



NJPSAFE

— LEGAL ONE —

Legal Issues in Social Media

David Nash, Esq.

LEGALONE Director

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Disclaimer

This presentation is intended as a summary of law only, and is not meant as legal advice. Please consult your attorney to obtain legal advice.



Overview of Topics

- Free Speech & Social Media
 - Student Free Speech Rights
 - Staff Free Speech
 - Social Media Laws / Regulations in NJ Public Schools
 - HIB, Cyberbullying and Investigations
 - Searching Electronic Devices

Student Free Speech

“I have a 1st Amendment Right to say whatever I want...”



Students vs. Staff Free Speech Rights

- First Amendment protects the right to free speech:
Congress shall make no law...abridging the freedom of speech.

However . . .

- Comparing penalties for students vs. school staff when it comes to “what one can say publicly” is like comparing apples and oranges...
- *Tinker* Rule vs. *Pickering* Balancing Test

Student Freedom of Speech

Tinker Rule: schools can restrict student expression only if the expression “materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.”

- Schools cannot silence “speech which does not disrupt the school environment and does not negatively interfere with the rights of others.”
- Schools cannot prohibit speech simply to avoid discomfort or unpleasantness, or because the point of view expressed is unpopular

What Student Speech is Protected?

- Speech that does not materially and substantially interfere with the operation of the school – VERY BROAD

What Student Speech is NOT Protected?

- Threats of violence
 - Communication takes many forms - words, symbols, clothing, etc.
- Promoting illegal drugs
- Lewd and vulgar language
- HIB that causes substantial disruption in school

April 2019 - 2 Students at a N.J. High School Charged With Jamming School's Wi-Fi to Avoid Exams

- Secaucus, NJ High School
- “Two 14-year-old boys were charged with computer criminal activity and conspiracy to commit computer criminal activity.”
- “Students interviewed Monday afternoon believe the boys used a Wi-Fi interrupter program, or an app, to send so much traffic to the routers that the system would crash, which ultimately caused connection failures when students tried to log on, do class work or take exams on their computers.”
- <https://www.nj.com/hudson/2019/04/2-students-at-a-nj-high-school-charged-with-jamming-schools-wi-fi-to-avoid-exams.html>

Penalties

When the culprits in any of these threat cases are identified and apprehended, they could be subjected to criminal charges for **terroristic threats**.

As set forth by N.J.S.A. 2C:12-3, a person who attempts to terrorize another individual or cause evacuation of a building can be charged with a **third degree felony and face 3-5 years in New Jersey State Prison upon conviction.**

Old Tweets...

April 26, 2018

- Josh Allen, QB for Wyoming – Top 10 Draft Pick of the Buffalo Bills
- Just prior to the NFL Draft, offensive tweets that on his account from when he was in high school were discovered
 - Contained racist and homophobic language
- Tweets are now deleted, but prior to deletion, were captured and circulated.
- Allen acknowledged the tweets, and explained that he was “young and dumb”.
- <https://www.msn.com/en-us/sports/nfl/allen-apologizes-after-offensive-tweets-from-hs-surface/ar-AAwmw2e>

On-Line Posting

- 11-21-2019 Article:
- An Illinois teen posted a photo of a black student on Craigslist with the caption 'slave for sale,' police say.
- Being investigated as a hate/bias crime.
- Disciplinary charges from the school would likely follow.
- <https://www.cnn.com/2019/11/21/us/naperville-student-hate-crime-charge/index.html>

Consider –

Can the School District Do This?

- Bridgewater-Raritan Public Schools
 - Students circulating “nude selfies” on a variety of social media sites, including their own smart phones.
 - Spring of 2014, the School District advised students (and their parents) to delete any student nude selfies by May 29, 2014.
 - The School District also involved local law enforcement officials due to concern that the nude photos violated local child pornography laws.
 - Discipline for a student’s failure to comply with this mandate could result in suspension, or not being allowed to attend the prom and/or graduation ceremonies

Staff Free Speech

Staff Speech Issues

“Pickering Balancing Test”

- Did the statement concern a matter of general public concern?
- Was the employee speaking as a private citizen or during the course of his duties?
- Was the statement likely to disrupt a close working relationship?

Pickering Analysis Questions

- Does the Speech Interfere with:
 - Employee's daily duties in the classroom?
 - Regular operation of the schools generally?
 - The working relationship between the speaker and the person or institution at whom the criticism is directed?
- Pickering v, Bd. Of Educ. Twp. High Sch. Dist. 205, 391 U.S. 563, 570-572 (1968)

Pickering Analysis Questions

- Teacher cannot speak in a manner that:
 - Is a reckless disregard for the truth;
 - Creates disharmonious relations in the workplace;
 - Undermines the immediate supervisor's discipline over the employee;
 - Compromises the loyalty and confidence required of close working employees.
- Pickering v, Bd. Of Educ. Twp. High Sch. Dist. 205, 391 U.S. 563, 573 (1968).

Speaking as a Teacher or a Citizen?

- “An employee does not speak as a citizen when he is acting pursuant to his official duties.”
 - Garcetti v. Celballos, 547 U.S. 410, 421 (2006)

O'Brien v. SOSD of Paterson, Superior Crt, Appellate Division,

Docket No. A-2452-11T4 – December 18, 2012

FACTS:

- 1st Grade Elementary School Teacher in Paterson
 - Class comprised of 6 year old students
 - All were either Latino or African-American
- Teacher posted 2 comments on Facebook:
 - “I’m not a teacher I’m a warden for future criminals!”
 - “They had a scared straight program in school why couldn’t [I] bring [first] graders?”
- Conduct Unbecoming Charges were filed
 - Teacher Defense:
 - First Amendment Protections – “Matter of Public Concern”
 - Charges were granted – Teacher was dismissed.
 - NJ Commissioner of Education upheld Teacher’s dismissal from her teaching position – Teacher appealed.

HOLDING: Affirmed. Teacher is Dismissed.

Using Social Media to Screen Job Applicants

- Employers can, and do, look to social media and other sources for information on prospective employees.
 - Criminal records
 - Financial information
 - Other publically available information

Using Social Media to Screen Job Applicants (Continued)

- P.L 2013, C. 155, Adopted August 28, 2013.
 - No employer shall require or request a current or prospective employee to provide or disclose any user name or password, or in any way provide the employer access to, a personal account through an electronic communications device.
 - No employer shall require an individual to waive or limit any protection granted under this act as a condition of applying for or receiving an offer of employment. An agreement to waive any right or protection under this act is against the public policy of this State and is void and unenforceable.

Using Social Media to Screen Job Applicants (Continued)

- No employer shall retaliate or discriminate against an individual because the individual has done or was about to do any of the following: a. Refuse to provide or disclose any user name or password, or in any way provide access to, a personal account through an electronic communications device; b. Report an alleged violation of this act to the Commissioner of Labor and Workforce Development; c. Testify, assist, or participate in any investigation, proceeding, or action concerning a violation of this act; or d. Otherwise oppose a violation of this act.

Using Social Media to Screen Job Applicants

(Continued) Pass The Trash

Effective June 1, 2018

- Addresses 20 Year Work History - Any Position Contact With Children
- Meets definition of HIB
- Must report any Child Abuse or Sexual Misconduct involving students where the employee was determined to have acted inappropriately or there is a pending/open investigation
 - Claims where the Employee was exonerated do not need to be reported
 - TBD re: prior settlement agreements
- School District Obligation to Check
- Past District Responsibility To Respond Contracted Workers Included in the Bill
 - Landscapers, Food Services, Transportation, Substitutes, etc.
- Emergencies.... 90 Days to Confirm
- (Civil & Criminal Penalties for Violation of the Law)



Email and Social Media – Who Can See Your Private Facebook Page?

- What is an employer allowed to look at regarding your social media use?
 - In Pietrylo v. Hillstone Restaurant Group, 2009 WL 3128420 (D.N.J.), two employees created a private MySpace page to complain about their workplace. A manager viewed the page without authorization from the employees, and fired the employees as a result of what they had posted. A jury concluded that the manager had violated the federal and state Stored Communications Acts by her unauthorized access to the webpage, and found in favor of the employees

Analysis – Since the Employer had forced her way into the private MySpace page that would have required authorization to view, her actions were deemed an invasion of privacy.

Email and Social Media – Who Can See Your Private Facebook Page?

- What is an employer allowed to look at regarding your social media use?
 - In Ehling v. Monmouth-Ocean Hospital Service, No. 2:11-cv-03305 (WJM) (D.N.J. May 30, 2012) (Slip Opinion), Ehling created a Facebook page, which utilized privacy settings. She “friended” several co-workers, thereby permitting these selected co-workers access to the Facebook page. One co-worker voluntarily provided the employer with screenshots of Ehling’s posts. As a result of comments posted by Ehling on the Facebook page, she was suspended. Since a co-worker, who had authorized access to Ehling’s Facebook page, had sent the unsolicited screenshots without any coercion or pressure to the employer, the employer had not committed an intrusive act.

Analysis – Unlike the Pietrylo case, the relevant information was provided to the Employer, and therefore the Employer’s action of disciplining the Employee for her “out of the office” personal Facebook postings was legally allowed.

Social Media & Student Speech

Issues in Social Media

- Staff Member & Student First Amendment Rights
- Privacy Interests
- Permissible Use
- Cyberbullying
- Curriculum and Instruction
- Criminal Issues

Social Media Laws

P.L. 2014, c.2 defines “electronic communication” as a communication transmitted by means of an electronic device including, but not limited to, a telephone, cellular phone, computer, computer network, personal data assistant, or pager.

Electronic Communications include, but are not limited to:

- ✓ E-mails
- ✓ Text Messages
- ✓ Instant Messages
- ✓ Internet Website Communications including Social Media and Social Networking Websites

Social Media, Staff & Students “Friending”

- Staff/Student boundary issues--
 - Community Culture
 - Blurring Roles/Favoritism
- Legislation requires School Districts to adopt policies concerning electronic communications between employees & students– P.L. 2014, Ch.2
 - Signed April 24, 2014
 - Implementation Deadline was August 20, 2014

Spanierman v. Hughes, 576 F.Supp.2d 292 (USDC Ct 2008)

Facts:

- Non-Tenured HS English Teacher used personal MySpace “Mr. Spiderman” account to:
 - “Communicate with students about homework”
 - “Learn more about the students so he could relate to them better”
 - “Conduct casual, non-school related discussions”
- Students complained – Guidance Counselor reviewed the account and discovered:
 - Pictures of students in close proximity to pictures of naked men with inappropriate comments beneath the pictures.
 - Inappropriate communications with students
 - “Very peer to peer like, with their personal problems”
 - Opined page was “disruptive to students”
- Teacher told the content was inappropriate
 - He deactivated the “Mr. Spiderman” account and created the nearly identical “Apollo 68” account
- SD discovered Apollo 68 account
 - Teacher placed on Administrative Leave with pay
 - SD did not renew Teacher’s contract
- Teacher sued – claimed violation of 1st & 14th Amendment Rights

Holding: Dismissed

Rationale:

- Nothing discussed on cite was a matter of Public Concern.
 - The material on the cite was disruptive to the SD’s learning environment.
- Teacher’s Due Process rights were not violated

Student Records NOT on the School Server

Emerging Problem

- Requirements that all communication between SD personnel and students/parents be done on the school server/using the school email system are not always followed
- Particularly becoming problematic in Special Education area
 - Teachers / staff are communicating via personal texts and/or emails
 - When legal proceeding occurs (Due Process Hearing, etc.), SD is obligated to turn over all of the students' records.
 - Since staff has communicated with parents/students via personal texts / off of the school server, the SD is not aware of these communications and fails to produce them
 - Parents know they exist and demand them
 - Teacher / staff member must now turn over personal cell phone / account information
 - SD may be subject to sanctions for failing to produce required records
 - SD is blind sided – it might have done something differently if it had seen these communications
 - Teacher / staff member may be subject to disciplinary action for failing to follow SD directives re: communications
- Note
 - If you do not want to your superior to view a communication that you are having with a student / parents, that communication is INAPPROPRIATE.
 - SD 's are responsible and held legally accountable for the actions of its staff.
 - SD has a right and obligation to be able to view ALL communications between staff and students/parents.

Sarmiento v. SD Twp of Saddle Brook

8/31/17

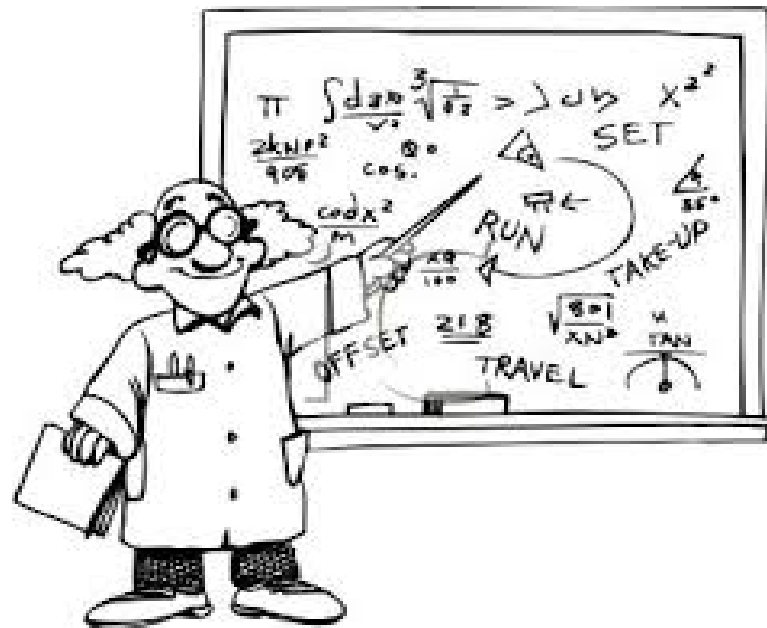
FACTS:

- Teacher/Coach accused of improperly communicating with students via text and improperly using her phone during class time
- Teacher/Coach accused of getting rid of her cell phone when she knew tenure charges were going to be brought against her for improper use of the phone in violation of SD policies

HOLDING / Discipline:

- Spoliation imposed against teacher
- 120 Suspension

A Good / Bad Summary Case



Miguel v. Mahwah BOE

11/16/18 - #373-18

FACTS: SD filed CU Charges against tenured English Teacher / SGA Advisor

SD Allegation Summary – The Teacher...:

1. Shared sexually explicit personal blog with his Supervisor;
2. Discussed a personal sexual act of his with students and jokes about a “stereotypical gay car”;
3. Was intoxicated at a graduation party where minor students drank alcohol;
4. Swore at students, called them “nerds” and stated that he preferred “C” students to “A” students that are a****les;

SD Allegation Summary – The Teacher...:

5. Told a student that he had slept with opposing SD’s soccer team’s coach;
6. Made inappropriate comments regarding male genitalia to SGA Officers in referencing school organization acronyms
Student Activity Counsel (“Holding the SAC”)
Class Officer Council (“Grabbing the COC”);
7. Was excessively tardy/absent, and appropriate notice of same
Missed leave time for a Field Trip
Missed scheduled, planned observation
Unreported tardiness resulted in a classroom to be unattended for 33 minutes
Documentation – Notice of Concern, Level 1 & 2;
8. FERPA Violation
Took pictures of students in school without their consent
Inserted captions on the picture
Texted the image to other students in the SGA Group Chat

Miguel v. Mahwah BOE

11/16/18 - #373-18

FACTS: SD filed CU Charges against tenured English Teacher / SGA Advisor

SD Allegation Summary – The Teacher...:

9. Transmitted a provocative/sexually suggestive picture of a man lying down with his shirt off, and his lower half covered with a blanket, by text message to approximately 5 students / “SGA Fam Senior” Group Chat
 - Inappropriate Content / Action;
 - Violated Electronics Policy 3283
10. Encouraged/texted students to violate Administrative Directives regarding a planned “walk-out” in response to the Parkland tragedy
 - Impact student / building safety;
 - Violated SD policy – “text messaging communications between a teaching staff member and an individual student are prohibited.”
11. Acted inappropriately collectively and individually when he made inappropriate comments to students;
12. Pattern of aforementioned behavior warrants dismissal.

All charges sustained except #7.

“The sustained charges in their totality warrant a finding that the [teacher] engaged in conduct unbecoming and support a determination that there is just cause for dismissal.”
Teacher did not appear remorseful for his behavior.

“While some of the individual charges would each independently warrant termination, there is no need to make that determination because it is abundantly clear that, taken as a group, the charges demonstrate conduct unbecoming ... and just cause for the [teacher’s] dismissal.”

Food For Thought...

- Be careful about what you / your staff post on-line **in any forum** (Facebook, Article Comment Section, emails, texts, etc.)
 - Are the pictures / comments too provocative, divisive or sexual in nature?
 - Could your post pass the “Grandma Test”?
 - Ask how your comment / post could affect your students / staff – will you appear to have a bias?
 - Are you / your staff willing to accept the consequences for posting whatever you want?
 - Are you creating a “virtual presence” with your electronic posting / communication?
 - Massachusetts Teen Suicide Case
 - Remember - Items posted “over the summer” or “during a school break” can still be an issue at school...
 - Would you want someone that sees you in a vulnerable position to be able to post information about you because it amuses them? Consider your doctor, lawyer, boss, co-workers, etc.

Common Employee Defenses

“I didn’t mean it” / “I was joking around”

Generally – this defense does not work.

If you violate the *Pickering Test*, your speech is not protected.

March 17, 2019 – School Clerk’s Racist Tirade Caught on Video in Supermarket

- A Connecticut Public School Clerk in the Central Office resigned after videos of her using racial epithets towards two people in a grocery store went viral on Facebook.
- The Clerk, who is white, is shown yelling the “n-word” 3 times and spitting at 2 people, a black man and a woman.
- The School District posted a statement about the incident on its website:
 - “We have become aware of video footage that appears to show an employee in our district engaged in abhorrent conduct. Specifically, the video appears to show the employee repeatedly calling an African-American man the N-word in a supermarket in East Haven,”
 - “The video also appears to show the Hamden employee spitting at the aforementioned African-American male as he was walking away from the employee. It also appears that the employee’s children witnessed her conduct. Because her children were present, school administrators filed a DCF report,”
 - “While it appears as though this happened after work hours on Friday evening, the Human Resource Director contacted the employee and arranged an investigatory meeting with her. Shortly after final arrangements were made for the investigatory meeting, the employee rendered her resignation effective immediately.”
 - “The language the employee used in the video is in conflict with the values of the Hamden Public School System,” the district’s statement said. “Someone who will use that sort of language in any setting, whether public or private, is not someone we want anywhere near our children. The employee is separated from service, and we hope that her children will receive the support they need after witnessing such a traumatic event.”
- <https://www.msn.com/en-us/news/us/hamden-school-employees-racist-tirade-caught-on-video/ar-BBURsQM?ocid=spartanntp>

December 2018 – Teacher Mistakenly Showed Porn On School Projector

- Texas Computer Science Teacher mistakenly showed a pornographic image on a classroom projector
- A search of his District-owned equipment (laptop, iPad) allegedly revealed:
 - 4 short videos depicting a 10 year old girl in a bathroom
 - The girl was later identified and indicated that she had been unaware that she was being recorded.
 - Browsed pornography using both Chinese and Japanese terms translated to English meaning “school masturbation”, “teen scandal”, “webcam underwear teen” and “teen video chat”
- Teacher has been arrested on Child Pornography Charges and has resigned from his position with the School.
- <https://nypost.com/2018/12/03/teacher-arrested-for-child-porn-after-accidentally-showing-class-x-rated-image-cops/>

Halloween Costume – 10/31/18

- Idaho Teachers investigated for dressing up as “border wall” for Halloween
- Posted on SD’s Facebook page
- https://www.washingtonpost.com/nation/2018/11/03/these-school-teachers-dressed-up-mexicans-wall-halloween-it-didnt-go-well/?utm_term=.ee86400c86dd



Sports Commentary

- September 18, 2018
 - Superintendent posted on his Face Book page:
 - ... football fans “can’t count on a black quarterback.”
 - Comment was made in regards to Texans Quarterback Deshaun Watson
 - Superintendent claimed “... he thought he was responding to a private message from a friend and did not know his comment had been posted publicly.”
- September 22, 2018
 - Superintendent resigns
 - <https://www.cbsnews.com/news/lynn-redden-texas-superintendent-resigns-after-black-quarterback-comment-2018-09-22/>

April 2017 – Woodbridge Teacher

- 30 year HS Math teacher fired by the SD for misconduct, including calling students “losers” on Facebook
- State Board of Examiners issued a two-year teaching certificate suspension
 - Hearing had been held before the State Board of Examiners in 2016.

Scenario 1

- Mr. Smith, a science teacher in the Pleasant School District, uses a website outside his school district that facilitates chats among defined groups of persons, and invites all of the students in his science classes to join his group. Mr. Smith believes this will allow him to respond to questions about course materials and class assignments to all students at one time, and that it is thus efficient and permissible. Is Mr. Smith correct?

Student Classroom Privacy and Confidentiality Issues



Social Media in the Classroom

- See article at the below link
 - *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices*
 - Published by the Privacy Technical Assistance Center
 - <https://tech.ed.gov/wp-content/uploads/2014/09/Student-Privacy-and-Online-Educational-Services-February-2014.pdf>

School Issued Technology

- School Issued Technology Items are the property of the SD. Such items include but are not limited to:
 - Laptops
 - IPADs / Chromebooks
 - Cell phones
 - Any Electronic Device
 - Anything Done on the SD Internet Server
- These items are NOT personal property
 - SD has the right to confiscate at any time
 - SD has the right to see everything for which they were used
- **YOU HAVE NO EXPECTATION OF PRIVACY WITH THE USE OF SD DEVICES**

Problem

- SD has obtained parental permission to use the images / personally identifiable information for **SD Purposes**
- Teachers/staff **incorrectly** believe that since the SD has obtained this consent, the teachers, as individuals, also have permission to post / use the information
 - While the SD has permission to use the information for SD purposes, the individual teacher **does not** have permission to use the information for non-SD purposes
 - **Examples**
 - Posting pictures of her class/students on **personal** Face Book, Twitter or other on-line accounts
 - Posting team pictures in any forum other than a SD sanctioned location
 - Having pictures of students on their personal phone
 - Unauthorized videoing of students
 - » Videoing aspect not contained within approved lesson plans

Social Media in the Classroom

BEWARE OF FREE APPS

- Teachers now commonly use Apps as part of their classroom technology
 - Example – Class DoJo
- Questions
 - Has the teacher reported the use of such Apps?
 - Monitoring usage?
 - Accessibility of Passwords by SD?
 - Privacy Issues?
 - Student data issues?

Social Media in the Classroom

“Cloud” Contracts

– Security Issues

- FERPA Compliance
- Reporting Data Breach Policies
- Back Up Systems
- When “fine print” terms will be modified
 - The “terms are subject to change” clause...

Being Proactive... A Checklist

- Develop Board Policies and Procedures on:
 - Social Media Use Parameters
 - Bullying & Cyberbullying
 - Searching Electronic Devices
 - Contacting Law Enforcement
 - Addressing Teen Dating Violence
- Develop a Social Media Safety Curriculum
- District Oversight
- Professional Development
 - All Staff (administrators, teachers, other staff)

Things to Remember

- Because of your job, you know a lot about people including “personally identifiable information” such as:
 - Names
 - Parent / Family Member Identities
 - Family History
 - Addresses
 - Both home and facility locations
 - Personal Identifier ID’s
 - Social Security Number
 - Facility ID Number
 - Physical Appearance
 - Crimes Committed and any Affiliated Information
 - Medical Conditions / Disabilities
 - Any information that, alone or in combination, is linked or linkable to a particular person that would allow a reasonable person in the community to identify that individual

Things to Remember

- You do not have the right to use students', colleagues', subordinates' personal information / photos / audio for your personal amusement / venting session / workplace complaints
 - Violations could subject you to Civil Rights Claims
 - Violations could result in disciplinary measures being taken against you
- Federal / State law, and SD policies require that you protect the privacy rights of these individuals
 - Things that are allowed to be made public about these individuals will be done so in the proper forum(s) by the appropriate staff member(s) in compliance with the law.

Things to Remember: Do's and Don'ts

- **Do's**

- **Do** use separate personal and professional social media accounts.
- **Do** make sure you have strict privacy settings and review those settings frequently.

- **Don'ts**

- **Don't** say anything on your social media profile (personal or professional) that you wouldn't say in class.
- **Don't** chat with students on your personal profile.
- **Don't** chat with students unless it is in accordance with a school sanctioned policy and on a school sponsored platform.
- **Don't** share too much. Personal pictures should not be on your professional profile.

HIB & Cyberbullying



Bullying and Cyberbullying

- Schools have a duty to address harassment, intimidation and bullying that occur on and ***off*** school grounds
 - *Off school grounds*: if the HIB causes material and substantial disruption to the school environment
- Schools have a duty to do whatever is reasonable to STOP harassment, intimidation and bullying
 - *L.W. v. Toms River Reg'l Bd. of Ed.* (N.J. 2007)
- Anti-Bullying Bill of Rights Act of 2011 has reporting & investigation procedures

HIB Code Amendments – Effective July 1, 2018

Topics

- Initiation of HIB Investigation
 - Does your SD have an approved revised policy?
 - Is it posted on the SD website?
- Role of Approved Private Schools with Disabilities
 - Is this being followed? / Who is investigating?
- Taking Into Account the Circumstances of Incident when Contacting Parents
- Timeline for Parental Appeals
- School Safety / Climate Team
- Recognition of Power Imbalance
 - “Power Imbalance” is NOT a Distinguishing Characteristic by itself
 - If you can identify a Power Imbalance, then you should be able to identify the characteristic(s)
- Conflict of Interest
- Student with Disabilities

Immunity For Reporters



- Staff members who report suspected child abuse, **HIB**, drug & alcohol use & teen dating violence are immune from legal liability

Definition of Harassment, Intimidation, or Bullying

“Harassment, intimidation or bullying” means:

- Any gesture
- Any written, verbal or physical act, or electronic communication
- Whether it be a single incident or a series of incidents
- That is reasonably perceived as being motivated either by any actual or perceived characteristic
- That takes place on school property, at any school-sponsored function, on a school bus, or off school grounds

Definition of Harassment, Intimidation, or Bullying

The HIB must *substantially disrupt or interfere* with the orderly operation of the school or the rights of other students and:

- A reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
- Has the effect of insulting or demeaning any student or group of students; or
- Creates a *hostile educational environment* for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

Other Potential Characteristic Examples

- Height, intelligence and sports proficiency
 - *C.C. o/b/o S.C. v. BOE Twp of Jefferson*, EDU 10872-14 Initial Decision (April 6, 2015) aff'd Commissioner (May 12, 2015)
- Vegetarianism
 - *G.C. o/b/o v. BOE of Twp of Montgomery*, Commissioner 2016: April 22
- **A Distinguishing Characteristic is NOT a dispute between students such as:**
 - A relationship falling apart between former friends
 - A fight over a piece of property
 - Some form of personal vendetta of one against another
 - *L.P. and H.P. o/b/o . BOE of West Morris Reg. HS District*, EDU 04462-16, Initial Decision (June 10, 2016)

Bullying and Special Education

- If behavior would otherwise be HIB, still must classify as HIB even if behavior is manifestation of student's disability
- Need to consider student's disability when determining discipline, remediation or other response to HIB
- ***Need to convene IEP Team in all cases where HIB is confirmed and student with disability is the victim***

HIB & Free Speech

“Substantial Disruption Link”

Consider

- Under both Tinker and Pickering, in order to regulate the speech of students / staff members, the SD must show a “substantial disruption” within the SD to bar the speech / action.
- Under the ABBR, one of the required elements is a “substantial disruption” to the victim of HIB.
- If there is a HIB finding resulting from the speech of a student/staff member, the SD has already established the “substantial disruption” element regarding Free Speech issues.

Student Free Speech: Cyberspeech

- High school student created fake website profile outside school that portrayed principal as drug & alcohol abuser, sex addict, thief; site had open access to viewers; student was disciplined with suspension
 - Discipline was held to violate 1st Am. right of expression because site had not substantially disrupted school
Layshock v. Hermitage Sch. Dist. (3d Cir. 2011)
- Middle school student created website profile of principal with lewd language with limited access to viewers; student disciplined with suspension
 - Suspension held to violate student's right of expression because it didn't cause substantial disruption in school
J.S. v. Blue Mountain Sch. Dist. (3d Cir. 2011)

Cyberbullying

Dunkley v. BOE of Greater Egg Harbor SD, 2016 WL 6134518 (D.N.J. 2016)(Oct. 20, 2016)

- HS student claimed 1st Amendment Right Defense after SD suspended him and filed a formal juvenile complaint with the Prosecutor’s Office
 - Out of School YouTube Videos
 - Out of School Twitter Posts
- SD determined HIB
- District Court held that the student’s speech constituted HIB, and that the school was required by the Anti-Bullying Act to regulate such speech.

W.D. and J.D o/b/o G.D. v. Bd. Of Ed. of Twp. of Jefferson – Comm. 11/26/18

- Commissioner determined that BOE finding of no HIB was not arbitrary, capricious or unreasonable.
 - Board determined that students were mutually engaged in conflict.
- Online exchange among a group of fifth grade female friends;
 - Extraordinarily offensive and vile language towards each other;
 - Egregious words, sexual references, use of the “N word”.
 - Girls, including victim, viewed it as “pranking”.
- No showing of substantial disruption or interference with student’s rights or academic program

E.W. and D.W. v. Bridgewater-Raritan BOE (October 23, 2017)

- Superintendent has the authority to reject a decision of the Anti-Bullying Specialist.
- In this case, superintendent rejected finding of no HIB.
- Presented finding of HIB to the Board, and Board affirmed.
- Case involved two 7th grade students in social studies class.
 - Students were cutting and pasting.
 - A.W. said to J.S., who was a Jewish student, “if you throw those scissors at me you are going back to the concentration camp.”
 - J.S. then stabbed A.W.’s water bottle.
- ABS had found it was a code of conduct violation and not HIB.
- Superintendent disagreed.

Lessons from Recent Case Law

- If there is alleged cyberbullying, engage in due diligence to determine source – S.J. v. Plumsted SD (Nov. 22, 2016)
- The Road to HIB may be paved with good intentions! (K.C. v. Montgomery Twp. SD, Aug. 11, 2016) – Expressing concerns about friend and possible eating disorder
- Distinguishing characteristics are defined very broadly (e.g., vegetarianism, sports proficiency...)
- If the target is resilient, the behavior may not be HIB (D.K. v. Readington SD , Nov. 11, 2016) – Asian student targeted, but no substantial disruption)

On-Line Posting

- An Illinois teen posted a photo of a black student on Craigslist with the caption 'slave for sale,' police say.
- <https://www.cnn.com/2019/11/21/us/naperville-student-hate-crime-charge/index.html>

Pending Legislation – Mallory’s Law

SENATE, No. 3433

SYNOPSIS -

- Introduced February 7, 2019
 - Revises provisions required in school district’s anti-bullying policy;
 - Provides for civil liability of parent of minor adjudicated delinquent for cyber-harassment or harassment; and
 - Increases certain fines against parents.
- https://www.njleg.state.nj.us/2018/Bills/S3500/3433_I1.PDF

Sharing HIB Records

- What does the parent have a right to know?
- How about the teacher of the victim? The aggressor?
- Who else has a right to know?
- Key test – who has a “legitimate educational interest”?

HIB Case Law – Access to Records

- J.L. v. Bridgewater-Raritan Regional School District, 2018 WL 4997195
- Appellate Division, in an unpublished opinion, determined that a district violated parent rights and directed that parents of student found to have engaged in HIB must be provided with
 - *“the full record of the HIB allegations ... including the underlying investigative report, [and] any additional written reports or summaries, and the letter from [the victim’s] parents to the superintendent.”*

HIB Case Law – Access to Records

Letter to Wachter, December 7, 2017

- Pennsylvania school district was advised by the U.S. Department of Education Office of the Chief Privacy Officer that a parent had a right to inspect video footage showing her son's role in an on-campus hazing incident, even though the parents of other students did not consent to disclosure of their child's images in the video.

Reporting Suspected Bias-Related Acts and the Link to Suspected HIB

- Must report to local law enforcement and bias investigation officer for county prosecutor's office whenever school employees "develop reason to believe a bias-related act has been committed or is about to be committed."
- "Bias-related act" means any act "that is motivated in whole or in part by racial, gender, disability, religious, sexual orientation, or ethnic prejudice."
- Includes any allegation of HIB involving one of the above protected classes.
- See N.J.A.C. 6A:16-6.3(e)

Scenario 2

- Two students in the Anywhere School District create a website on which they post their thoughts about fellow students and teachers. The thoughts are derogatory, insulting, and include fabricated information about both students and staff. When confronted by the school principal about the website, the students claim the website is maintained as a joke, and that they don't mean anyone harm.
- Can the students be disciplined and/or have a HIB claim filed against them based on the contents of the website? Why or why not?

Investigating HIB Incidents



Investigation Steps



- HIB complaint filed (Staff must report incident on day it occurs, follow up in writing)
- Assess whether to initiate HIB investigation (if in local BOE policy)
- Principal initiates investigation and responds to Code of Conduct issues (Key Q - Is this an allegation of HIB?)
- Parents of both parties notified by principal
- ABS leads investigation (10 school days to complete)
- ABS writes HIB Report (within 2 school days of completing investigation)

Investigation Steps



- Superintendent signs off on HIB response
- Board informed of incident
- Parent/Guardian notified of outcome, right to hearing
- Hearing occurs if requested
- BOE votes to affirm, reject or modify
- Parent retains rights to appeal, pursue other legal avenues

Interview Standards

- Conduct interviews in private
 - Location should be considered before proceeding
 - Keep in mind risks of interviewing persons of the opposite sex in private (i.e. students)
- Limit distractions
 - Number of distractions can be limitless, make every attempt to minimize them
 - Be aware of surroundings, keep yourself safe
- Interview only one person at a time
- Do not be intimidated
- Follow board of education and school procedures

Examples of Questions

Good questions

- Tell me what happened
- What happened after the teacher left
- What do you think their intention was
- Tell me in your own words what happened
- What did you do next/what did they do next

Not so good questions

- Tell me about the incident you saw at 1pm in the classroom
- This happened in the hallway, right?
- (person) has been mean to you for years, correct

Points on Investigation/Reports

- Good practice to get written statements from alleged aggressor, victim, sometimes witnesses in advance
- Time is critical – talking to students right away is best chance to get accurate information
- No need for prior parent notice or permission
- Critical to be precise in any email communications with parents and not respond with partial information

Investigation Points (cont'd)

- Reports should address all elements in HIB definition
- ABS needs to do report and reach conclusions whether HIB occurred
- Reports need sufficient information to stand on their own, withstand legal challenges
- Advocates and attorneys may be able to compare HIB reports and make an issue where some reports are less detailed than others

Investigation Points (cont'd)

- ABS is lead investigator, needs to be present for key interviews
- Should be clear record if others are appointed by principal to assist with investigations
- Should specify who was interviewed
- Should specify other evidence reviewed
- Allegations listed in report should specify the actual or perceived characteristic involved
- Allegations should be detailed enough to provide clear picture

Investigation Points (cont'd)

- Better to list all allegations numerically, rather than in narrative form, and respond to each
- There is a difference between factual findings and legal conclusions
 - Students were engaged in conflict, not HIB, is a legal conclusion
- (In companion report) important to identify remedial measures taken for alleged aggressor and victim, if any, and be specific
 - (not just “counseling” but meeting with counselor weekly for a month)
- (In companion report) Identify steps taken to work with parents

Investigation Points (cont'd)

- Standard of proof is “preponderance of the evidence” or “more likely than not”
- Permissible to conclude that one student’s version of events is more credible than another student
- No need to have “smoking gun” to reach conclusion
 - Do not need confession or print out from student who allegedly posted comment online

Checks and Balances

- Good practice to have a second staff person present during interviews
- Good practice to sit in on ABS interviews AND review reports from ABSs at other schools in the district
- Important that ABS and Principal each have a critical eye and challenge each other's assumptions and biases, rather than waiting for outside challenges
- Build in time to share draft reports with Anti-Bullying Coordinator for additional feedback prior to submitting final report
- Reopen investigations and revise reports in response to new information
- Be prepared for an ABS Conflict of Interest

Searching Electronic Devices

Case Law – U.S. Supreme Court

Riley v. California 134 S. Ct. 2473 (2014)- Law enforcement may not search a cell phone without a warrant, absent exigent circumstances

RATIONALE: *Cell phone searches are like searching a house years ago.*

The "smart phones" that exist today were not conceived of at the time of Chimel. Cell phones can store a large quantity of text, pictures, videos and information, that can date back many years.

The scope of privacy interests are further complicated by the fact that the data on many modern cell phones may be stored on a remote server. Today, searching a cell phone is akin to searching a person's home.

It is permissible to search the physical phone itself or its casing, as that may be used as or could conceal a weapon. However, the "data" on the phone cannot endanger an officer.

Searches and Seizures of Students

- Fourth Amendment to Constitution protects against unreasonable searches and seizures:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....
- This applies to public school districts

Interviewing Students

- School districts have the right to interview students **WITHOUT** prior parent permission – Goss v. Lopez, 419 U.S. 565 (1975) Supreme Court case

Searches and Seizures of Students

When can school officials search students or their belongings?

School legal standard = reasonable suspicion

Law enforcement standard = probable cause

TLO v. New Jersey (1985)

Search and seizure regulation - N.J.A.C. 6A: 16-6.2(b)(5)

NJ Requirements for Searches

- Must have specific procedures and persons responsible
- Questions should be directed to county prosecutor (and board attorney)
- May request that law enforcement assume responsibility (but ...)
- May not impede law enforcement involved in lawful search, seizure, arrest (even without warrant)
- Permit law enforcement to assume responsibility upon arrival
- See N.J.A.C. 6A:16-6.2(b)5

Memorandum of Agreement

- MOA is between school officials and law enforcement
- MOA & school searches - school officials can search without a police officer present
- If school officials search at the request of law enforcement, OR if SRO is part of the search, then schools are held to “Probable Cause” standard
- If CDS/firearms/drug paraphernalia found, must notify police
- Only turn over vaping devices IF there is reasonable suspicion they are being used as a nexus for inhalation of marijuana or other CDS
- If officials request drug-detection canines, need permission of county prosecutor
 - *See September 2018 Article: “Lawyers Say Dogs Sniffing School Property Permissible” - <https://ncadvertiser.com/129107/lawyers-courts-say-dogs-sniffing-school-property-permissible/>*

Initiating a Search

Can you identify:

- Reasonable grounds, based on totality of circumstances
- Law or rule has been broken
- Particular student(s) committed infraction
- Whether suspected infraction involves physical evidence
- Sought-after evidence may be found in particular place
- Ask:
 - Why on this day, do I believe that I need to do a search involving this student?
 - What are you looking for?
 - Ex.: Cigarettes vs. Vaping Materials
 - Do you have a separate SD policy for vaping?

Special Rules for Searches of Persons

- Greater expectation of privacy
- More likely to be sustained if item in question poses danger to students (drugs, weapons)
- Need a search plan
- No strip searches!

Consent to Search

- Not needed if deny ownership or item abandoned
- Must be knowing and voluntary
 - Best to get it in writing, although not mandated
- Not voluntary if student feels you will do search anyway
- Student must have authority to give consent
 - Can't give consent to search someone else's bag
- Refusal to give consent not evidence of guilt

Searching Electronic Devices - Case Law

Klump v. Nazareth Area School District, PA

425 F.Supp.2d 622 (2006) (3rd Circuit)

- **Facts: Teacher and A.P. confiscated student's cell phone because he displayed it during school hours, in violation of district policy.**
- **School officials then:**
 - **called nine other student listed in the phone's directory to determine whether they were also violating the school's cell phone policy;**
 - **accessed student's text messages/voicemail; and**
 - **instant-messaged the student's younger brother without identifying themselves.**

Klump v. Nazareth Area School District, PA

425 F.Supp.2d 622 (2006) (3rd Circuit)

- District sued for invasion of privacy and for violating state wiretapping laws.
- HELD: The court concluded that the search violated the student's Fourth Amendment rights, pointing out that school officials "*had no reason to suspect at the outset that such a search would reveal that [the student] himself was violating another school policy; rather, they hoped to utilize his phone as a tool to catch other students' violations.*"

Cell Phone Searches Case Law

G.C. v. Owensboro Public Schools, 711 F.3d 623 (6th Cir. 2013).

Facts

- School officials took away a student's cell phone after seeing him text during class.
- The administrator claimed she was concerned because of the student's history of suicidal thoughts and drug use.

Holding

- SD violated the boy's Fourth Amendment rights by proceeding to read all the text messages on his phone.
- Court also determined that the school didn't have to search the phone's contents in order to find evidence that the student had broken the no-texting rule, and the school had no information to suspect that he was guilty of other misconduct.

Cell Phone Searches Case Law

- After receiving a report that a student may have been smoking marijuana on the school bus, school officials violated the boy's privacy rights by going through his phone. As the judge saw it, the phone wasn't related to the search for marijuana because it couldn't contain drugs. (Gallimore v. Henrico County School Bd., 38 F.Supp.3d 721 (E.D. Virginia 2014).)
- In another case where school officials confiscated a student's phone for violation of school policy on cell phone use—then searched the phone, found seminude pictures of the girl, and sent the phone to police—a federal judge ruled that she could pursue a lawsuit against the school. (N.N. v. Tunkhannock Area School Dist., 801 F.Supp.2d 312 (M.D. Pa. 2011).)

Scenario 3

- Mrs. Williams is the principal of the Somewhere School. Mrs. Williams heard a rumor that Susie threatened to harm several students, and may have provided details of her plans in text messages to her friend Steve. Mrs. Williams calls Steve to her office and demands to see his phone to review text messages. Steve feels he has no choice and provides the phone. Mrs. Williams then searches Steve's text messages, photos and email and, while seeing no texts from Susie about harming other students, finds pictures of Steve and two friends, Mark and John, vaping at the school's football field. Mrs. Williams then suspends the three students for violating the school's vaping policy.
- Was Mrs. Williams allowed to search Steve's phone as she did?