



Fagen Friedman & Fulfrost LLP

# Free Speech in Schools: Navigating Legal Boundaries for Students & Staff



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# Student Speech



# Guaranteed Protections

- Public school students have the right to engage in free speech and expression
- Protected and governed by:
  - U.S. Constitution First Amendment
  - Illinois Constitution Article I Section 4



# U.S. Constitution

## First Amendment

- *“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”*



# Illinois Constitution

## Article I - Section 4

### ■ SECTION 4. FREEDOM OF SPEECH

*“All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.”*



# U.S. vs. Illinois Constitution

- The First Amendment to the U.S. Constitution only provides the floor of protection for student speech
- Illinois case law generally provides more protection for student speech than federal law



# Student Speech

- Organized into distinct categories governed by different legal standards:
  - Vulgar, lewd, obscene, and plainly offensive speech [*Bethel Sch. Dist. v. Fraser* (1986)]
  - School-sponsored speech (student journalist) [*Hazelwood Sch. Dist. v. Kuhlmeier* (1988)]
  - All other speech not fitting into the other two categories [*Tinker v. Des Moines* (1969)]
  - Speech promoting illegal drug does not require proof of substantial disruption [*Morse v. Frederick* (2007)]



# “Plainly Offensive” Speech

## Bethel v. Fraser (1986)

- 17-year old high school student gave speech before student assembly that contained lewd references (graphic sexual metaphors)
- Student was suspended out of school for 3 days for “disruptive-conduct”
- Supreme Court upheld the suspension; the Court found that a public school district may properly prohibit speech that is vulgar, lewd, obscene and “plainly offensive”



# Balancing Test – Plainly Offensive

- “The freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society’s countervailing interest in teaching students the boundaries of socially appropriate behavior” (Fraser)



# School-Sponsored Publications

## Hazelwood School District v. Kuhlmeier (1988)

- Newspaper written and edited by journalism class as part of school's curriculum
- Principal censored two student articles on topics of pregnancy and divorce
- Supreme Court held that school officials retained control of making 'content decisions' relating to articles published in the school newspaper because they were produced as part of the school curriculum



# Hazelwood Standard

- Determine whether past policy or practice 'opened the forum' for public speech/expression
- If not, school officials may impose reasonable restrictions.
- A school becomes an open forum when it allows indiscriminate use of its facilities by the general public, or by some segment of the public, such as student organizations.
- Restrictions must be reasonably related to a legitimate pedagogical interest



# Substantial Disruption

## Tinker v. Des Moines (1969)

- Three students under wore black armbands to protest the Vietnam war
- School implemented a policy banning armbands, indicating that the administration had a reasonable fear that wearing armbands would create disturbances at school.



# Tinker Standard – Substantial Disruption

- School officials may not silence student expression just because they dislike it or have a vague fear of something that might occur.
- The Court held that school officials must reasonably forecast that student expression would lead to either:
  - A substantial disruption of the school environment, or
  - An invasion of the rights of others



# Tinker Standard – Substantial Disruption

- To meet the Tinker standard, a school district must demonstrate the restriction of speech or expression “is necessary to avoid material or substantial interference with schoolwork or discipline”



# Bong Hits 4 Jesus (Illegal Drugs)

## Morse v. Frederick (2007)

- During the Olympic Torch Relay in Juneau, Alaska, the student unfurled a 14-foot banner reading “BONG HiTS 4 JESUS”
- The student was issued a 10-day out of school suspension.
- On appeal, the U.S. Supreme Court upheld the suspension, finding that schools have a ‘compelling interest’ in deterring drug use among students.



# **Student Threats Bullying / Harassment**



# What Is a Threat?

- Threat = A threat is an expression of intent to do harm or act out violently against someone or something
- Threats can be spoken, written, or symbolic – for example, motioning with one's hands as though shooting at another person
- The Illinois School Code addresses:
  - Internet (Social Media) Threats – Section 10-22.6
  - Bullying Prevention – Section 27-23.7



# Types of Threats

- Direct threat - Identifies a specific act against a specific target and is delivered in a straightforward, clear, and explicit manner. Example: "I am going to place a bomb in the school gym."
- Indirect threat – Vague, unclear, and ambiguous. Example: "If I wanted to, I could kill everyone at this at school."
- Veiled threat - One that strongly implies but does not explicitly threaten violence. Example: "The school would be better off if Principal Doe were dead."
- Conditional threat - Warns that a violent act will happen unless certain terms are met. Example: "If Ms. Johnson does not give me an "A" in the class, I will place a bomb in the school."



# Factors in Determining Whether Threat Exists

- Age of student
- Capability of student
- Student's discipline history
- Credibility of student and willingness to acknowledge his/her behavior
- Credibility of witness accounts



# Indicators of a Serious Threat

- Specific, plausible details
- Threat is repeated over time (either same victim or different victims)
- Threat is reported as a plan (details are specific and show advance planning)
- Accomplices or recruitment of accomplices
- Physical evidence of intent (weapon, bomb making components, drugs, etc.)



# “True Threats”

- In determining whether a “true threat” exists, courts ask:
  - What was the reaction of the victim?
  - Was the threat conditional?
  - Was the threat communicated directly to the victim?
  - Did the student threaten the victim previously (*i.e.*, is there a pattern)?
  - Did the victim have reason to believe that the student might engage in violence against them?
- Important legal construct because “true threats” lie outside of First Amendment protection



# Threats Made on Social Media

## 105 ILCS 5/10-22.6(d-5)

- The *Illinois School Code* allows school personnel to discipline students for making threats over the Internet:
  - Explicit threat was made against another student or school personnel;
  - The website was accessible in school at the time of the threat or was otherwise available to students or school personnel; and
  - Threat could be reasonably interpreted as threatening the safety and security of the threatened individual because of their status as a student or employee.



# Bullying Prevention

## 105 ILCS 5/27-23.7

- The *Illinois School Code* requires that each Board of Education adopt a policy prohibiting bullying which must specifically include:
  - A prohibition on cyber-bullying, including off-campus activity “if the bullying causes a substantial disruption to the educational process or orderly operation of a school” (Tinker standard).
  - Interventions and restorative measures as alternatives to disciplinary exclusions.



# Cyber Bullying Definition

## 105 ILCS 5/27-23.7

- Bullying through the use of technology or any electronic communication, including email, internet communications, instant messages, etc.
- Includes the creation of a webpage in which the creator assumes the identity of another person or the knowing impersonation of another person as the author of posted content.
- Updated recently to include the creation or distribution of AI-generated digital replicas (deepfakes) for purposes of harassment.



# Cyberbullying Not Protected Speech

- Any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, that has the effect of or can reasonably be predicted to have the effect of:
  - Placing a reasonable pupil in fear of harm to his/her person or property
  - Causing a reasonable pupil to experience a substantially detrimental effect on his/her physical or mental health
  - Causing a reasonable pupil to experience substantial interference with his/her academic performance
  - Causing a reasonable pupil to experience substantial interference with his/her ability to participate in or benefit from the services, activities, or privileges provided by a school



# Threats and Free Speech

- When may schools prohibit student speech that is threatening in nature – and impose disciplinary sanctions on the student?
  - If it constitutes a “true threat”
  - If it “substantially interferes” with education or with the rights of others in the school environment (Tinker v. Des Moines)



# Threats and Free Speech (cont'd)

- Let's examine a few cases involving student threats in which courts have balanced the individual First Amendment rights of students with the legitimate educational interest of the school district
  - On-campus student threats (*Cuff, Dariano*)
  - Off-campus student threats (*LaTour, Wynar, D.J.M., Nixon*)



# Threats and Free Speech (cont'd)

- Cuff v. Valley Cent. Sch. Dist. (2d Cir. 2012)
  - Fifth-grader suspended after crayon drawing of astronaut stating his wish was to blow up school with teachers inside
  - Refused to explain what drawing meant
  - Prior history of misbehavior, previous drawings of guns and violence and had written story about destruction of all schools
  - 2d Cir. found no violation of First Amendment rights
  - No “true threat” analysis, but court found that picture would result in substantial disruption under Tinker



# Threats and Free Speech (cont'd)

- Dariano v. Morgan Hill USD (9th Cir. 2014)
  - Cinco de Mayo altercation between Caucasian and Mexican students in 2009
  - The following year on Cinco De Mayo, group of Caucasian students wore American flag clothing
  - School gave them option of turning shirts inside-out or going home to change
  - 9th Cir. ruled that school could prohibit flag apparel
  - Level of threat of physical altercation distinguished facts of case from Tinker



# Threats and Free Speech (cont'd)

- LaTour v. Riverside Beaver SD (W.D. Pa. 2005)
  - Middle school student posted rap songs on public Internet web page
  - Contained profanity and violent imagery
  - District Court: Songs were not “true threats”
  - Songs that contain violent imagery do not actually INTEND violence
  - No “substantial disruption” either
  - First case to apply the ‘true threat’ standard



# Threats and Free Speech (cont'd)

- Wynar v. Douglas County SD (9th Cir. 2013)
  - High school student sent increasingly violent and threatening instant messages to friends on MySpace
  - Threatened to shoot specific classmates and “take out” others on anniversary of Virginia Tech shootings
  - Friends notified school officials who expelled students
  - 9th Cir. upheld expulsion decision
  - Schools may take disciplinary action for off-campus speech when faced with “identifiable threat” of school violence
  - Rejected student’s argument of no history of threats



# Threats and Free Speech (cont'd)

- D.J.M. v. Hannibal SD (8th Cir. 2011)
  - High school student sent instant message from home computer to classmate on her home computer identifying specific gun he was going to obtain and specific students he would like to kill
  - Recipient told school authorities who notified police
  - Student suspended for remainder of school year
  - 8th Circuit: Student's speech was unprotected "true threat"
  - Student expressly stated that he had access to weapons, said he was depressed and named names



# Threats and Free Speech (cont'd)

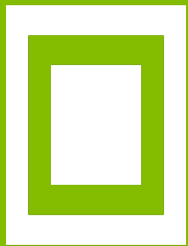
- Nixon v. Hardin Co. Bd. of Educ. (W.D. Tenn. 2013)
  - Middle school student posted off-campus “tweets” about shooting another student in the face (followed by pictures of a face with a gun)
  - Student had been feuding with other student over boyfriend
  - Despite student’s claim that tweets were jokes, she was sent to 45-day alternative educational setting
  - District Court found Tinker did not justify District’s actions
  - Speech was off-campus, no likelihood of disruption and no connection to school



# Summary

- Presumption that speech is protected
- Speech is not protected and schools can discipline student when speech:
  - Is plainly offensive/promotes illegal activity
  - Constitutes “true threat”
  - Will “substantially interfere” with education or with the rights of others
  - Promotes drug use





# Student Interviews

“Because they are not law enforcement officers, when school officials search for contraband in order to foster a safe and healthy educational environment, they are afforded greater flexibility than if a law enforcement officer performed the same search.”

*People v. Pankhurst*, 365 Ill. App. 3d 248, 257, 848 N.E.2d 628, 636 (2006) (quoting *State v. Heirtzler*, 147 N.H. 344, 789 A.2d 634 (2001))

# Interviews by School Personnel

- SROs or school security personnel may interview students on school grounds without parent/guardian permission when they are not acting at the direction of law enforcement and:
  - They are acting to further a proper educational environment at school OR
  - They are acting at the request of school personnel to further a school response to student misconduct, promote school interventions, school discipline or any situation which may have potential consequences for the safety of students or school staff

# Suspected Criminal Activity

- SROs and school security personnel, however, cannot interview a student under the age of 18 for suspected criminal activity unless the SRO complies with Corey's Law.

# Corey's Law

- Corey's Law was passed in 2019 by the Illinois legislature in response to the death of Corey Walgren, who took his own life after being interviewed by police at school (Naperville North High School) 105 ILCS 5/22-88
- Corey's Law applies when
  - A student is suspected of committing a criminal act
  - Questioning is done by a law enforcement officer, SRO, or other school security personnel
  - Questioning occurs on school property during regular school hours when school is in session and students are present



# Corey's Law

## Basic Requirements:

- Notify or attempt to notify the student's parent or guardian and document the time and manner of notification.
- Make reasonable efforts to ensure that a parent is present during questioning. If parent cannot be present, include a mental health professional. Parent can participate via telephone.
- If practicable, school districts should make reasonable efforts to ensure that a law enforcement officer trained in promoting safe interactions and communications with youth is present during the questioning.

Special note: A student who is 18 or older may request the presence of a parent/guardian if the student is questioned or detained, and the student must be notified of this right.



# Corey's Law

Absent exigent circumstances, law enforcement interviews of students should generally be conducted off school grounds.



# Employee Speech



# Pickering Test

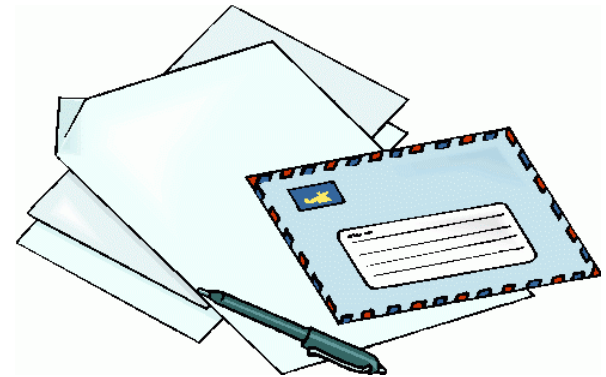
- Public employees' speech is protected when they
  1. Speak as a private citizen,
  2. On a matter of public concern, and
  3. Employer's interest in the efficient operation of the public agency outweighs employee's interest in exercising their First Amendment right



# Pickering v. Board of Education

391 U.S. 563 (1968)

- Teacher disciplined for writing a letter to the local newspaper critical of the district's spending.
- Supreme Court held: Statements made as a private citizen on a matter of public concern is protected speech.



# Public vs. Private Capacity

- Two step inquiry:
  1. Whether speech was within “scope and content of individual’s job responsibilities”
    - Job description is not determinative
    - Practical considerations
  2. Whether speech “owed its existence” to position as a public employee



# Balancing Test



- Whether school district had adequate justification for treating employee differently from any other member of the public
- Employer's burden to prove if employee demonstrates he/she was speaking in as a private citizen on a matter of public concern



# Johnson v. Poway Unified SD

- District required teacher to remove banners emphasizing God from classroom
- Federal court ruled: District did not violate teacher's First Amendment rights because he spoke as a public employee
  - Decorated his classroom as part of his job duties
  - Speech was during school hours in classroom



# Kennedy v. Bremerton SD

- District placed football coach on administrative leave after he refused to stop kneeling in prayer on football field after games
- Federal court held: district could discipline football coach because he spoke as a public employee, rather than a private citizen
  - Entrusted to be a coach, mentor, and role model to students, and maintain positive media relations
  - Insistence that he kneel on the 50-yard line would not have occurred but for his position as a football coach



# Off-Duty Speech

- Not all speech is protected just because the employee is off-duty
  - Harassment/threats
  - Disclosing confidential information
  - Speaking as a District representative
  - Self-incriminating photos/statements
  - District-related business (Illinois Freedom of Information Act)
  - “Immoral conduct”



# Off-Duty Speech

- Even if speech is protected doesn't mean you should say it!
- Employees need to know that social media posts can cause disruptions in the workplace
- Employers are responsible for teaching / training staff that this may impact their employment



# Confidential Student Information

- FERPA prevents the disclosure of student information (commonly referred to as PII – personally identifiable information) without parental consent
- This includes statements which make students identifiable even without using their names
- Employees have a reasonable expectation of privacy concerning personnel matters



# Thank you for attending!



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