School Law Matters

September 2012

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Route to: Board ❑ Personnel ❑ Instruction ❑ PPS ❑ Business ❑ Other: _____

Hot Topics

When is a Student's Off-Campus Speech Protected by the First Amendment?

Joseph J. Bufano, Esq.

With the New York State Legislature's enactment of the Dignity for All Students Act ("Dignity Act"), educators and administrators have asked: When can school administrators take disciplinary action or other action based on off-campus communication that involves bullying and cyberbullying? And, when is such conduct protected by the First Amendment? As explained below, the answers to these questions appear to turn on whether it is foreseeable that the off-campus communication is likely to create a substantial disruption within the school environment.

These specific questions have yet to be answered by the courts. So, at this point, our only guidance comes from the 1969 U.S. Supreme Court case *of Tinker v. Des Moines Indep. Community Sch. Dist.* and some more recent cases applying that ruling. In *Tinker*, three teenage students wore black armbands to school in order to protest the Vietnam War. After the school banned the armbands under its dress code, the students challenged the policy as a violation of their First Amendment rights. In ruling for the students, the Supreme Court found the armbands to be expressive conduct and could not be banned absent a showing of a "compelling interest." The Court stated that in order to demonstrate a sufficient compelling interest, the District must demonstrate a substantial disruption of or material interference with school activities. In *Tinker*, the Supreme Court determined that the school failed to demonstrate that the mere wearing of the armbands at school posed any kind of a threat of material and substantial interference with the operation of the school.

Consistent with *Tinker* the Second Circuit decided in favor of a school district in the 2007 case *Wisniewski v. Board of Education*. In *Wisniewski*, an eighth-grade student in the Weedsport Central School District used as his AOL Instant Messenger icon a small drawing of a pistol firing a bullet at a person's head with the words "Kill Mr. Vander-Molen," his English teacher. The student sent IM messages, off-campus, displaying the icon to approximately 15 students. When the school discovered the student's icon, it suspended him for five days. In addition, the English teacher requested to stop teaching the student's class due to the emotional trauma he experienced as a result of the icon. Even though the student posted the messages off-campus, the court stated that "off-campus conduct can create a foreseeable risk of substantial disruption within a school." The court held it was foreseeable that the IM icon would come to the attention of school authorities and that the "threatening content of the icon," the "extensive distribution" of the content (15 people), and the time period for which the speech was distributed (three weeks) all made the risk "foreseeable to a reasonable person" and "would foreseeably create a risk of substantial disruption within the school environment."

In 2008, the Second Circuit again decided in favor of a school district and its regulation of off-campus speech. In *Doninger v. Niehoff*, a student brought a case against her school's administration after she was prohibited from running for school office. The prohibition was imposed because she posted a message, off-campus, on her public blog, criticizing the school district. The message stated, falsely, "Jamfest is cancelled due to douchebags in central office . . . [a]nd here is a letter my mom sent to Paula [Schwartz] and cc'd Karissa [Niehoff] to get an idea of what to write if you want to write something or call her to piss her off more." Subsequently, the school administration received numerous phone calls and email messages about Jamfest, forcing school administrators to spend an inordinate amount of time addressing the misinformation with the public and causing them to miss or arrive late to several school-related activities. The court determined that it was foreseea-

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Hot Topics

When is a Student's Off-Campus Speech Protected by the First Amendment? (cont'd)

ble that the off-campus expression would reach campus. The student's intent "to encourage her fellow students to read and respond," the fact that it related to school events, and that the speech actually reached school administrators was all relevant in the court's analysis.

The court found that the posting "foreseeably create[d] a risk of substantial disruption within the school environment" as it (1) contained "potentially incendiary language," (2) falsely stated that the Jamfest had been cancelled and (3) directed calls and emails to the school administration.

The court held, as it did in the *Wisniewski* case, that the student could be disciplined for the off-campus speech/ conduct because it "foreseeably create [d] a risk of substantial disruption within the school environment."

The legal standard of foreseeable risk is clear. What is unclear is what forms of off-campus cyberbullying rise to the level of foreseeably creating a risk of substantial disruption within the school environment. These court decisions appear to indicate that when a student's off-campus speech personally attacks a particular student, courts are more likely to allow school districts to regulate student speech because there is a consequential link between the speech and the likely student harm to follow. On the other hand, speech that is not directed at an individual student appears more likely to be afforded First Amendment protection as it is less likely to create a substantial disruption and to inflict harm.

The Dignity Act makes a similar distinction regarding personal attacks in its definition of "harassment." Furthermore, in June 2012, the New York State Legislature passed additional cyberbullying provisions which will be added to the Dignity Act and includes language from the *Wisniewski/ Donninger* cases. Under these new provisions, which become effective July 1, 2013, when "cyberbullying… occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property", the school district must address the harassment.

This area of law is evolving as new cases arise. It is particularly important for school officials to consult with counsel because of the constitutional issues that may be involved when complying with the new requirements of the Dignity Act. To address cyberbullying, school boards should develop a plan, with legal counsel, for local action to implement the Dignity Act. Your board's discussions should be informed by an awareness of the legal principles regarding protected speech in and out of the schools. Be prepared for change as the law continues to develop on cyberbullying and other consequences of expanding technological capabilities.

Feel free to contact us if you have any questions in this regard.

Capital Projects News

Changes in the Law May Affect Financial Aid for Your District's Construction Projects

The State Education Department's Office of Facilities Planning recently issued a reminder to school districts that the law has changed with respect to obtaining financial aid for capital projects. Specifically, the changes involve filing Final Cost Reports (FCR) with the Department.

Under the old rules, (i.e., for projects approved prior to July 1, 2011), FCRs had to be filed within two years from the date of final substantial completion. Failure to file the FCR within that timeframe resulted in a loss of **all** financial aid for the project.

Under the new rules, (i.e., for projects approved on or after July 1, 2011), the deadline has been removed along with the potential for losing all aid for this paperwork technicality. While aid cannot be lost under this new law, aid will not begin to flow to a district until both the final Certificate of Substantial Completion and the FCR are received by the Department (and no earlier than 18 months). The new law also requires that the FCR be submitted directly to the Office of State Aid. For a complete guide to the new rules visit the following link: https://stateaid.nysed.gov/build/pdf_docs/ch_97_bldg_aid_guidance_with_timelines.pdf.

In addition, the State Legislature enacted an "amnesty program" for districts that currently have late FCRs. For those projects approved prior to July 1, 2011, that currently have late FCRs the new law will permit the district to submit a FCR no later than December 31, 2012 to have partial aid restored. Simply stated, the penalty has changed from a total loss of aid to a partial loss, so long as the FCR is submitted before the December 31 deadline. If the FCR is received after that date, no aid will be restored. For more details visit: https://stateaid.nysed.gov/build/html_docs/pastdue_final_cost_rep_cap_projects.htm.

If you have any questions, please feel free to contact Joseph Shields, Esq. of our office.

Attorney-Client Privilege

Protect the Confidentiality of Communications with Your School District's Attorneys

Communications between clients seeking legal guidance and their attorneys have long been deemed to be shielded from disclosure to third parties pursuant to the so-called, "attorney-client privilege." For school districts, attorney-client privilege usually protects communications with the board of education or high-level administrators. Documents and other confidential information protected by the attorney-client privilege need not be disclosed in response to a Freedom of Information Law request and, absent some rare exceptions, need not be disclosed to another party during litigation.

It is important to note, however, that not all communications with an attorney are privileged. The attorney-client privilege will only apply where the information sought to be protected from disclosure was a "confidential communication" with an attorney "for the purpose of obtaining legal advice or services." *Priest v. Hennessy*, 51 N.Y.2d 62 (1980)

Accordingly, school officials should conduct conversations with counsel in private. Discussions that take place in the presence of a "third-party" are not going to be protected by the attorney-client privilege. While there are some exceptions to this rule, it is best to think of a "third-party" as being anyone other than a client and his/her attorney. If the attorney-client privilege is waived through even inadvertent disclosure to a third-party, the school district's attorney may become a witness in lawsuit. If that happens, the attorney may not be able to represent the school district in the lawsuit.

For example, if a client and an attorney make the mistake of discussing a legal matter in an elevator in the presence of a stranger, the attorney-client privilege would not apply. This would mean that an adversary's attorney could question both attorney and client about the content of their discussion in the event of litigation.

With written communications, the attorney-client privilege is lost when the document, or email, is shared with a third-party. If a privileged document, such as an opinion letter from the school district's attorney, is disclosed to a third-party, an opposing attorney could obtain that document in the event of litigation. Further, the opposing attorney may also be able to question both the attorney and the school district's representatives about the legal and factual issues discussed in the opinion letter.

School attorneys often prepare opinion letters relating to personnel matters. Given the potential that third parties will have access to an employee's personnel file, it is advisable to avoid placing these opinion letters in those files.

Communicating via email is convenient and efficient. It may be tempting to forward emails from a school district attorney to individuals who may be involved in a given matter. Before doing so, however, make sure that none of the recipients may qualify as a "third-party." Just because a party may be "working with" the school district on a given matter does not mean that emails to or from the school district's attorney may be shared with that party without destroying the attorney-client privilege.

In general, sharing emails or opinion letters from legal counsel with third-parties will destroy the attorney-client privilege and should be avoided.

Consult with your school attorney if you have any doubt about whether a disclosure to a given party may destroy the attorney-client privilege. Should you have questions about the attorney-client privilege, please feel free to contact Charles E. Symons, Esq. at our office.

Employee Free Speech

Second Circuit Affirms Limitation on Public Employee Free Speech

One of the most basic/fundamental rights we enjoy as American citizens is our right to freedom of speech. It is preserved in the First Amendment to the U.S. Constitution, and states: "*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."* There is, however, a limitation on the right of freedom of speech "when public employees make statements pursuant to their official duties."

In a recent Second Circuit Court opinion (*Ross v. Breslin, et al*; __ F.3d __, 2012 WL 3892396 (C.A.2 N.Y)), a public school employee (who had over a period of time reported alleged financial malfeasance of a number of school district officials to the Superintendent of Schools) who was termi-

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Employee Free Speech

Second Circuit Affirms Limitation on Public Employee Free Speech (cont'd)

nated from employment because she had failed to disclose her full employment history on her employment application. The employee commenced an action against the School District, its Board Members and Superintendent of Schools in Federal District Court claiming (in part at least) that her termination was a violation of her First Amendment rights (i.e., that she was terminated because she had reported the alleged financial impropriety).

In resolving the case, the Second Circuit Court of Appeals recognized that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." (Citing *Garcetti v. Ceballos*, 547 U.S. at 421.) There is no bright-line rule to be applied, Courts have to look at the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two. (Citing *Weintraub v. Bd. of Educ*., 593 F.3d 196, (2nd Cir. 2010).)

The plaintiff had testified during her deposition that her job duties included processing the payroll and making sure pay rates were correct. If there was a mistake with a payment requisition, her duty was to 'bring[] it to the appropriate person's attention,'" She also testified that she had brought many such questionable payment requisitions and unauthorized payments (payroll bonuses and overtime payments) to the attention of the Superintendent. In fact, the Court concluded that reporting pay irregularities to a supervisor was one of the plaintiff's job duties and she acquired all of the information that she had about the irregular payments in the ordinary course of performing her work. Her reports to the Superintendent were part of her official job responsibilities.

Because the plaintiff was speaking pursuant to her official duties as a clerk and not as a private citizen, her speech was not protected by the First Amendment, no violation of the Clerk's First Amendment Right, and no basis for a First Amendment cause of action.

If you have any questions about this case or other matters associated with Free Speech, please contact our office.

Upcoming Events

Attorney(s)	Date(s)	Event/Program/Location
Donald Budmen Joseph Bufano	**9/24/12**	**NYSCOSS - Fall Leadership Summit presentation *"In Truth, We Never Ignored Bullying! So, What's Up DASA?"* - Saratoga Hilton, Saratoga Springs, New York**
Henry Sobota	**9/24/12**	**NYSCOSS - Fall Leadership Summit presentation "*Hot Topics in Labor and Personnel Confronting Superintendents* in the *Fall of 2012"* - Saratoga Hilton, Saratoga Springs, New York**
Benjamin Ferrara Eric Wilson	**9/24/12**	**NYSCOSS - Fall Leadership Summit presentation "*It's a New Playbook Now! The Newest 3020-a Reforms and the Impact of APPR on the Discipline of Teachers and Principals*"- Saratoga Hilton, Saratoga Springs, New York**
Benjamin Ferrara	**10/3/12**	**Hosting Study Council at Syracuse University's 36th Annual Education Law Conference and presenting "*The Hypotheticals*"- Sheraton Syracuse University Conference Center, Syracuse, New York**
Donald Budmen Joseph Bufano	**10/3/12**	**Study Council at Syracuse University's 36th Annual Education Law Conference presentation "*Bullying, Cyberbullying, Harassment and DASA"* - Sheraton Syracuse University Conference Center, Syracuse, New York**
Eric Wilson	**10/3/12**	**Study Council at Syracuse University's 36th Annual Education Law Conference presentation "*APPR: Not Everyone's First Rodeo*" - Sheraton Syracuse University Conference Center, Syracuse, New York**
Susan Johns	**10/3/12**	**Study Council at Syracuse University's 36th Annual Education Law Conference Presentation "*Update on Special Education Matters*" - Sheraton Syracuse University Conference Center, Syracuse, New York**
Marc Reitz	**10/3/12**	**Study Council at Syracuse University's 36th Annual Education Law Conference Presentation "*Labor Relations: Negotiating in Lean Times and Other Trends*" - Sheraton Syracuse University Conference Center, Syracuse, New York**
Joseph Shields	**10/3/12**	**Study Council at Syracuse University's 36th Annual Education Law Conference Presentation "*New Approaches to Successful Capital Projects and Protecting Property Tax Revenue*" - Sheraton Syracuse University Conference Center, Syracuse, New York**