



Social Media- Employee and Student Issues



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Why Lawyers Should (Not) Use Social Media

“I am not a cat.”



Agenda

Employee's Use of Social Media

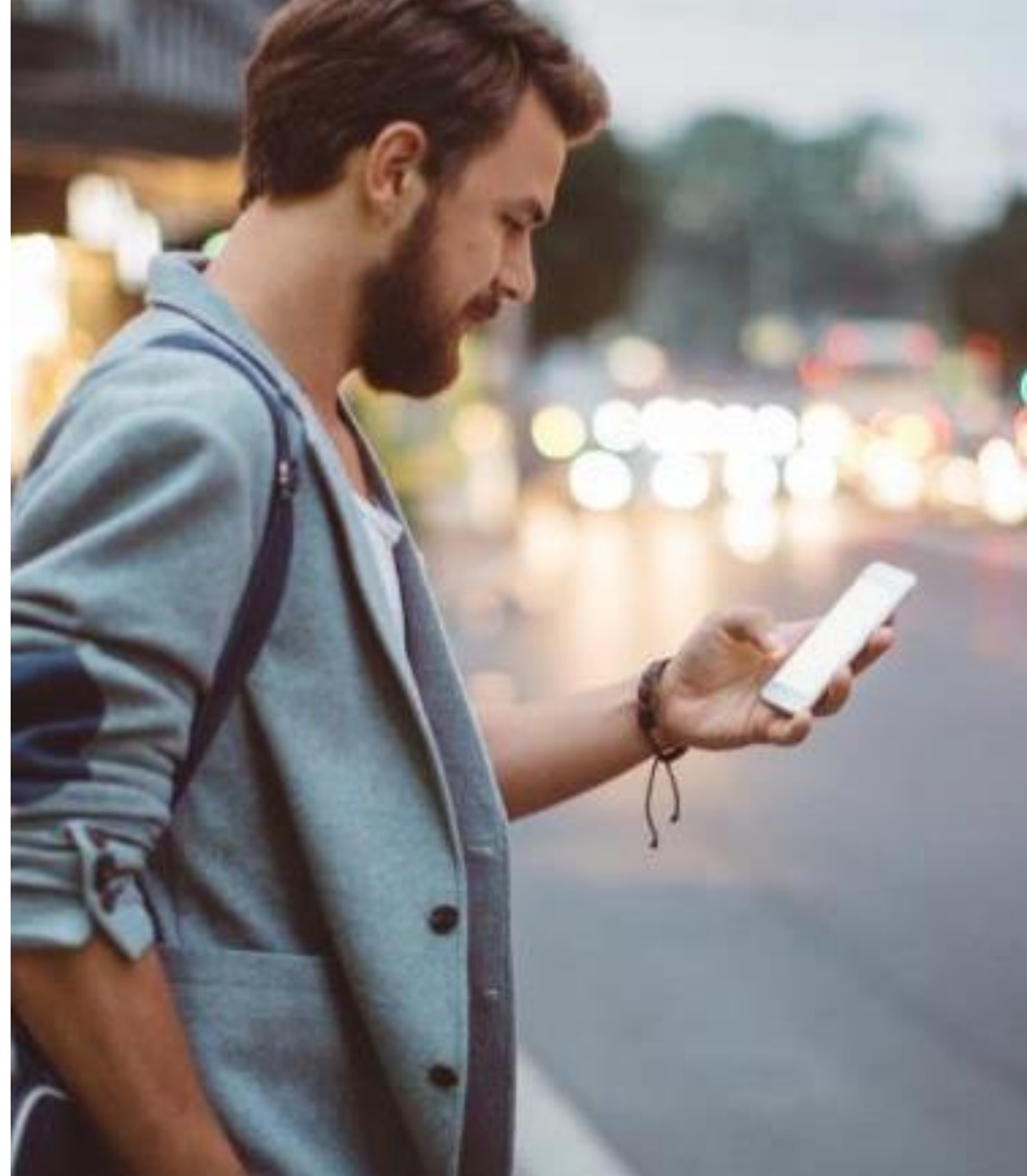
Employee First Amendment Protections

Social Media and Employee/Student Relationships

Social Media and Student Behavior

Student First Amendment Protections

School Board Recommendations



Employee's Use of Social Media



Meet 14 Teachers Bringing Positivity to the Classroom During an Unpredictable School Year

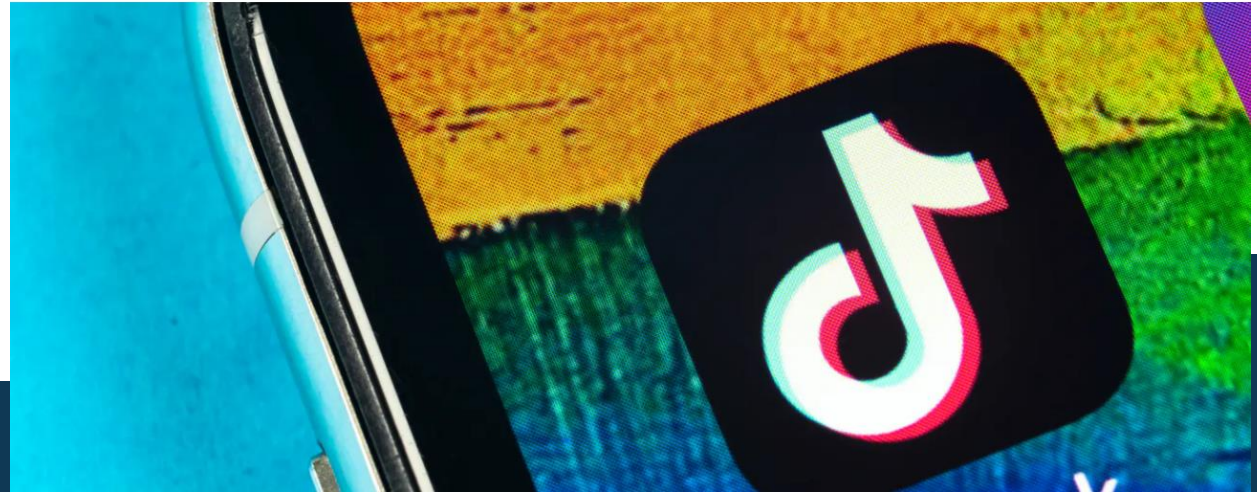
On World Teacher's Day, E! News honored 14 teachers who are going above and beyond during an unpredictable school year. Meet the educators who won't let the coronavirus dampen their positivity.

By MIKE VULPO OCT 05, 2020 6:00 AM TAGS ▼



Teachers Are Going Viral on TikTok. Is That a Good Thing?

By Jeffrey R. Young Jan 26, 2021



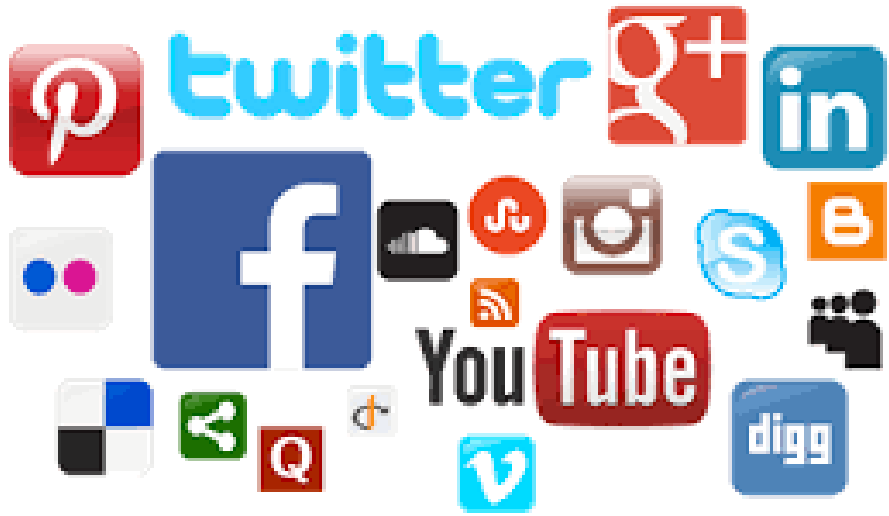
- Positive Impact of Social Media- It's Not all Bad
- Enhance Learning Outcomes
- Digital Learning





Breaking News

Are These Headlines Real?



Breaking News

Teacher Resigns After Twerking and Posting on Facebook

Former teacher sues after being fired for her social media posts that ridiculed African American people, Muslims, and former President Barack Obama.

School District Board votes to terminate after a controversial Facebook post she made about the Black Lives Matter movement last month.

Jacksonville teacher who sparked inclusion training continued posting homophobic memes. Duval Schools says it will investigate.

Student sues school district after a teacher was convicted of sending her sexually explicit photos and videos of himself, claiming that the district failed to monitor the teacher's communications with students and did not act even after it became aware of some of the teacher's troubling behavior.

Teacher fired for posting picture of herself holding beer on Facebook.



Social Media and Employee Professionalism





What were they thinking?

Who are my friends?



What were they thinking?

- Picture Courtesy of the Daily Dot News and *Photos via @crunk_bear/Twitter*

What were they thinking?

Confidentiality....

Teacher Resigns After Facebook Rant About Student With Learning Disability



The Mighty • January 07, 2016



One high school teacher is out of a job after posting a Facebook rant about a student with special needs.



How Celebs Remove Wrinkles Without Surgery

WATCH

What to Read Next



Billboard Company To Pull Gun Shop Ad Calls 'Squad' Idiots

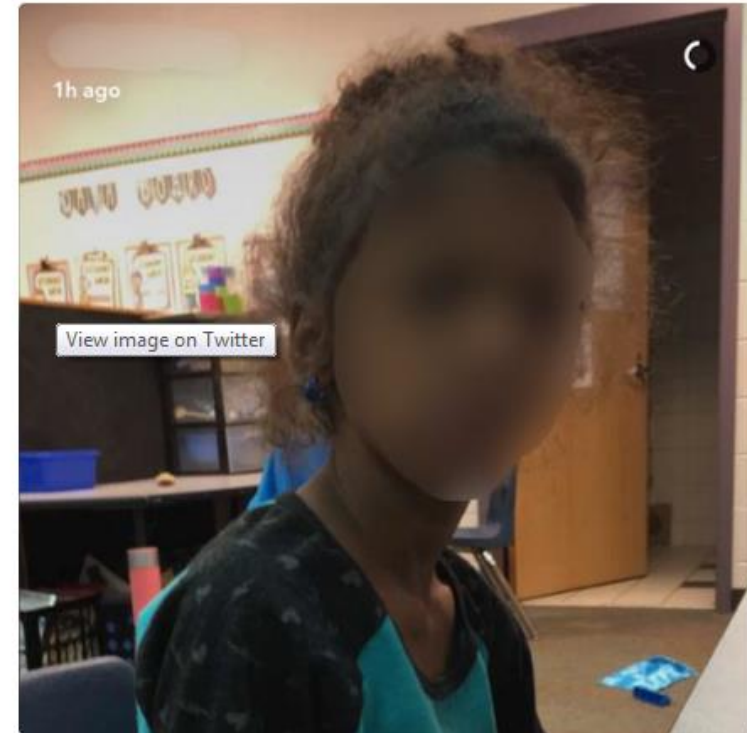
The girl's mother told the station her daughter was upset about her computer time being taken away. Neither the girl nor her mother was identified in the report.



Jeff Paul
@Jeff_Paul



A special-needs student is called "She devil" on Snapchat by the very person tasked to help her. How the school is reacting on @CBSDFW @ 5



2 4:43 PM - Feb 7, 2017



See Jeff Paul's other Tweets



Consequences...



The professional relationship with administration and Board becomes strained.

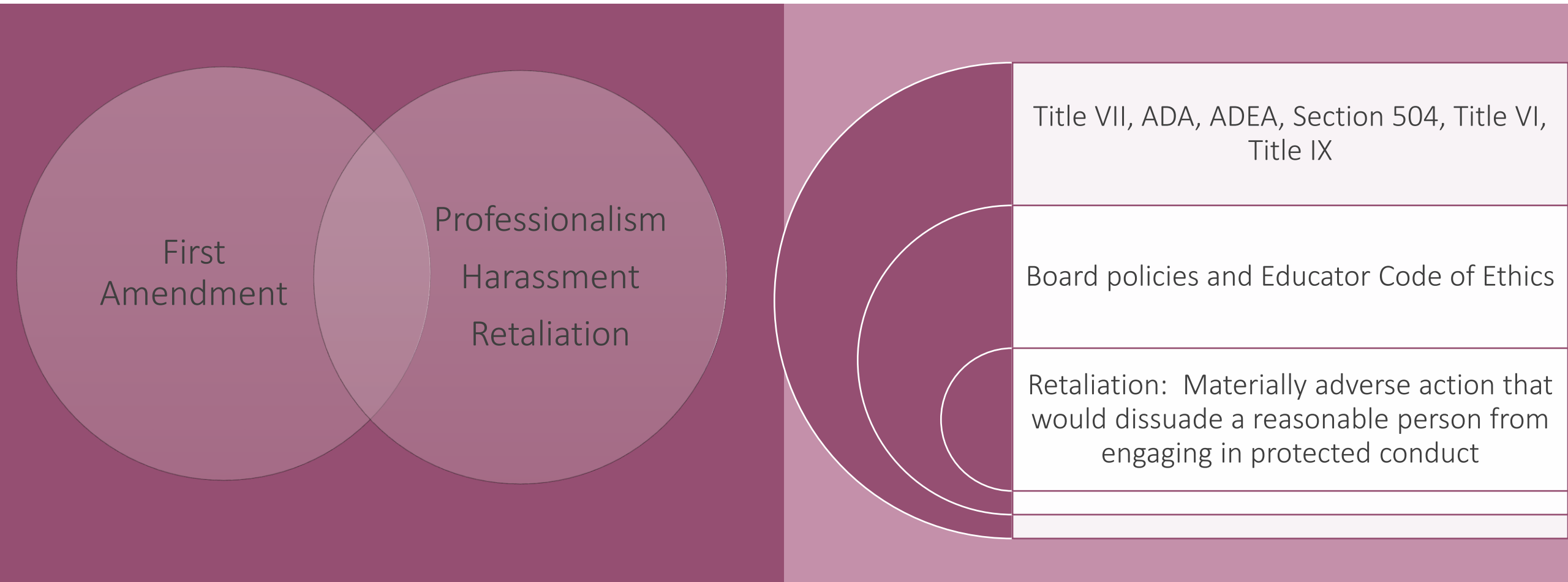
Media Attention

Loss of respect and credibility from colleagues, administrators, students, parents, board members, and community.

Counseling, Reprimand, Suspension, Loss of employment.

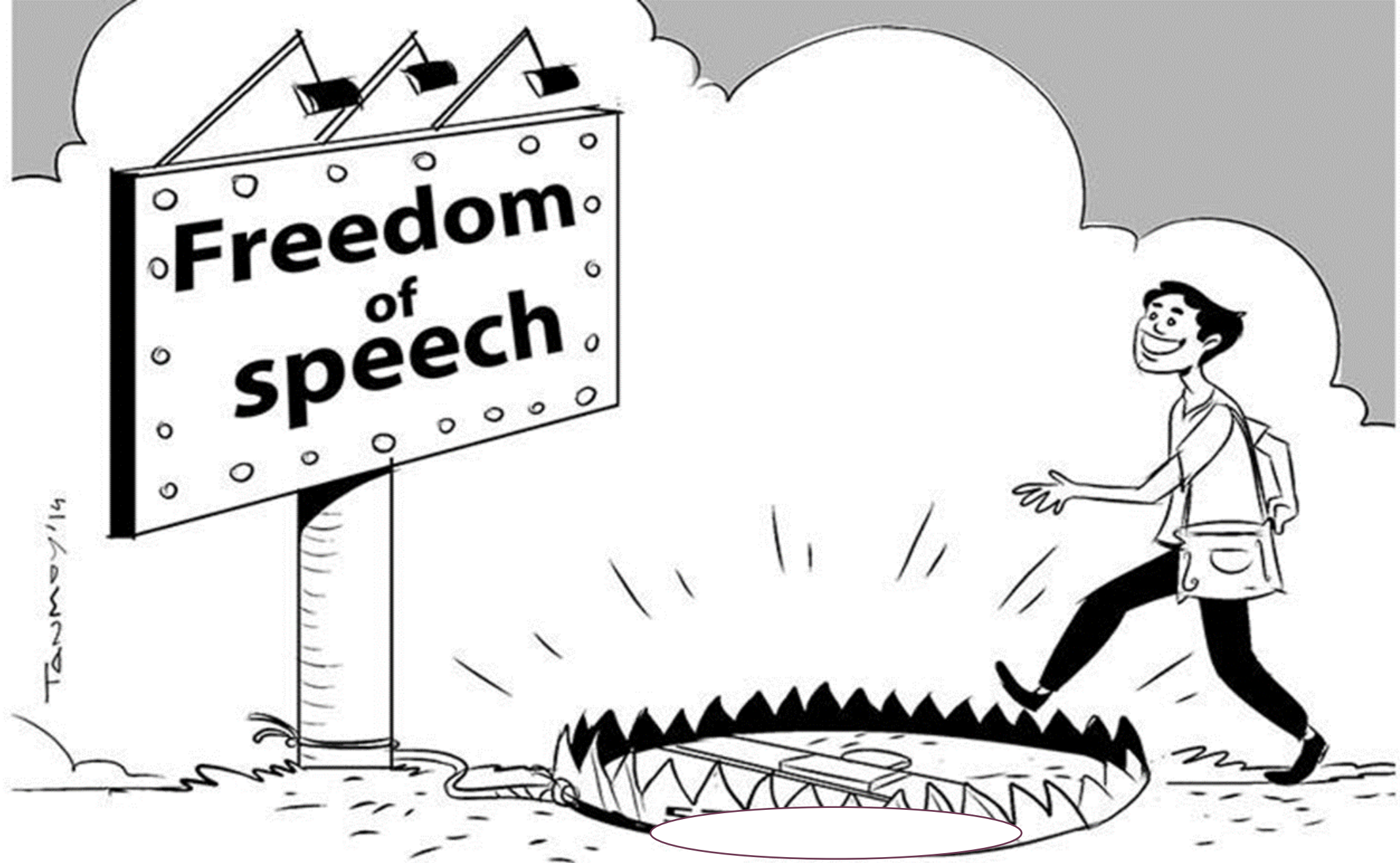
Loss of future employment/certification OR Worse: INCARCERATION

The overlap of Professionalism Harassment, and Retaliation in the workplace with First Amendment Freedom



Employee First Amendment





Do I really have a First Amendment Right?

The *Pickering* Balancing Test



Does the employee's speech as a citizen impair workplace discipline? Harmony among coworkers? Result in loss of confidence/loyalty? Impair operations?



Balance government workplace interests vs. employee speech as a citizen.



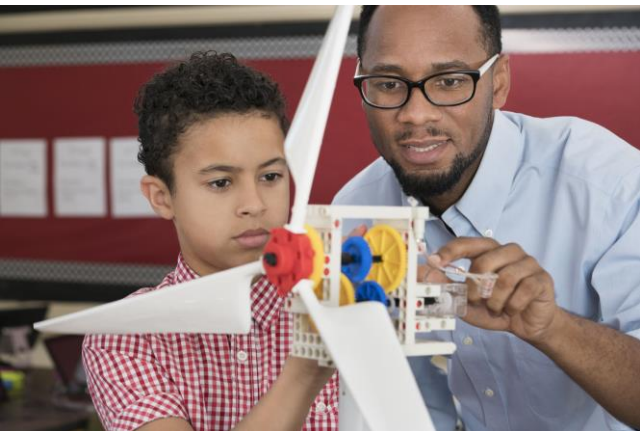
If balance tips in favor of the District, the District may be able to regulate the speech.

Do I really have a First Amendment Right?

Connick:
Public
Concern v.
Personal
Interest



The “main thrust” of
the speech must
relate to a matter of
public concern.



Employee speech is only
protected if it is speech
as a citizen on a
“matter of public
concern.” Speech that is
of “personal interest”
to the employee is not
protected.



To determine the
“main thrust,”
courts look to
the “form,
content and
context.”

Do I really have a First Amendment Right?

*Garcetti:
Public Official
or Private
Citizen?*



Speech by public employees on matters related to their employment is not necessarily unprotected “employee speech.”



“Employee Speech” on a matter of public concern is protected only if the employee is speaking as a private citizen and not “pursuant to official duties.”



Critical Question: Is the speech an ordinary part of the employee’s duties? If yes, it is not protected.

Non-Protected Employee Speech

Educators as Professionals
Educators as Role Models



Personal/Non-
Public
Concern
speech

Official duty
speech

Disruptive
speech

Free Speech Analytical Framework

1. Whether the employee is speaking as a public citizen or pursuant to official duties.

i.e. Speech made as a citizen or employee?

2. Whether the employee's speech relates to a matter of public or private concern based on its content, form and context.

i.e. public or private concern?

3. Whether the interests of the employee as a private citizen in commenting on matters of public concern outweigh the interests of the public employer in promoting the efficiency of the public services it performs, or vice versa.

i.e. Balancing Test

	Public Concern	Private Concern
Official Duties	Not Protected	Not protected
Private Citizen	Protected	If work nexus, perform balancing test

So do I really need a Social Media Policy?



Anti-harassment laws and
policies:

Title VII

Title IX

ADA

ADEA

Board Policies and the Alabama Educator Code of Ethics



Employees have a duty to perform their jobs responsibly and in a conscientious manner. In addition to any specific job requirements set forth in job descriptions or elsewhere, employees are expected to meet the following general performance and service standards:

- Employees are expected to treat all students, co-employees, visitors, and guests of the Board with respect. Employees are expected to demonstrate moderation, restraint, and civility in their dealings with others and, in general, to serve as appropriate role models for students in their behavior and demeanor.
- Employees are required to obey all laws, ordinances, Board policies, and supervisory directives, and are expected to follow the *Alabama Educator Code of Ethics* and other pertinent authority while carrying out duties for the Board.
- Employees shall at all times maintain appropriate, “professional” distance from students and shall not engage in conduct (including communication of any kind) that constitutes, solicits, or suggests inappropriately familiar interaction with students.

Standards 1 and 4: Professional Conduct and Teacher/Student Relationships



Inappropriate employee conduct includes, but is not limited to:

- Harassment of Colleagues
- Engaging in harassing behavior on the basis of race, gender, national origin, religion, or disability.
- Soliciting, encouraging, or consummating an inappropriate written, verbal, or physical relationship with a student.
- Sharing confidential information concerning student academic and disciplinary records, health and medical information, family status/income, and assessment/testing results unless disclosure is required or permitted by law.

Overly Broad Policies are subject to First Amendment legal scrutiny



In *Liverman v. City of Petersburg*, the Fourth Circuit struck down a police department social media policy prohibiting any posts “that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees” as overly broad. *Liverman v. City of Petersburg*, 844 F.3d 400 (4th. Cir. 2016)

“Sitting here reading posts referencing rookie cops becoming instructors. Give me a freaking break, over 15 years of data... shows on average that it takes at least 5 years for an officer to acquire the necessary skill set to know the job and perhaps even longer to teach other officers.”

The Court: The constraints of the social media policy created a “virtual blanket prohibition” of all speech critical of the government employer, and Liverman’s speech was a matter of public concern.

The Court also characterized the criticisms of department operations and policies as arguably the “paradigmatic” matter of public concern



Teacher posts on her personal blog “comments I really wanted to add to my students’ report cards- 1. Lazy a**hole; rude, belligerent, argumentative f***, utterly loathsome in all imaginable ways.”



“Thank god we have more America loving rednecks. Red spread across all America. Even n***** and l***** voted for trump too!”



“It’s turned into a race matter. What about the thugs that beat the father in his vehicle because he didn't slow down. What about the thugs that shot the college baseball player because they were bored. The list can go on and on....”

Employer/Employee Examples



“The funny part about immigrants staying home is the rest of us who pay for them are here at work like we’ve always been. Looks like less mouths to feed today. So glad to hear about massive deportation. Let’s make America great again. Thanks Donald Trump!”

You Decide...

- Unfortunately, statistically my cumulative GPA increased today. Most failing students were missing.” #Americasfutureisinbigtrouble
- “The pace that the district expects us to teach the curriculum is not possible!!! I feel like I’m up all night preparing for class and when I get there in the morning, I’m ready to fall asleep!!! It’s obvious that administration doesn’t give a flying f*** about the teachers. Anybody else have this problem?!!”
- A school clerk makes a reference to her support for LGBTQ on her Facebook page by putting a rainbow flag as her cover photo and a profile picture of herself wearing a rainbow LGBTQ flag pin.
- A teacher expresses on her Facebook page that the Bible says being transgender is wrong and a sin.
- A school clerk calls homosexuals a derogatory name on her page and discusses a certain political candidate that has spoken out against LGBTQ rights and then says in the comments that “this page is my page and I will post whatever the f***k I want.”

Social Media and Employee/Student Relationships

Scary Reality

Educators and Social Media Use:

- What happens with the personal communication goes too far?
- Providing a student with advice on personal matter
- Using social media to communicate romantically or sexually
- Survey Results- More than 62% of educators surveyed have had minimal or no training in the area of interacting with students and parents through social media. ~ (University of Phoenix College of Education, 2015)



An Inappropriate Relationship Begins Through Social Media



Voluntary Statement Given to Law Enforcement

- *“I began playing Words With Friends with several students before the end of the school year, including Gabriella. I often chatted with students about the game. My conversations began innocently, but after school let out in June my conversations with Gabriella became more intense.”*

Voluntary Statement given to Law Enforcement

- *“I told my wife that I had an emotional relationship with Gabriella and it moved beyond an appropriate boundary between a teacher and student. My wife was angry and demanded that I terminate contact with Gabriella entirely. I then emailed Gabriella and asked her to not try and contact me or my wife and I apologized for any emotional harm I had caused her.”*

Report to DHR?

Administrative Leave

Report to State

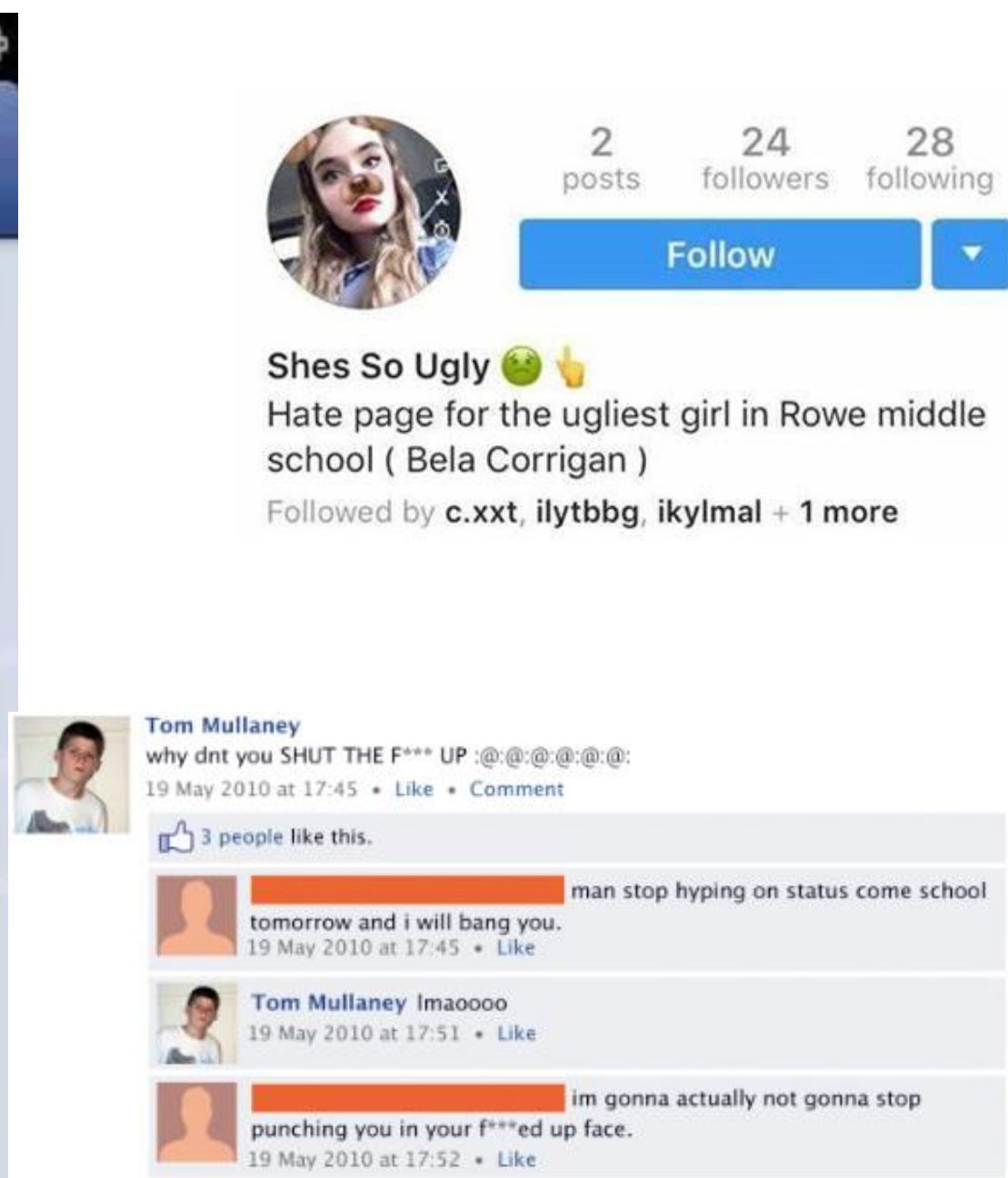
Investigate

Take Appropriate Corrective Action



15 times EVERY week in this country

Social Media and Student Behavior





Student's avatar depicts a pistol firing a bullet at a man's head with the message to "kill [the student's English teacher.]"

Student files lawsuit after being suspended from football team following viral posts showing student using an American flag to wipe the visor of his helmet during a football game.

In response, cheerleader posts to Snapchat: "f**k school f**k softball f**k cheer f**k everything" with a picture of her and a friend raising their middle fingers. Student was suspended from the cheerleading team for her entire sophomore year for violating team rules.

Why do we care?

Media Attention

Crime & Safety

High School Student Investigated For Social Media Threat

hewitt-Trussville High School student is being questioned by police after making a threat on social media.



Michael Seale, Patch Staff

Posted Wed, Apr 18, 2018 at 9:47 am CT

Like 1

Share



Reply



TRUSSVILLE, AL – A student at Hewitt-Trussville High School is being



Colorado school principal resigns after students post video reenacting George Floyd murder

Kaelan Deese

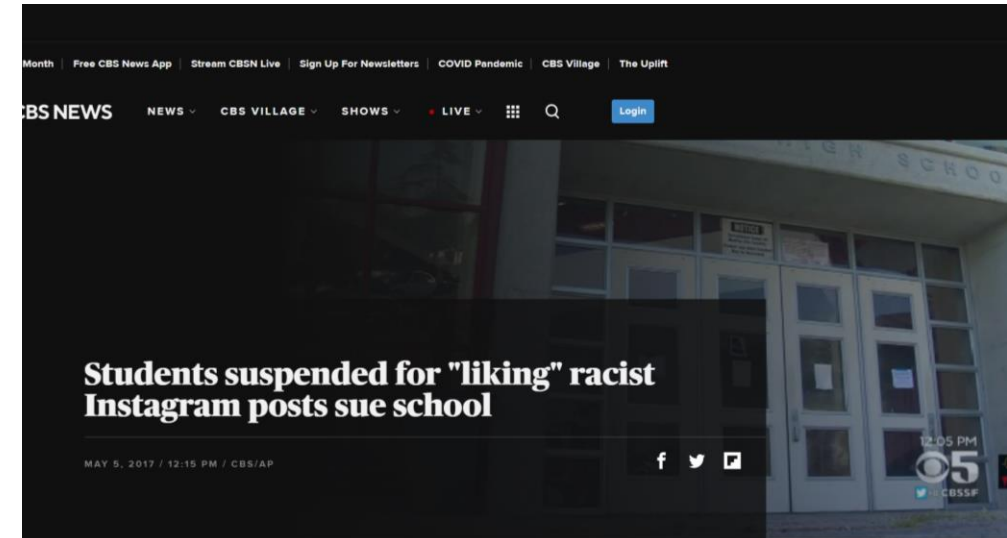
Wed, June 9, 2021, 11:20 AM · 2 min read

George Floyd



A high school principal in [Colorado](#) resigned this week after an image was posted to social media in May showing three students doing a reenactment of [George Floyd's](#) murder.

St. Vrain Valley Schools Superintendent Don Haddad [sent a letter](#) to parents of students in the district on Monday notifying them that Mead High School Principal Rachael Ayers had stepped down after 12 years serving in various roles at the [school](#). Haddad's letter mentioned "significant challenges" during



SAN FRANCISCO -- A California school district suspended a high school student after racist images that included nooses drawn around the necks of a black student and coach appeared on his social media site.

But a federal lawsuit says Albany Unified School District went too far when it also disciplined four Albany High School students -- three of them Asian -- who indicated they "liked" the posts on the Instagram account. The suit, which was filed Monday in San Francisco on behalf of the students, accuses the school district of violating students' free speech rights.

[CBS Sacramento reports](#) the students say the district had no right to discipline them because the offensive posts were on a private account that had no connection with any official school activity or school account.

Bullying Lawsuit Against School Settled For Record Amount

by James Slater | Mar 7, 2016 | Personal Injury | 0 comments



was identified as “A.M.” in the lawsuit and later as “Andrew.” He was younger than he was and suffered two years of torment. “Andrew” not the students who bullied him, but reportedly he has not been bothered

A bullying lawsuit in the Washington school district of Enumclaw was settled recently for \$295,000.

HOME / NEWS / U.S. NEWS®

Mother's Suit Blames Suicide of 9-Year-Old Girl on Bullying

The mother of a 9-year-old Alabama girl who took her own life is suing school officials who allegedly ignored the child's complaints at of bullying.

By Associated Press, Wire Service Content Jan. 16, 2020, at 3:20 p.m.

BY JAY REEVES, Associated Press

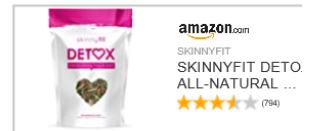
BIRMINGHAM, Ala. (AP) — The mother of a 9-year-old girl who took her own life filed suit Thursday blaming the fourth-grader's death on educators she accused of ignoring the girl's complaints about months of bullying by a boy.

Administrators and teachers at U.S. Jones Elementary School in the west Alabama town of Demopolis showed “deliberate and blatant indifference” to bullying McKenzie Adams endured before killing herself at her grandmother's home in December 2018, the lawsuit claimed.

One white boy in particular taunted the black girl with “racial and gender based slurs,” the lawsuit said, but McKenzie wrote in her diary that another boy also harassed her.

The child, her mother and her grandmother all complained but school officials didn't act to stop

LAWSUITS FILED



Laws, Policies, Procedures to Follow

Alabama Bullying and Harassment and Prevention Act

- Alabama Code §§ 16-28B-1 *et seq.*
- Jamari Terrell Williams Student Bullying Prevention Act
- Board Policy provisions and Student Code of Conduct

Alabama Anti-Hazing Law

- Alabama Code § 16-1-23

Title IX of the Education Amendments Act of 1972

Title VI of the Civil Rights Act of 1964

The Individuals with Disabilities Education Act (IDEA)/Section 504

Student Code of Conduct

Student Extracurriculars Rules and Guidelines

Alabama Bullying Prevention Act

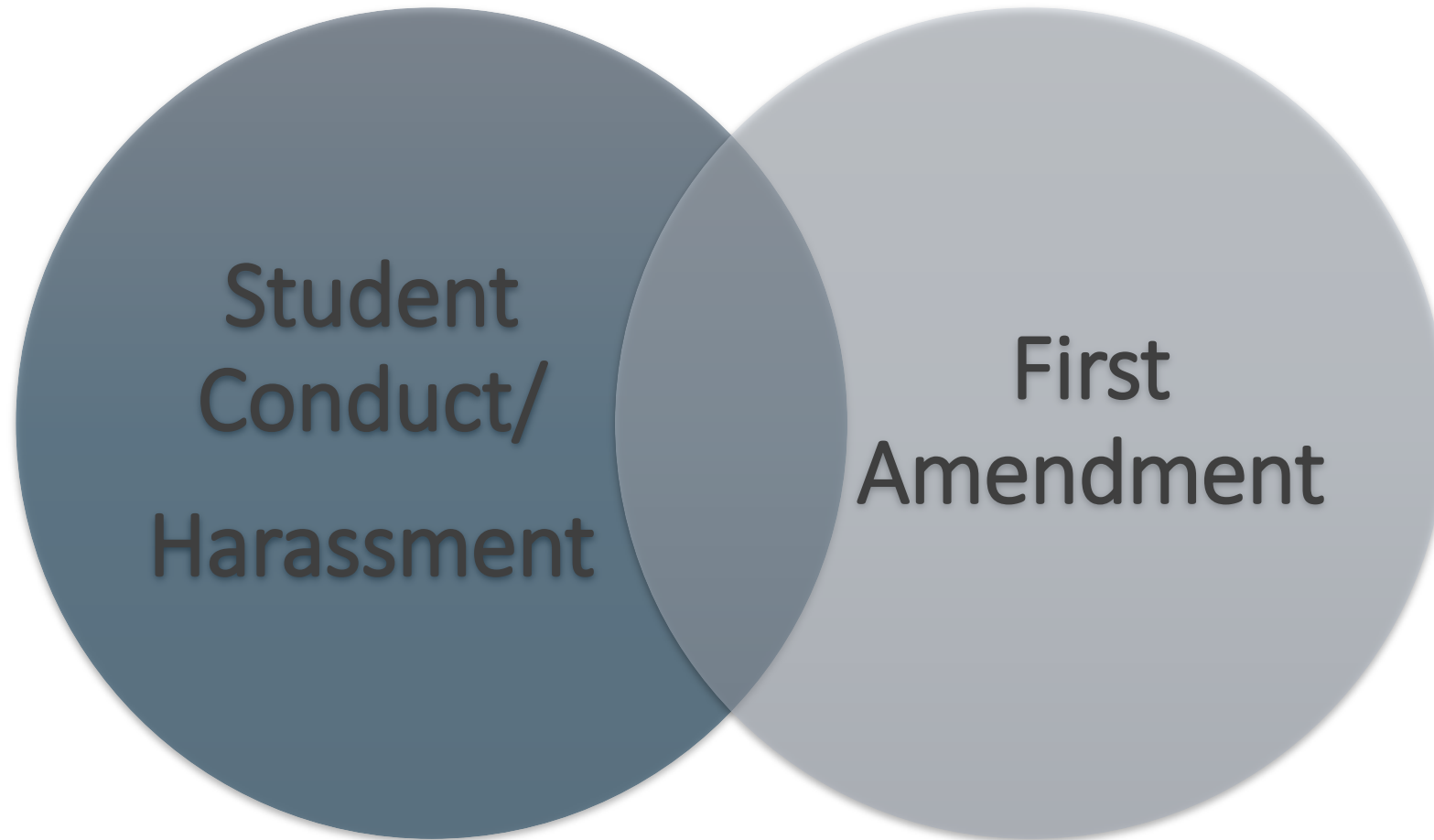
Previously named the Student Harassment Prevention Act

2018- Jamari Terrell Williams Bullying Prevention Act

- Expanded Act to better identify and define “bullying”
- Includes cyberbullying in the definition of bullying.
- Includes bullying, intimidation, violence and threats of violence that occur *off school property*.



The Overlap of Harassment and Student Conduct with the First Amendment



Student Free Speech Protections

Student First Amendment

Tinker v. Des Moines Ind. Sch. Dist.

- “Students do not shed their constitutional rights at the schoolhouse gate.”

Bethel v. Fraser; Hazelwood v. Kuhlmeier; Morse v. Frederick

- Set additional limits on student free speech based on specific factors (school-based speech, lewd/obscene speech, speech advocating for illegal activity)



Student First Amendment

Shanley v. Northeast Ind. School District, 462 F.2d 7960 (5th Cir. 1972).

J.C. v. Beverly Hills Unified School District, 711 F.Supp.2d 1094 (C.D. Cal. 2010).

To impose discipline for off-campus conduct or cyberbullying, schools must find a nexus to the school environment.

Must balance the legal rights of the perpetrator of bullying or harassing with the school's interest in maintaining a school atmosphere free of substantial disruption.

A federal district court ruled the school's suspension of a student who created a vulgar derogatory video about another student off-campus and posted it from her home computer on YouTube violated the perpetrator's First Amendment free speech rights.

The court did not find any evidence that the video either caused, or was reasonably likely to cause, a "material and substantial" disruption of the educational process.

Student First Amendment: Public Concern v. Attacks on Individuals

Zamecnik v. Indian Prairie Sch. Dist. 204, 636 F.3d 874 (7th Cir. 2011)

Generalized "hurt feelings" are not a defense to violation of students' First Amendment rights

Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12 (1st Cir. 2020)

Who was the target and is there valid social commentary in the speech?

C.R. v. Eugene School District 4J, 835 F.3d 1142 (9th Cir. 2016)

Sexually harassing speech that interferes with ability to feel safe and secure at school is not protected

U.S. Supreme Court Will Hear Mahanoy Area Student's Free Speech Case



Earlier this week, the United States Supreme Court announced the Mahanoy Area School District's request to hear a case in which the school district sought to discipline a student for an online speech that occurred off-campus on a weekend, according to the American Civil Liberties Union of Pennsylvania.

In 2017, the student, who was a minor at the time and is known as B.L., sent a message - a "snap" - to her followers on the social media app Snapchat. The snap was a photo of the student and a friend with the text, "fuck school fuck softball fuck cheerleading." The school removed her from the junior varsity cheerleading team.

B.L., who is being represented by the American Civil Liberties Union of Pennsylvania, filed a lawsuit against the school district's punishment violated her First Amendment rights. A federal district court judge ordered the school to reinstate B.L. to the cheerleading team. The school had exceeded its authority in punishing B.L. for off-campus speech, a decision that a federal appeals court affirmed. B.L. is a member of the cheerleading team until she graduated in 2020.

"Mahanoy Area School District stands behind its restrained approach to disciplining student speech-which is the same approach that thousands of schools across the country have taken for generations. We are proud of our extracurricular programs. Learning to participate in team sports and abide by team rules teaches students lifelong lessons about responsibility and teamwork. Thus, when B.L. broke team rules and posted messages that she admitted would undermine team morale and chemistry, B.L.'s coaches responded with a temporary, team-related punishment: suspending her from the team for the year. Obviously, B.L.'s family disagrees with that punishment, and responded by bringing a federal lawsuit. That lawsuit has produced a judicial decision that leaves schools powerless to respond to speech that is directed at the school environment and would have a devastating effect on students' well-being during the school day. The School District views that decision as inimical to our basic mission of safeguarding student welfare. Groups representing 1.7 million teachers and thousands of school districts nationwide have supported our efforts to reverse this unprecedented ruling in the Supreme Court."

So....Now we wait

School Board Recommendations

Board Tips: Employee Social Media

Understand the Limits of the First Amendment

- Did speech occur at work or is it about work related duties
- Public concern v. Private concern

Understand Educator Code of Ethics, Board policies, including Acceptable Use Policy, and Applicable Laws

Encourage employees to maintain strict private settings on Facebook, Twitter, and other social media platforms.

Encourage separate personal and work accounts for each platform used

Be a role model- Monitor your own internet presence

Provide and support increased training for educators in the use of appropriate social media, including appropriate interactions with students

Training on FERPA and Confidentiality

Social Media Policy?

- The social media policy should define or list prohibited content for school district accounts, including:
 - Unlawful political advertising;
 - Confidential information, limited in scope (e.g. FERPA, etc.)
 - Personal information for the employee using the account or that of other school district employees;
 - Threatening, harassing, or discriminatory content; or
 - Offensive content containing lewd or obscene references.
- Savings Clause: “Not intended to interfere with...”
- Address Security Issues Regarding Social Media Accounts
- Training on Social Media Policy

Board Tips: Student Social Media

Understand the Limits of the First Amendment

- Substantial Disruption
- Invades the Rights of Others
- Sufficient Nexus
- Stay Tuned

Understand Board policies, including Acceptable Use Policy and Student Code of Conduct and Applicable Laws

Be a role model- Monitor your own internet presence

Provide and support training regarding bullying and harassment

- Training for school-system wide positive behavioral interventions and supports

Lawyer Additional Tips



Know and understand your clients' goals and any "politics" involved in the situation. Be aware of the "Barbara Streisand" effect

After developing the "legal" conclusion, consider the political and practical realities and how that legal conclusion fits with the district's goals.

Regularly evaluate and update district policies to ensure that they are consistent with the laws governing employee speech and do not unduly interfere with such rights.

Consistently apply district policies related to employee and student speech and document the district's rationale when taking action based on an employee's or student's speech or expressive conduct.

Prior to elections and other times when social media speech issues may arise with frequency, remind administrators of the rules regarding employee speech and expressive conduct to minimize potential violations.

For student speech remember different laws that apply and different liability exposure

The complaint label does not dictate the response; look at nature of conduct (race, gender, disability)



Thank you!



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#baldwinproud