard of conduct."

Goldin v Bd of Ed (NY, 1974)



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www.badbadteacher.com

- Christopher Moses, 23, a former volunteer basketball coach at Hamilton Middle School in Hamilton, Michigan has been sentenced to 75 days in the Allegan Co. Jail for using a computer to view nude pictures of a 15-year-old student and to send her sexually explicit e-mails.
- Reportedly Moses and the victim communicated via Facebook.



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Bronx Teacher Fired

- "Friended" students and commented on girls' photos: "This is sexy."
- Teacher's tagline: "I'm not a gynecologist, but I'll take a look inside."
- Attempted to date one teen by sending flowers, candy, and teddy bear



NYC Parapro Discharged

- Posted photo kissing 18-year-old former student
- Investigation concluded that parapro had inappropriate relationship with student
 - 2,700 phone contacts
 - Sexual interactions



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NYC Substitute Teacher Barred

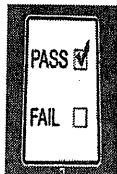
- Friended female students
- Sent inappropriate messages
 - You are pretty
 - Your boyfriend does not “deserve a beautiful girl like you”



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Virginia Teacher Faces Hearing

- Posted comment on Facebook page with names of students who passed class, and one student who failed
- “I do believe that I did something wrong, but I don’t believe it’s something I should lose my career over.”



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Pennsylvania Professor Suspended

- “Does anyone know where I can find a very discrete hitman? Yes, it’s been that kind of day.”
- “Had a good day today. DIDN’T want to kill even one student. ☺ Now Friday was a different story.”



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Massachusetts Teacher Loses Job

- Teacher fired for posting unflattering “status” about school on Facebook
- Parents are “arrogant and snobby”
- Students are “germ bags”



Teacher Responds

“I made a stupid mistake, it may have cost me my career. I take full responsibility for my stupidity and I hope it serves as an example to kids that they need to be very, very vigilant about their privacy.”



June Talvitie-Siple
ABC News (August 19, 2010)

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Georgia Teacher Discharged

- 24-year-old English teacher sued district for improper termination
- Asked to resign due to photo of her holding wine and beer and an expletive ("b*tch") on Facebook



Teacher Responds

"I wasn't doing anything illegal. I wasn't doing anything provocative. I had no idea how a parent could've seen something like that on my page because I had everything set for private. I wasn't friends with any students. I didn't give access to any students or parents."



Ashley Payne
Fox Atlanta (Nov. 10, 2009)

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Land v L'Anse Creuse Pub Schs 2010 Mich App Lexis 999 (2010)

- Teacher discharged *"after photographs of her engaged in a simulated act of fellatio with a male mannequin appeared on an internet website."*
- Board found conduct was *"lewd behavior contrary to the moral values of the educational and school community, which undermined her moral authority and professional responsibilities as a role model for students."*
- Court upheld STC decision to reinstate

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That's Where the Kids Are

"The reason social networking is so powerful is because it builds relationships. Smart teachers can use the technology to show their students that they care."



Kyle Peck, Prof. of Ed.
Penn State University
The Morning Call (Jan. 31, 2010)

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"Friending" Students?

"There are many forms of technology, but there is a basic line and that basic line is you are a teacher and you are not there to be social. You are an academic mentor."



Terry Stahler, Prof. of Ed.
Kutztown State University
The Morning Call (Jan. 31, 2010)

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Be Careful Out There

"The message given to student [teachers] is they need to be very, very cognizant of social networking and how literally nothing is private."



Camie Modjadidi, Moravian College
Teacher Placement Coordinator
The Morning Call (Jan. 31, 2010)

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Teachers and Facebook

"I think it's safer for teachers and students to be interacting in the educational plane – not a friendship plane. Socializing on Facebook can cross over into areas that are potentially dangerous."



Nancy Willard, Director,
Center for Safe and
Responsible Internet Use

Managing Facebook Settings

- "Custom" privacy settings allow user to control who sees most content
- Does not prevent others from seeing name and profile picture



Facebook's Privacy Settings

- Everyone
- Friends
- Friends of friends
- Customize
- Note: Facebook's default setting allows *everyone* to see posted content



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Control Your Social Network

- Do not "friend" students
- Use the "block" feature when necessary
- Limit access to "only friends"
- Monitor your site
- Think before posting
- Know public availability
- Don't do it at school



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The Faces Behind Bullying



Tempest Smith, 12
Lincoln Park Middle School
Lincoln Park, Michigan

Committed suicide Feb. 20, 2001, after enduring peer bullying. In her diary, Tempest wrote that she was targeted due to her interest in Wicca, alternative clothing styles, and shy demeanor

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Psychological Autopsy

"When Tempest Smith received no help from school authorities, concerning the constant student-on-student teasing and harassment she reached the conclusion that the only way to resolve this painful situation was to opt out of it and this meant killing herself...."



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Expert Witness

Tempest's suicide was a reaction to *"being alienated from her peers"* based on *"rejections"*.

"What you might not be seeing is not an effort to fit in. She may have given up on that; and was then looking for where she could fit in and be accepted."



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Bullycide

- "Suicide attributable to the victim having been bullied."
–Neil Marr and Tim Field
–*Bullycide: Death at Playtime* (2001)
- In 2010, 33 child suicides where bullying was the principal issue in the decision to end their lives



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Half of U.S. Teens Admit to Bullying

- Survey asked 43,321 high school students whether they had been physically abused, teased, or taunted in a way that seriously upset them
 - 43% said yes
 - 50% admitted to being the bully
- Survey conducted by Josephson Institute of Ethics and released October 26, 2010

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SB 45, SB 147, SB 148 HB 4173, HB 4252, HB 4391

- "Matt's Safe School Law"
- Requires schools to have anti-bullying policy based on various characteristics, including sexual orientation
- All bills are currently in committee



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Model Anti-Bullying Policy

"Any gesture or written, verbal, graphic, or physical act (including electronically transmitted acts – i.e., internet, cell phone, personal digital assistant (pda), or wireless handheld device."



Michigan State Bd. of Ed.
September, 2006

71

State Board Model Policy

"Reasonably perceived as being motivated either by any actual or perceived characteristic such as"



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State Board Model Policy

"...race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression; or a mental, physical, or sensory disability or impairment; or by any other distinguishing characteristic."



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U.S. Office for Civil Rights "Dear Colleague" Letter

"Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential."



OCR, Oct. 26, 2010

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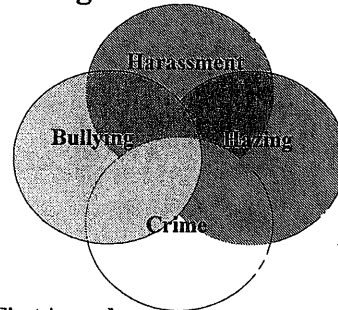


"The age-old problem of bullying, hazing, and harassment should be directly addressed in preventing violence."

Ronald Stephens(1999)
National School Safety Center

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Categories of Behavior



And . . . First Amendment
"Speech Rights"

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Responding to Misconduct

"The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications."

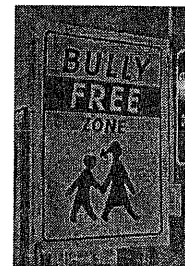


OCR, Oct. 26, 2010

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Bottom Line . . .

*Is the
conduct
appropriate
in the
school
setting?*



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Harassment Based on Race, Color, National Origin, Sex, or Disability



Legal Standards

- Title VI of the 1964 Civil Rights Act
- Title IX of the 1972 Education Amendments
- Section 504 of the 1973 Rehabilitation Act
- 14th Amendment to the US Constitution
- Civil Rights Act of 1871, 42 USC § 1983
- Michigan Elliott-Larsen Civil Rights Act
- Michigan Persons with Disabilities Act

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U.S. Office for Civil Rights

"[S]ome student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department's Office for Civil Rights (OCR)."

Race
Color
National Origin
Sex
Disability

October 26, 2010

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Religion-Based Harassment

- OCR does not enforce anti-discrimination laws on religion
- BUT ... Oct, 2010 letter notes OCR may have jurisdiction under Title VI when *"harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices."*
- In particular: Amish, Muslims, Jews, Sikhs, Hindus

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U.S. Office for Civil Rights

"By limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment."



OCR, Oct. 26, 2010

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Davis v Monroe Co Bd of Ed (1999)

- Student-to-student sexual harassment
- Title IX liability if
 - Actual knowledge of harassment and
 - Deliberate indifference to
- Student deprived of school benefits if harassment is
 - Severe
 - Pervasive
 - Objectively offensive



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Five-Part Liability Test

1. Is student member of statutorily protected class?
2. Was student harassed because of protected status?
3. Was the conduct severe, pervasive, and objectively offensive?
4. Did the school know of the harassment?
5. Was the school "deliberately indifferent"?

85

Patterson v Hudson Area Schools (CA 6, 2009)

- Male student was bullied and harassed for over 4 years
- Whether school officials were "deliberately indifferent" was a fact issue for the jury
- "*Hudson's isolated success with individual perpetrators cannot shield Hudson from liability as a matter of law.*"



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\$800,000 Jury Verdict

- Plaintiff was subject to harassment due to his sex/gender
- Harassment was severe, pervasive and objectively offensive
- School officials had actual knowledge of harassment
- School officials acted with deliberate indifference to the known harassment
- As a result, Plaintiff was deprived of access to educational benefits from the school



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Patterson v Hudson Area Schools (ED Mich, July 1, 2010)

- Court overturned jury verdict
- The harassment was "*bullying, not sexual harassment*" because it was *not* based on sex, sexual orientation, or perceived sexual orientation
- Alternatively, plaintiff did not prove that school was deliberately indifferent

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Patterson: No Sex Discrimination

"For good or bad, in the Hudson Area Schools, like many schools, . . . the successful athletes (jocks) are at the top level of social status structure and the scholars are at a lower social status level. Title IX does not, however, protect students against being teased or harassed because of their social status; it only protects against harassment or discrimination on the basis of sex."

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Patterson: No Deliberate Indifference

"[T]he uncontroverted evidence is that Defendant's teachers and administrators responded to each and every incident of harassment of which they had notice.... [T]here was no evidence whatsoever presented that Defendant was aware that adverse consequences from its action or inaction were certain or substantially certain to cause harm...and that Defendant decided to act or not act in spite of that knowledge."

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Sexual Orientation

"Sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX."



Office of Civil Rights (2001)
US Dept. of Education

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Sexual Orientation

"When students are subject to harassment on the basis of their LGBT status, they may also ... be subjected to forms of sex discrimination prohibited under Title IX."



OCR, Oct. 26, 2010

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Nabozny v Podlesny (CA 7, 1996)

- Male students harassed and physically abused Jamie Nabozny because he was gay
- Nabozny sued, claiming administrators did not respond to his complaints and requests for protection
- Court did not dismiss claim and ruled that administrators did not have "qualified immunity"

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Jamie Nabozny

"I spent a lot of time thinking defensively, which is a strange thing to have to do at school. Looking back, I feel like I tried to be numb as much as possible to not feel what was happening. The moment that I got home, I was allowed to feel what was happening. I spent most nights in my bedroom with the door locked, crying. I wouldn't come out to eat. It was hell."



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Flores v Morgan Hill SD (CA 9, 2003)

- Students claimed that school personnel failed to respond to anti-homosexual harassment
- Court found evidence of discriminatory treatment
- No qualified immunity because evidence suggested administrators were "deliberately indifferent" and violated "clearly established law"

95

J.L. v Mohawk Central Sch Dist (ND NY, 2010)

School settled case in which student alleged school district was deliberately indifference to harassment based on sex/sexual orientation

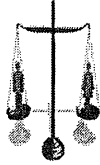
- \$50,000 to student/\$25,000 attorneys
- Review policies/procedures
- Training
- Compliance reports

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U.S. Office for Civil Rights

"... It can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity."

OCR, Oct. 26, 2010



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Hostile Environment

- Must be sufficiently severe or pervasive, or persistent to
 - Create hostile or abusive environment, or
 - Interfere with or limit a student's ability to participate in or benefit from school activities
- Determined by reasonable person standard



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Conduct Factors

- Frequency
- Location
- Severity
- Context
- Interference with or limitation on student's ability to participate in or benefit from school activities



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Harassing Conduct

"Harassing conduct may take many forms, including verbal acts and name-calling, graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents."

OCR, Oct. 26, 2010

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Deliberate Indifference

"Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances."

Williams v Paint Valley SD
(CA 6, 2005)



101

Johnson v Indep Sch Dist (D Minn, 2002)

- Student claimed yearbook photo caption was offensive ("One time at band camp.")
- Court dismissed claim of peer sexual harassment
- While school's response was "imperfect" it was not "deliberate indifference"



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Vance v Spencer Co Pub Sch Dist **(CA 6, 2000)**

"Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances."



103

Williams v Port Huron Sch Dist **(ED Mich, 2010)**

- Court denied school's summary judgment motion, finding that plaintiffs had stated valid Title VI claim for deliberate indifference for student-student racial harassment
- Despite school's efforts, court found that harassment continued and escalated
- Issue of fact as to deliberate indifference

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School Response

"When an administrator chooses not to act, they're saying, 'It's more important for me to protect the district than the student.' That is the wrong set of priorities. They have to understand what's at stake here. Children are dying."

Kevin Jennings, Ass't Deputy Secretary
USDOE Office of Safe and Drug-Free Schools

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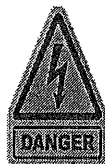
Policies/Procedures/Prevention

- Publish (including website)
 - Notice of nondiscrimination
 - Prohibition and consequences for bullying, harassment, and hazing
 - Information about where to get help
- Address off-campus conduct in handbook
- Promptly investigate and document
- Be proactive with staff and students

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Avoid Dangerous Words

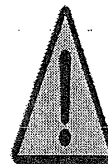
- People in our school would never do...
- I know he/she didn't mean that.
- He puts his arms around everyone.
- You need to handle these things.
- Why can't you accept a compliment?



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More Dangerous Words

- It's just teasing- no big deal.
- If you didn't dress that way...
- It's a prank that got out of hand.
- Just ignore it.
- It's a joke. Lighten up.
- It's a matter of hormones.
- Boys will be boys.
- Girls will be girls.



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Standards to Assess Behavior

- Does behavior
 - Contribute to school's mission?
 - Offend or hurt others in school community?
 - Send signals that invite harassment?
- Is there a "power" difference?
 - Real or perceived
 - Age, grade, gender, race, socio-economic



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Liability Analysis

- Would *reasonable person* find the conduct
 - Welcome?
 - Threatening or humiliating?
 - Hostile or abusive?
- Was the school's response
 - Prompt?
 - Effective?
 - Reasonably calculated to prevent further harassment?



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Range of Responses

- Meet with students and parents
- Dispute resolution
- Revoke privileges
- No contact orders
- Disciplinary consequences
- Monitor both bully and victim
- Watch for retaliation
- Report to police and internet provider
- Document



111

OCR Guidance

"The good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX."



US Dept. of Ed. Office for Civil Rights
January, 2001

112

First Amendment Freedom of Speech

"Congress shall make no law ...abridging the freedom of speech...."

Amendment 1, US Constitution



113

The Schoolhouse Gate

"Public school students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."



Justice Fortas
Tinker v Des Moines (1969)

114

Tinker v Des Moines School Dist
393 US 503 (1969)

- School must prove that the student's speech would "*materially and substantially disrupt*" school work or discipline
- School cannot suppress speech due to "*undifferentiated fear or apprehension of disturbance*"
- Need "*reasonable forecast*" of disruption

115

Defoe v Spiva (CA 6, 2010)

"Indeed, Tinker does not require that displays of the Confederate flag in fact cause substantial disruption or interference, but rather that school officials reasonably forecasted that such displays could cause substantial disruption or materially interfere with the learning environment."



Zamechik v Indian Prairie Sch Dist,
(CA 7, 2011)

- Court refused to adopt "hurt feelings" defense to a school's violation of student's First Amendment rights
- No forecast of substantial disruption



H. v Easton Area School District
(ED Pa, April 12, 2011)

- No substantial disruption
- Not vulgar speech
- *"If the phrase 'I (heart) Boobies!' appeared in isolation and not within the context of a legitimate, national breast cancer awareness campaign, the school district would have a much stronger argument."*



118

Previous School Code Sec. 1303

"...shall not permit any pupil to carry a pocket pager, electronic communication device, or other personal communication device in school except for health or other unusual reasons approved by the board...."



Public Act 215 of 1988
MCL 380.1303
Later amended in 2003

119

School Code Sec. 1303

"Beginning with the 2004-2005 school year...the board of a school district...may adopt and implement its own local policy concerning whether or not a pupil may carry a pocket pager, electronic communication device, or other personal communication device in school."



MCL 380.1303(2)
Amended as of August 1, 2003

120

Off-Campus Speech?

"Off-campus speech can become on-campus speech with the click of a mouse."

US District Judge Mark Kravitz
Doninger v Niehoff (2009)



121

Student Off-Campus Conduct

- School must show conduct has direct impact on school
- Without nexus, court may overturn discipline
- No First Amendment protection
 - True threats
 - Substantial disruption
- Parodies are protected



122

Cyberbullying

"The use of information and communication technologies to support deliberate, repeated, and hostile behavior by an individual or group, [which] is intended to harm others."



123

Response to Cyberbullying

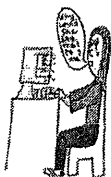
- School response
 - Nexus to school?
 - True threat?
 - Substantial disruption?
- Reports
 - Parents
 - Law enforcement
 - Internet service provider



124

"Dear Colleague" Letter

"Harassing conduct may take many forms, including verbal acts and name-calling, graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating."



125

J.C. v Beverly Hills Unified Sch Dist (CD Cal, 2009)

- School suspended student (2 days) for filming and posting video of friends making mean/sexual comments about 8th-grade girl
- Court ruled school violated student's First Amendment speech rights because conduct was off campus and had no "substantial disruption" at school
 - \$1 nominal damages
 - \$107,150 for student's attorney fees

126

Court Ruling

"Unfortunately for the School, good intentions do not suffice here....The Court cannot uphold school discipline of student speech simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments."



127

No "Uber" Censorship

"This Court does not wish to see school administrators become censors of students' speech at all times, in all places, and under all circumstances . . ."



128

Layshock v Hermitage Sch Dist (WD Pa, 2007 and CA 3, 2010)

- Student created parody profile of school principal
- Discipline overturned because
 - No nexus to school
 - No *Tinker* substantial disruption
- Qualified immunity for administrators



129



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

130



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
 Club: Steroids International
 Interests: Transgender, Appreciators of Alcoholic Beverages

131

Layshock Lower Court Ruling

"The mere fact that the Internet may be accessed at school does not authorize school officials to become censors of the World Wide Web. Public schools are vital institutions, but their reach is not unlimited."



132

Layshock v Hermitage Sch Dist
593 F3d 249 (CA 3, 2010)

"It would be an unseemly and dangerous precedent to allow school authorities to reach in to a child's home and control his/her actions there to the same extent that they can control the child when he/she participates in school-sponsored activities. Allowing the District to punish Justin for conduct he engaged in using his grandmother's computer while at his grandmother's house would create just such a precedent...."



133

Snyder v Blue Mountain Sch Dist
(MD Pa, 2008 and CA 3, 2010)

- Student created MySpace imposter profile with principal's photo, indicating that he is a pedophile and sex addict
- 10-day suspension for making "false accusations" and copyright violation
- Court denies student's TRO request and upholds school discipline

134



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 to be just like me. I know, I know, you're all thrilled

Another reason I came to my space is because- I am keeping an eye on you students (who 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)

135

Snyder Lower Court Ruling

"Thus, as vulgar, lewd, and potentially illegal speech that had an effect on campus, we find that the school did not violate the [student's] rights in punishing her for it even though it arguably did not cause a substantial disruption of the school."



136

Snyder v Blue Mountain Sch Dist
593 F3d 286 (CA 3, 2010)

"We therefore conclude, based on the profile's nature and its threat of substantial disruption of the Middle School, that the School District did not offend J.S.'s First Amendment free speech rights by punishing her for creating the profile."

137

First Amendment Protects Parodies

Parodies are not "reasonably believable" and are clearly exaggerated to enhance humor of the parody.... The First Amendment protects parodies that involve speech that cannot "reasonably be understood as describing actual facts about [the subject of the parody]."



Hustler Magazine, Inc v Falwell
485 US 46, 57 (1988)

138

Beidler v North Thurston Sch Dist
(Wash Super Ct, 2000)

- Student expelled for satirical website with disparaging images of assistant principal
- School argued that the website
 - Disrupted learning environment
 - Harmed school safety
 - Defamed assistant principal
 - Created fear for victims of future parody

139

Beidler's Website

- Superimposed principal's head
 - Nazi book burning
 - Viagra spokesman
 - Sex with Homer Simpson
 - Sodomizing pig
 - Smoking marijuana
- Disclaimer/Warning
 - All pictures are parodies
 - Do not view at school



140

Beidler's Father Reacts

- Took down the website
- Grounded his son
- Revoked computer privileges
- *"He did something that wasn't particularly good or right or pleasant. But he did it on his own time and with his own resources. It had nothing to do with the school."*

141

Beidler Court Ruling

"Schools can and will adjust to the new challenges created by such students and the Internet, but not at the expense of the First Amendment."

- No *Tinker* substantial disruption
- Student awarded
 - \$52,000 legal fees
 - \$10,000 damages



142

Killion v Franklin Reg'l Sch Dist
(WD Pa, 2001)

- Killion sent e-mails from home which mocked AD with "Top Ten List" and "fat jokes"
- Receiving student brought list to school
- Court overturned 10-day suspension for "abuse" of staff member because there was no "substantial disruption"

143

Killion Court Ruling

"We cannot accept, without more, that the childish and boorish antics of a minor could impair the administrators' abilities to discipline students and maintain control."



144

J.S. v Bethlehem Area Sch Dist
(Pa, 2002)

- Student expelled for "Teacher Sux" website
- Image of teacher's decapitated head
- Photo of teacher's face morphing into Hitler
- "Why should Mrs. Fulmer die?"
- "Take a look at the diagram and the reasons I gave, then give me \$20 to help pay for the hitman."

145

J.S. Court Ruling

- Not a "true threat"
- But "sufficient nexus" between website and school caused substantial disruption
 - Teacher on medical leave
 - Substitutes hired
- Expulsion upheld



146

Barnett v Tipton Co Board of Ed
(WD Tenn, 2009)

- Student suspended for fake MySpace profiles of teacher and ass't principal with sexual comments about students
- No First Amendment protection as "parodies" because site visitors believed fraudulent profiles were real
- Lawsuit dismissed



147

facebook

"Ms. Sarah Phelps is the worst teacher I've ever met! To those select students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics: Here is the place to express your feelings of hatred."

148

Evans v Bayer (SD Fla, 2010)

"Regardless of the standard used, Evans's speech falls under the wide umbrella of protected speech. It was an opinion of a student about a teacher, that was published off-campus, did not cause any disruption on-campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior. Therefore, the Court finds that Evans had a constitutional right."



149

Doninger v Niehoff
(CA 2, 2011)

- Student's Blog:
 - "Jamfest is canceled due to douchebags in central office."
 - Call administrator and "piss her off"
- Student not allowed to run for class office
- Injunction request denied because conduct created substantial disruption
- Summary judgment granted to school
- Qualified immunity for administrators

150

Doninger Court Ruling

"Avery's conduct posed a substantial risk that administrators and teachers would be further diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion over Jamfest's purported cancellation."



151

Qualified Immunity

"It was objectively reasonable for school officials to conclude that Doninger's behavior was potentially disruptive of student government functions (such as the organization of Jamfest) and that Doninger was not free to engage in such behavior while serving as a class representative—a representative charged with working with these very same school officials to carry out her responsibilities."

152

Careful!

"To be clear, we do not conclude in any way that school administrators are immune from First Amendment scrutiny when they react to student speech by limiting students' participation in extracurricular activities."



153

"All threats are NOT created equal."

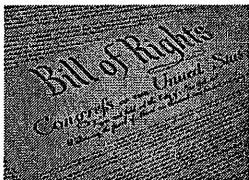


Federal Bureau of Investigation
The School Shooter: A Threat Assessment Perspective

154

Distinguish

"[W]hat is a threat . . . from what is constitutionally protected speech."



Watts v United States
394 US 705 (1969)

155

"True Threat"

"[T]hose statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."



Virginia v Black
538 US 343 (2003)

156

U.S. v Landham (CA 6, 2001)

Whether a reasonable person would:

1. take the statement as a serious expression of an intent to inflict bodily harm, *and*
2. perceive such expression as being communicated to effect some change or achieve some goal through intimidation

157

Objective Test

- Would a “reasonable person” see the statement as a serious expression of intent to cause a present or future harm?
- Distinguish from hyperbole, jest, political views
- Whose viewpoint
 - Speaker?
 - Recipient?



158

Doe v Pulaski Sch Dist (CA 8, 2002)

- Student expelled for letter about rape, sodomy, and murder of his ex-girlfriend
- District court reinstated student
 - Not a “true threat”
 - Divided panel affirmed
- Expulsion upheld by en banc review (6-4)



159

Emmett v Kent Sch Dist No. 415 (WD Wash, 2000)

- “Unofficial Kentlake High Home Page”
 - Mock student “obituaries”
 - Visitors could vote on next to “die”
- Emmett placed on “emergency expulsion” (modified to 5-day suspension)
- Disclaimer
 - Not school-sponsored
 - For entertainment only



160

Emmett Court Ruling

- Acknowledged that “school administrators are in an acutely difficult position after recent school shootings”
- TRO granted because the student’s conduct was “entirely outside of the school’s supervision or control” and there was no evidence of threat
- School settled the case



161

Mahaffey v Aldrich (ED Mich, 2002)

- Suspension for creating “Satan’s web page”
 - Expulsion proceedings
 - Student withdrew and sued
- Listed student names of
 - “People Who Are Cool”
 - “People Who Should Die”
- Satan’s “Mission of the Week”



162

Satan's Mission For You This Week

"Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do it unless I'm there to watch - Or just go to Detroit. Hell is right in the middle. Drop by and say hi."

PS: NOW THAT YOU'VE READ MY WEB PAGE
PLEASE DON'T GO KILLING PEOPLE AND STUFF
THEN BLAMING IT ON ME. OK?

163

Mahaffey Court Ruling

- First Amendment violated
- No nexus to school
- No "true threat" because there was no serious expression of intent to harm
- No *Tinker* substantial disruption



164

***Latour v Riverside Beaver Sch Dist* (WD Pa, 2005)**

- Middle school student wrote, recorded at home, and sold on the Internet "battle rap" songs which had violent lyrics about shooting students
- Student expelled for engaging in "terrorist threats and harassment"
- Court granted preliminary injunction
 - Not a true threat
 - No *Tinker* substantial disruption

165

***Wisniewski v Weedsport Bd of Ed* (CA 2, 2007)**

- Student sent instant message
 - "Kill Mr. VanderMolen"
 - Pistol icon/head dripping blood
- Court found that IM created a "substantial disruption" at school
- 1-semester suspension upheld

166

Wisniewski Court Ruling

The student's action "*crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would materially and substantially disrupt the work and discipline of the school.*"



167

***Mardis v Hannibal Pub Sch Dist,* (ED Mo, 2009)**

- District suspended student who threatened, in IM, to get a gun and kill classmates
- Student sued, alleging free speech violation
- Court rules for school
 - IM was a "true threat"
 - Substantial disruption

168

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . ."



US Const, Am IV

169

Two Types of Unlawful Search Cases

- Criminal litigation
 - "Fruit of the poisonous tree"
 - Apply "exclusionary rule" to keep contraband out of evidence
- Civil litigation
 - Seek monetary damages for civil rights violation
 - Successful plaintiff gets attorney fees

170

New Jersey v TLO 469 US 325 (1985)

- Reasonable suspicion, not probable cause, is needed for school officials to search students
- Was the search
 - Justified at inception?
 - Reasonable in scope?



171

Search Justified at Inception

The presence of "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."



T.L.O., 469 US at 342

172

Reasonable in Scope

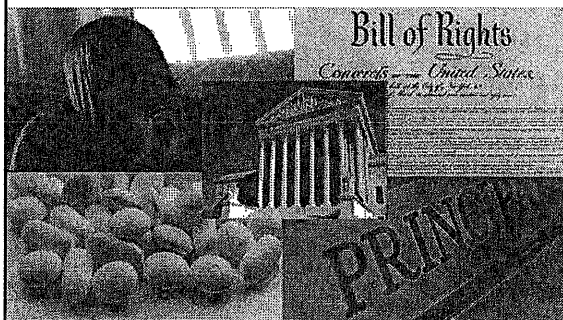
A school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."



T.L.O., 469 US at 342

173

Safford Unified Sch Dist #1 v Redding 129 S Ct 2633 (2009)



Safford Case History

- District court rules for school
- 9th Circuit panel rules for school
- 9th Circuit en banc rules for student
 - Search is unconstitutional (8-3)
 - No qualified immunity (6-5)
- US Supreme Court rules
 - Search is unconstitutional (8-1)
 - Qualified immunity applies (7-2)

175

Supreme Court Ruling

- Strip search violated student's Fourth Amendment right to be free from unreasonable search and seizure
- School officials were entitled to immunity from the lawsuit because the student's rights weren't "clearly established" *at the time*

176

Suspicion v Intrusion

"Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. Here, the content of the suspicion failed to match the degree of intrusion."

Safford, 129 S Ct at 2641

177

Strip Search Must Be Justified

A strip search is "categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings."

Safford, 129 S Ct at 2641



178

Strip Search: Heightened Standard

"But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off."

Safford, 129 S Ct at 2642

179

Circumstances Were Not Dangerous

"In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to support that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable."

Safford, 129 S Ct at 2642-43

180

Strip Search Standard

"The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions."



Safford, 129 S Ct at 2643

181

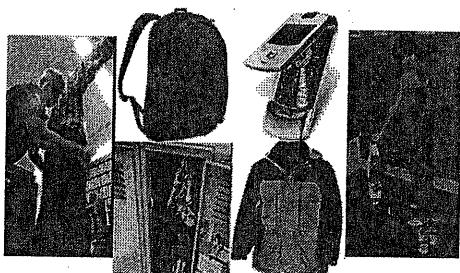
Clarified *T.L.O.* Standard

- Object of suspicion
 - Degree of danger for *what*
- Reliability of information
 - Question tipster
 - Analyze motivation
- Scope of search
 - Specific justification for *where*



182

Where Will You Search?



183

Qualified Immunity

"The intrusiveness of the strip-search here cannot...be seen as justifiably related to the circumstances, but lower court cases viewing school strip-searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt about the clarity with which the right was previously stated." *Safford, 129 S Ct at 2643*

184

Roberts Explains Immunity Ruling

School officials were entitled to qualified immunity because *"they didn't have very clear guidance and that was largely our fault, in the sense of trying to put down our rules. So we laid down a rule on what they can and can't do."*



Chief Justice John G. Roberts
4th Circuit Judicial Conference
June 27, 2009

185

Beard v Whitmore Lake School Dist (CA 6, 2005)

- Strip search without individualized suspicion unconstitutional
 - Not justified at inception
 - Not reasonable in scope
- School officials had immunity because past case law did not *"clearly establish"* rights
- It does now – so watch out!

186

Fewless v Wayland Union Schools
(WD Mich, 2002)

- Student strip-searched after 4 students reported he was hiding marijuana
- *Unreasonable* search at inception and in scope because
 - Informants' motive questionable
 - Technique of shaking (not pulling) underwear waistband

187

People v Perreault
Mich SC No. 140630 (May 21, 2010)

- AP searched student vehicle based on anonymous tip on "hotline"
- Trial court denied motion to suppress evidence
- Conviction for marijuana possession
- Court of Appeals reversed, finding no reasonable suspicion for search
- Supreme Court reversed and conviction reinstated



188

Supreme Court Adopts Dissent

"An anonymous tip can provide reasonable suspicion if it is considered along with a 'totality of the circumstances' that show the tip to be reliable.... Further, the tip must carry with it sufficient indicia of reliability to support a reasonable suspicion of criminal activity. However, a sufficiently detailed tip may provide reasonable suspicion of criminal activity, especially (but not necessarily) when there is independent corroboration of some of the facts."

189

School Code Sec. 1306 - Lockers

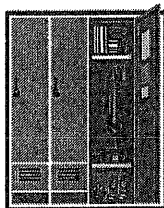
- No privacy expectation
- Principal may search locker/contents
 - Without reason
 - Without notice
- Law enforcement may assist
- Policy required
 - Copies to student, parent, MDE



190

Locker Statement

- School property
- Search at any time
- No privacy expectation
- Locks
- Student responsibilities



191

In Re D.L.D. (NC App, 2010)

- Through camera feed, AP and SRO observed suspicious activity outside boys bathroom
- Upon arrival, student ran into bathroom and put something in his pants
- Frisk search of waistband found marijuana
- Search was reasonable
 - Justified at inception
 - Not intrusive: age, gender, infraction

192

B.C. v Plumas Unified Sch. Dist.
192 F3d 1260 (CA 9, 1999)

- Students required to exit classroom and walk by a drug-sniffing dog
- No drugs found
- Dog-sniff of individual students was a
 - Highly intrusive search
 - Unreasonable



193

In Re D.H. (Tex App, 2010)

- Students were told to leave backpacks in class and wait in hall
- Police dog sniffed backpack and alerted, creating reasonable suspicion to search backpack



194

Doe v Little Rock School Dist
380 F3d 349 (CA 8, 2004)

- Students removed personal items from pockets, and put purses/backpacks on desks
- While students were in the hall, school officials searched their belongings
- Marijuana found in Doe's purse
- Search was *unconstitutional* because no individualized suspicion

195

Doe Court Ruling

"Full-scale searches that involve people rummaging through personal belongings concealed within a container are manifestly more intrusive than searches effected by using metal detectors or dogs."



196

Klump v Nazareth Sch Dist
425 F Supp 2d 622 (ED Pa, 2006)

- Rule against student cell phone use
- Administrators may seize cell phone
- Search of stored information subject to *T.L.O.* reasonable suspicion standard
 - Justified at inception?
 - Reasonable in scope?



197

Koch v Adams
2010 Ark 131 (2010)

- School confiscated cell phone for 2 weeks
- Court dismissed lawsuit
- "Taking" property does not require a specific state law
- Schools have discretion to adopt reasonable rules



198

Laney v Farley
2006 US Dist LEXIS 13449 (MD Tenn, 2006)

"There is no constitutional right to possess a cell phone in a classroom setting. It is clear that the student had notice of the conduct that caused the confiscation of the cell phone and that she had an opportunity to explain any mitigating circumstances to the teacher that confiscated it."



199

Parent Options

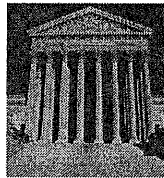
"If the parent did not wish a phone confiscated, they have the simple alternative of not allowing their child to take the phone to school, in violation of clearly stated school policy."



200

T.L.O. Remains the Touchstone

"[T]he legality of a search of a student should depend simply on the reasonableness, under all of the circumstances, of the search."



T.L.O., 469 US at 341

201

"All the Circumstances"

- *Who* is being searched?
- *What* are you looking for?
- *Where* will you look?
- *When* will you conduct the search?
- *How* will the search be conducted?
- *Why* conduct the search?

202

Lessons Learned

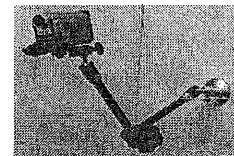
- Balance "danger" (*what* are you looking for) with "intrusion" (*where* are you looking)
- Address privacy concerns
- Obtain background information
- Carefully vet informants



203

Legal Issues

- Reasonable expectation of privacy?
 - Location
 - Activity
 - Notice
- Is it a search?
- Electronic eavesdropping
- Collective bargaining agreement



204

Public v Private Area

- Videotaping in public area is *not*
 - Violation of privacy right
 - Illegal search
- Public areas
 - Hallway
 - Bus
- Private areas
 - Locker room
 - Bathroom



205

Videotaping

Videotaping in public areas does *not* violate any constitutional right of privacy, nor does it constitute an illegal search or seizure.



US v Concepcion (CA 7, 1991)

US v Taketa (CA 9, 1991)

206

Brannum v Overton Cty Sch Bd 516 F3d 489 (CA 6, 2008)

- Video surveillance of locker rooms violated Fourth Amendment as an unreasonable "search"
- No immunity to principal and AP who installed the equipment and viewed/retained the tape



207

Reasonable Expectations

Students using the locker rooms "could reasonably expect that no one, especially the school administrators, would videotape them, without their knowledge, in various states of undress while they changed their clothes for an athletic activity."

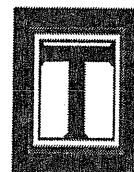


208

Brannum Court Ruling

"[A] person of ordinary common sense, to say nothing of professional school administrators, would know without need for specific instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty and that are grossly offended by their being surreptitiously videotaped while changing their clothes in a school locker room."

209



THRUN
LAW FIRM, P.C.

210

