

## Social Networking – Legal Implications in School Operations

October 21, 2013

Lisa O. Stump  
Lashly & Baer, P.C.



### I. Student Discipline for Off-Campus Conduct Occurring on Social Networking Sites

### II. Employees and Social Networking

### III. District Use of Social Networking



## Student Discipline for Off-Campus Conduct Occurring on Social Networking Sites

### Substantial Disruption

Cases involving social networking sites; including parody websites critical of school and staff or containing lewd or violent information.

Primary First Amendment Supreme Court Cases Involving Students (where threats not involved): **Tinker** and **Fraser**

- **Tinker v. Des Moines Independent Community School District**, 393 U.S. 503, 506 (1969) (invalidating disciplinary action against students for wearing black armbands to protest the Vietnam War)
- **Bethel School Dist. No. 403 v. Fraser**, 478 U.S. 675, 683 (1986) (upholding disciplinary action against student for delivering assembly laden with sexual innuendo)



## Substantial Disruption (cont.)

**Tinker** set forth the following criteria to describe student conduct that would merit school discipline:

- Conduct that would cause material and substantial interference with school work or discipline, or
- Conduct that would materially and substantially disrupt the work and discipline of the school, or
- Conduct that might **reasonably have led school authorities to foresee** substantial disruption of or material interference with school activities. – **FACTS!!!**

**Most Courts reluctant to expand Fraser to off-campus activities.**



## Where Threats are Involved – Courts May Apply the “True Threat” Doctrine

1. Exception to the First Amendment protection where “true threats” are concerned. **Watts v. U.S.**, 394 U.S. 705 (1969)
2. Supreme Court has described “true threats” as “those 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 U.S. 343 (2003)



## The Test Is:

1. Whether the student's statements on a website constitute true threats as viewed by a reasonable person. If they do, the speech is not protected by the First Amendment.
2. The speech must be knowingly communicated to the object of the threat or to a third person.



## Case Review

State of the law and the analysis remain as described in the Hannibal School District case, discussed in the next 3 slides.



## Case Review (cont.)

**D.J.M. v. Hannibal Public Sch. District**, No. 10-1428, 2011 WL 3241876 (8th Cir. Aug. 1, 2011)

On October 24, 2006, Plaintiff student was chatting online via “instant message” on a computer in his home with a classmate. During the course of their conversation, Plaintiff told the classmate that he was going to get a gun and kill certain classmates. The classmate forwarded his statements to school administrators within hours.

Plaintiff was arrested by police for making those threats and was admitted to the psychiatric ward of the Lakeland Regional Hospital. Plaintiff was a sophomore in Hannibal Public School District at the time of the alleged threats. On October 31, 2006, the District suspended Plaintiff for ten days for his threatening communications. On November 3, 2006, the District’s Superintendent extended Plaintiff’s suspension through the end of the 2006-2007 school year.

Plaintiff’s parents appealed the suspension to the District’s Board of Education (“the Board”). On February 21, 2007, the Board conducted an appeals hearing. On March 1, 2007, the Board upheld the decision to suspend Plaintiff until the end of the school year.



## Case Review (cont.)

**D.J.M. v. Hannibal Public Sch. District (cont.)**

The Court of Appeals applied both the “true threats” test as well as the Tinker standard to the facts of the case and found under both that the District did not violate the Plaintiff’s First Amendment Rights.

### True Threat

1. Plaintiff’s references to targeted classmates were hate-filled comments (e.g., midgets and fags).
2. Plaintiff’s statements that five specific named individuals “would go” were real cause for alarm, especially since talked about borrowing a 357 magnum from a friend.
3. The reaction of those who read his messages was evidence that his statements were understood as true threats (e.g., “serious stuff” and “sounds serious to me”).



## Case Review (cont.)

**D.J.M. v. Hannibal Public Sch. District (cont.)**

### Substantial Disruption

1. The Court held that “it was reasonably foreseeable that Plaintiff’s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment.”
2. School officials had to spend considerable time dealing with parent concerns and ensuring that appropriate safety measures were in place.
3. The Court held that off-campus speech can be regulated under Tinker.



## Obscenity

Obscene material is unprotected by the First Amendment. Miller v. California, 413 U.S. 15, 23 (1973).

Elements of obscenity: (1) “whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest”; (2) “whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”; and, (3) “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” Id. at 24-25.



## Student Discipline for Off-Campus Conduct Occurring on Social Networking Sites - Summary

1. **Tinker Standard** – Substantial and Material Disruption
2. **True Threat Doctrine**
3. **Case law continues to emerge**
4. **Fact Intensive is KEY**
5. **Obscenity**



## Cyberbullying

1. **No explicit definition (See Section 160.775)**
2. **Generally, causing intimidation or harassment through the use of technology – on the Internet, social networking sites, texting, cell phones, emails**
3. **Lots of different forms**
  - a) **Direct threats**
  - b) **Constant negative or disparaging comments**
  - c) **Bashing websites, etc.**
4. **On campus cyberbullying**



## Off-Campus Bullying

1. **Respond to all complaints!**
2. **Discipline student?**
  - a) **Substantial and material disruption to school environment.**
  - b) **Need nexus between off campus behavior and school disruption.**
3. **Other options**
  - a) **Notify parents – inform them of what consequences can be**
    - **Crimes of harassment, stalking**
  - b) **Talk to SRO/Police**



## Employees and Social Networking



## Electronic Communications

1. **2011's Amy Hester Act** – limiting the type of interactions that teachers in Missouri can have with their students via social networks. On August 26, 2011, a Cole County Circuit Judge issued a preliminary injunction against the law, calling it a staggering prohibition of free speech rights.
2. Section 162.069 of the Act was placed on the September 6, 2011, General Assembly Special Session Agenda, providing:
  - Every school district shall, by March 1, 2012, promulgate a written policy concerning employee-student communication. Such policy shall include, but not be limited to, the use of electronic media and other mechanisms to prevent improper communications between staff members and students.
  - Recent amendment for charter schools



## Electronic Communications (cont.)

3. **Check your Policy** (might be separate electronic communication policy or in staff/student relations). Standard provisions relating to students may include:
  - a) Definitions for “staff” or “employee” (may include any individual employed by the district) and “communication”
  - b) Nothing prohibits use for educational purposes (defined in policy)
    - An activity reasonably considered to be a part of the employee's duties in the district
    - May include coordination of an extracurricular activity, depending on employee's job description



## Electronic Communications (cont.)

- c) Some policies put time limits on communication for educational purposes, or require it be on a district provided device, or if not, require supervisor authorization.
- d) The district discourages staff members from communicating with students electronically for reasons other than educational purposes.
- e) When the communication is not for educational purposes, and if concerns are raised, the staff member must be prepared to articulate the reason for any deviation from the requirements of this regulation and must demonstrate that the staff member has maintained an appropriate relationship with the student.
  - Employees are encouraged to consult with their supervisors prior to engaging in behaviors or activities that might violate professional boundaries as defined in the policy.
  - The policy does not limit staff members from communicating with relatives (or those living in the home) who happen to be students of the district.



## Good Intentions or Skirting the Policy?

1. “Appropriate Use of Social Media”
  - a) Recent principal resignation
  - b) California school's “eavesdropping policy”
    - \$40,000 to monitor social media
    - Mission: “provide more timely and relevant information to school administration so that they can better intervene in the lives of children and ultimately provide these kids with a more optimal chance to become productive citizens with positive peer connections”



## District Use of Social Networking



## District Use of Social Networking

1. What are the types of Social Media that schools and governments may utilize?
  - a) Allows users to interact with other users directly.
    - Facebook accounts, MySpace accounts, and micro-blogging sites like Twitter and “Plurk”
  - b) A consequence of this is that the “operator” of the account or page may no longer control the flow of information
    - Another consequence is that conversations are occurring among different people and in different places than otherwise would occur in a physical setting
    - The results of this are both positive and negative



## District Use of Social Networking (cont.)

2. What are the benefits of Social Networking in schools?
  - a) It allows schools to more easily communicate with parents and students
  - b) It allows schools to compete in a “World of School Choice”
  - c) It assists in recruitment of staff and faculty
  - d) It assists in solving problems



## District Use of Social Networking (cont.)

3. Legal issues to consider in a district’s use of Social Media
  - a) School districts and other governmental entities face special considerations that are not applicable to more typical users
    - First Amendment issues
    - Public forum analysis – “non-public forums” and “public forums”
    - Limited public forum
    - Adopt Policies/Restrictions
    - Be prepared
  - b) Equal Protection Issues
  - c) Sunshine Law Issues
    - Public meetings
    - Public records



## **District Use of Social Networking (cont.)**

3. **Legal issues to consider in a district's use of Social Media  
(continued)**
  - d) **Confidentiality Issues**
  - e) **Discipline Issues**
  - f) **Other Issues**
    - **Copyright infringement**
    - **Equal Access issues**



## **Questions???**

**Lisa O. Stump**  
**Lashly & Baer, P.C.**  
**Attorney at Law**  
**714 Locust Street**  
**St. Louis, MO 63101**  
**Direct: (314) 436-8344**  
**E-Mail:**  
**lostump@lashlybaer.com**

***www.lashlybaer.com***

