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Student-Staff Boundary Invasions: Addressing the Epidemic in Our Schools

John E. Britton
Britton, Smith, Peters & Kalail, Co., L.P.A.
3 Summit Park Drive, Suite 400
Cleveland, Ohio 44131-2582
(216) 503-5055
(216) 503-5060 (direct)
(216) 503-5065 (fax)
www.ohioedlaw.com
jbritton@ohioedlaw.com

I. Social Technology and Staff-to-Student Misconduct

A. The Scope of the Problem

The frequency with which administrators confront technology issues in public education has grown exponentially. The 21st Century comes standard with cell phones, internet usage, blogging, "YouTube," "Facebook," "MySpace," "Twitter," texting, instant messaging, digital videos, and image sharing.

How people communicate and express themselves has drastically changed and we are witnessing the corresponding evolution of education and constitutional law as it relates to employee expression and conduct in the public school environment, including conduct toward students.

Unfortunately, these concepts continue to change as the courts confront the new fact patterns created by the integration of technology in public schools. In this regard, these materials are best used as a resource, and should not take the place of securing competent legal advice at the point of contact when addressing the various challenges you will likely face as educators.

To that end, issue identification becomes crucial to success in understanding the developing legal landscape. Identifying potential pitfalls is half the battle.

B. It's Not Just Kid's Stuff

Aside from the myriad issues that spring forth from technology with regard to student regulation, there are an equal number of important issues addressing staff-to-student conduct, including:

1. Employee use of the internet – social networking sites, blogs, etc.;
2. Employee First and Fourth Amendment rights;
3. Electronic communications with students by staff;
4. Emails – FERPA, IDEA, and confidentiality;
5. Collective bargaining issues; and
6. "Conduct unbecoming the teaching profession," as defined by the Ohio Department of Education

C. A Few Recent Examples of Teacher Misconduct to Illustrate the Problem

1. Coach seen on Facebook playing beer pong with underage students.

2. Female teacher "sexting" her student and later convicted of having sex with him.

   a. SOURCE: Jon Newberry, "Schools Struggle to Keep Up, Legally, with Digital World," *Business Courier of Cincinnati*, Nov. 20, 2009.

3. 26-year-old P.E. teacher who admitted to having sex with 14-year-old, "sexted" him with nude pictures of herself

   a. SOURCE: Christy Oglesby, "Cells, Texting Give Predators Secret Path to Kids," CNN.com, Jan. 11, 2008.

4. Pickerington, Ohio, teacher had an inappropriate relationship with students, including texting, e-mailing, and sending letters to students; establishing personal friendships with students; and allowing students to come to her room during free periods—license suspended one year with mandatory counseling

5. Delaware, Ohio, teacher sent a student inappropriate e-mails, made sexual comments, invited the student to his house, attempted to engage in sexual contact with the student, and invited the student to be alone with him in a hotel room—license permanently revoked

6. School district suspended a first-grade teacher to investigate charges from parents that she wrote on Facebook about feeling like a "warden" and referred to her students as future criminals

   a. SOURCE: NSBA Legal Clips, http://legalclips.nsba.org/?p=5777, April 1, 2011

7. School district suspended a high school English teacher after parents complained to administrators about her blog in which she railed on her students for more than a year—phrases on the blog include; "Frightfully dim," "Rat-like," "Am concerned your kid is going to open fire on the school," "I hate your kid," and "Seems smarter than she actually is."

   a. SOURCE: NSBA Legal Clips, http://legalclips.nsba.org/?p=4718, February 9, 2011

D. Distinguishing between Boundary Invasions and Educational Outreach

1. The exponential increase in social technology in schools inherently carries with it greater scrutiny of school employees' relationships with students. While using technology allows teachers other methods of educational outreach, it can create unintended impressions or appearances from the perspective of a student, parent,

or third party. It is important to identify how we use technology and best practices in order to minimize the potential for allegations of misconduct, or worse, criminal activity. The need to take proactive action is critical given the significant potential consequences (i.e. disciplinary action, licensure issues, and criminal charges).

Given moral and ethical obligations to our students, it is also critical for teachers to err on the side of caution and report boundary invasions by a school employee with a student. Sexual molestation by educators is normally always preceded by sexual grooming. Since sexual grooming is almost always accomplished through boundary invasions, all boundary invasion behavior is suspect and must be examined.

2. **"Sexual Grooming" Defined:** Increasingly invasive and inappropriate actions deliberately undertaken with the aim of befriending and establishing an emotional and/or physical connection with a child, in order to lower the child's inhibitions in preparation for sexual abuse. Examples include:

- Giving gifts or money to a student when there's no educational purpose
- Engaging in peer-like behavior with students (i.e. being cool like one of the kids)
- Being overly touchy with students
- Favoring certain students by giving them special privileges
- Favoring certain students by inviting them to come to the classroom at non-class times
- Getting a student out of class repeatedly to visit a teacher
- Talking to a student about problems not normally discussed with an adult
- Telling a student "secrets" or having secrets
- Talking to a student about personal problems to the extent that the adult becomes a confidant of the child when it is not the adult's job to do so
- Allowing the child to get away with inappropriate behavior
- Being alone with a student behind closed doors
- Giving a student rides in a personal vehicle

- Extending contact beyond the school day for personal purposes
- Going to the student's home for non-educational reasons
- Taking the student on personal outings, even with the parent's permission
- Telling sexual jokes to students
- Discussing sexual topics with students
- Hugging, kissing, or other physical contact with students
- **Using e-mail, text-messaging, or web sites to discuss personal topics or interests with students**

3. Recent statistics from the Ohio State Board of Education indicate that investigations of teachers for "Conduct Unbecoming" has nearly doubled from 357 investigated allegations in 2008 to 699 investigated allegations in 2009. Although the number of investigations for sexual offenses has decreased from 100 in 2008 to 80 in 2009 and the total number of allegations reported to the Office of Professional Conduct has also slightly decreased from a total of 8,246 in 2008 to 8,089 in 2009, one cannot ignore the drastic rise in alleged "Conduct Unbecoming."

   SOURCE: James Miller & Lori Kelly, Office of Professional Conduct, Annual Report for 2009, submitted to the Ohio State Board of Education May 2010.

   The larger number can be attributed to many factors, including better data recording and heightened awareness among parents and students, but it also indicates a general trend of increasingly inappropriate behavior. In addition, the larger number suggests a misunderstanding of boundaries and a growing need for clearer standards.

E. "Linking" to Students: When Electronic Communications by Staff with Students Becomes a Really, Really Bad Idea

1. Social networking technology facilitates the blurring of lines between teacher and student.

2. It allows students and teachers more access to each other outside of school, giving rise to more opportunities for inappropriate relationships.

3. Moreover, teachers who are not that much older than the students also grew up using text messaging and other forms of digital networking.

4. Internet and cell phones create ripe opportunities for general misconduct, sexual harassment, or child molestation.

5. Misuse of social technology can lead to "grooming" among other inappropriate conduct.

6. Examples of Inappropriate Teacher-Student Emails:

   a. Leslie Finch

      High School Teacher emailed her 17-year-old male student -- "Hey Baby - I just wanted to say hi before I go to bed. Good night, baby! I'll meet you in our dreams. I miss you baby! Muaah!"

      Teacher was still employed by the district ten months after the district's investigation. District determined that "something inappropriate took place," but nothing more.

      After recently resigning, she became a substitute teacher in another school district.

      Dallas School District is now under investigation for failing to properly address teacher misconduct in at least ten instances in four years where the district allowed educators who were suspected of inappropriate relationships with students to quietly resign, to maintain clean criminal records, and to continue working with children.

      SOURCE: Tawnell D. Hobbs, "DISD Educators' Misconduct with Students Kept Quiet," *The Dallas Morning News*, Feb. 28, 2010.

   b. Troy Mansfield

      Kline v. Mansfield, 454 F. Supp. 2d 258 (E.D. Penn. 2006)

      Elementary Teacher emailed poems to third grade student. The girl said that she felt like she could confide in him. After 4 years of additional "grooming," they would regularly discuss sexual fantasies and escape to the teacher's car to have sex.

      Student sued the principal and school district for § 1983 violations. The district could not be held liable for the teacher's actions based on respondeat superior, and plaintiffs failed to establish a custom or policy that could support § 1983 liability. There was no indication that the district was aware of sexual misconduct by the teacher prior to his arrest on criminal charges, nor did plaintiffs establish deliberate indifference by the

district with regard to training employees to recognize and report signs of sexual abuse.

Although the court granted summary judgment to the defendants, other defendants in a similar situation may not be so fortunate.

c. Kelly Dalecki

Middle School Teacher gave 13-year-old student her cell phone and email address. She emailed him porn and illicit messages, and eventually started a sexual relationship with him.

7. "Friending" on Facebook Examples:

a. Jonathan S. Dick

Middle School P.E. Teacher was arrested for soliciting sex from a 15-year-old boy by way of a social networking website. The teacher "sexted" the student as well. He was employed with the district for ten years and was an athletic coach.

SOURCE: Jonathan Pitts, "Teacher Accused of Soliciting Sex from Teen," *The Baltimore Sun*, Mar. 21, 2009

8. MySpace Examples:

a. Mr. *"Spiderman"*

Teacher's MySpace page showed discussions with students involving sexual content.

Spanierman v. Hughes (D. Conn. 2008), 576 F.Supp.2d 292 (discussed below in more detail).

9. Teachers "Sext" Too! - Teacher-Student Texting Examples:

a. Allison Musacchio

School officials discovered more than 200 texts and phone calls between a 31-year-old High School Social Studies Teacher and male student. The investigation was prompted by the student's ex-girlfriend, who noticed his cell number on the teacher's cell phone.

SOURCE: http://www.chattahbox.com, Dec. 10, 2009.

b. Beth Ann Chester

P.E. Teacher admitted to having sex with 14-year-old student. Detectives found evidence of "Sexting" by way of nude pictures of her on the teen's cell phone, along with text messages.

c. Geneva Henry

29-year-old English Teacher, wife and mother of three, faced charges of lewd and lascivious conduct for sending inappropriate text messages to 14-year-old student via her cell phone and MySpace account. Although she was not charged with engaging in any other sexual activity with the student, she did write him love poems and messaged: "I want to rip all your clothes off"; "I want to kiss you all over"; "I want to have sex with you." Students were drawn to the teacher because she was young. They had an extra connection to her and viewed her as a role model. Her lawyer stated, "She could be a friend as well as a teacher. She could be someone they could confide in."

SOURCE: Christina Denardo, "Lawyer Blames Bipolar Disorder, 'Mutual Affection,' for Ex-Jupiter-Christian Teacher's 'Sexting' Case," Palm Beach Post, May 7, 2009.

d. Pamela Rogers

Gym Teacher used cell phone to send provocative photos and videos of herself to 13-year-old student. In addition, she contacted him by way of MySpace. Also convicted for having sex with the student.

e. Ronnie Brendan Watts

Teacher sent sexually explicit instant-messages to at least one of the 10 victims that he abused.

People v. Watts, 2009 Cal. App. Unpub. LEXIS 3084 (Apr. 23, 2009)

f. Todd Kendall Dunnings

High School Classroom Aide sent sexually explicit text message to two students. Defendant-teacher argued that he was not in a custodial relationship with the students because he sent the messages when he or the students were away from school. The Court held that the teacher clearly maintained a supervisory or custodial relationship over the victims at the time of his proposals to them. He was a teacher's assistant in the victims' math class at the time he made the proposals. The fact that these

proposals occurred when the victims were not on school property did not change the outcome.

Dunnings v. Virginia, 2008 Va. App. LEXIS 107 (Ct. App. Va. Mar. 4, 2008)

g. Michael Walter (Brooklyn City Schools):

The district reported that Mr. Walter engaged in conduct unbecoming to the teaching profession and crossed the boundaries of an appropriate student-teacher and adult-child relationship with a particular female student in the District when he sent voluminous text messages to that student. Documents disclosed that Mr. Walter sent the student as many as 255 text messages in a single day and a total of 6,405 in a 71-day period for an average of 90 text messages a day.

Permanent License Revocation (Ohio State Board of Education Resolution #11 – September 9, 2008)

10. Be Proactive Regarding Teacher-Student Electronic Communication

a. Obligation to Report Child Abuse – Resolve Any Doubt in Favor of Reporting!

Ohio Revised Code § 2151.421 requires ***each school employee*** to report child abuse when, while acting in his/her official capacity, he/she:

- Knows or has reason to believe that;
- A child under 18 or a disabled person under 21;
- Has suffered or may suffer "any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect."

You don't need absolute proof! When misconduct has occurred and there has been inappropriate electronic communication, it is NOT advantageous to spend much energy contemplating whether or not what you see or suspect qualifies as child "abuse." Make the report and let the professionals decide.

b. ***Baby with the Bathwater?*** What is the Best Way to Effectively Discourage Inappropriate Teacher-Student Electronic Communications?: The Mississippi Approach –

School districts across the state of Mississippi are telling students not to text their teachers or communicate with them on social networking sites. Noting a "casual rapport" between students and teachers, the Lamar County School Board prohibited teachers and students from communicating via text messages or social networking sites. Other districts are taking similar steps. Since approximately 2006, the Mississippi School Boards Association has been advising districts to develop policies. The state Department of Education's Office of Safe and Orderly Schools has encouraged districts to do the same, telling them that such communication isn't secure and is easily misconstrued. While the technological communication is taboo in the K-12 arena, it's perfectly acceptable in higher education. John Forde, head of the communication department at Mississippi State University, said social networking sites are sometimes the best way to get a message to students about class, and he sees an increasing number of teachers and students using it for schoolwork, which he doesn't see as problematic.

But the lines between faculty and students are more formal in K-12, where most students are under the legal age of consent. Text messages and social networking, educators say, provide the kind of private communication that sets the stage for inappropriate behavior. "If you look at those cases where school employees have lost their jobs, you'll see that almost every one of them is characterized by an extensive text-messaging relationship," said Jim Keith, an MSBA attorney. It's fine, he said, for students to communicate on school district-maintained Web sites. Those sites, officials said, can provide information about schoolwork and are monitored by the school officials. And educators say it's OK for coaches to send the entire team a text message about things such as practice times or cancellations. In those instances, everyone gets the same message, Keith said.

SOURCE: LaRaye Brown, Jackson Clarion-Ledger, July 27, 2008.

[*Note: An ABC News story quotes Lamar County school board attorney Rick Norton, who initiated the policy prohibiting "fraternization via the Internet between employees...and students," as explaining, "This was just an attempt by us to put into policy that there doesn't need to be any informal socialization between teachers and students. The main thing is that we actually encourage interaction via the Internet for educational purposes. What we're trying to prevent is communication of an inappropriate nature." Lamar's superintendent Ben Burnett adds, "The downside is that part of being a good teacher is having a good relationship with a kid. You have to get to know a child to form a relationship, and then education can happen. In fact, no learning will happen until then. But we have so many different avenues for educational*

communication, and have really incorporated technology in so many ways in trying to change the culture of how we educate students, that we felt we could do this for the safety of the kids."]

SOURCE: Jon Wiener, ABC News.com, July 24, 2008

c. NEOLA Policies and Student-Teacher Communications: What's Your District's Policy?

i. *"District Web Page,"* optional language in policy: "Staff members are prohibited from requiring students to go to the staff member's personal web pages/sites (including, but not limited to, their Facebook or MySpace pages) to check grades, obtain class assignments and/or class-related materials, and/or to turn in assignments."

ii. *"Computer Technology and Networks"* policy:

"Social media shall be defined as internet-based applications (such as Facebook, MySpace, Twitter, et cetera) that turn communication into interactive dialogue between users. The Board authorizes the instructional staff to access social media from the District's network, provided such access has an educational purpose for which the instructional staff member has the prior approval of the Principal.

However, personal access and use of social media, blogs, or chat rooms from the District's network is expressly prohibited and shall subject students [and staff members] to discipline in accordance with Board policy."

OR

"Social media shall be defined as internet-based applications (such as Facebook, MySpace, Twitter, et cetera) that turn communication into interactive dialogue between users. The Board prohibits any access and use of social media by students [and staff members] from the District's network."

iii. *"Student Supervision and Welfare"* policy:

"[S]taff members shall not engage students in electronic communication via email, texting, social media and/or online networking media, such as Facebook, Twitter, YouTube, MySpace, Skype, blogs, etc., at any time unless such

communication has been specifically authorized by the student's principal."

AND/OR

"[S]taff members are prohibited from electronically transmitting any personally identifiable image of a student(s), including video, photographs, streaming video, etc. via email, texting, social media and/or online networking media, such as Facebook, Twitter, YouTube, MySpace, Skype, blogs, etc."

F. "New" Grounds for Teacher Termination in Ohio – "Good and Just Cause"

1. H.B.1 Amended R.C. 3319.16

a. **R.C. 3319.16** was amended from . . .

"The contract of any teacher . . . may not be terminated except for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause."

Now, it simply states:

"The contract of any teacher . . . may not be terminated except for *good and just cause*."

b. **"New" Grounds Making a Difference?**

Court Upholds District's Decision to Terminate Under "New" Standard

Lanzo v. Campbell City Sch. Dist. Bd. of Educ., 2010 Ohio 4779

A teacher grabbed a student by his arm or shirt, put his hand on the student's chin, and moved the student's face in an effort to force the student to pay attention to a video. The impartial referee who heard the matter found that these actions, along with several other incidents involving the teacher twisting the hair and pulling the ears of some male students, violated the board's policy against corporal punishment and the inappropriate touching of students. The appeals court held that the trial court properly concluded that the teacher's actions constituted "good and just cause" for termination pursuant to R.C. 3319.16. The teacher's physical intervention with a student merely for the purpose of redirecting the student's attention was disproportionate to the misbehavior involved

and was a violation of school policy. Moreover, the termination decision was based on the teacher's cumulative misconduct over a three-year period, including the teacher's acts of raising his voice to a student's grandparent, leaving his classroom unattended on two occasions, twice interrupting another' teacher's class, and threatening to slash the principal's tires.

Court Rejects District's Decision to Terminate Under "New" Standard

Stalder v. St. Bernard-Elmwood Place City Sch. Dist., 2010 Ohio 2363

A teacher had worked as a physical-education teacher for 20 years and had an exemplary record. He was terminated after a student alleged that the teacher threw a basketball at him when the student failed to comply with the teacher's directives. The appeals court held that the trial court properly reversed the board's termination decision given the teacher's exemplary teaching record and the fact that the referee had found that the teacher had not intentionally thrown the ball directly at the student but had, instead, thrown the ball at the basketball that the student was holding. Moreover, the teacher's attempt to knock the basketball from the student's hand clearly did not amount to a "fairly serious matter," which was necessary to support a decision to terminate a teaching contract under R.C. 3319.16. The student was not injured, there was no intent to hit the student, and the teacher's actions did not violate any of the board's policies. However, the trial court erred by awarding attorney fees to the teacher as the evidence presented did not demonstrate that the board acted in bad faith in terminating the teacher.

2. **R.C. 3319.31 -- "Grounds for Refusing, Suspending, Revoking, or Limiting a License"**

"For any of the following reasons, the state board of education, in accordance with Chapter 119 and section 3319.311 of the Revised Code, may refuse to issue a license to an applicant; may limit a license it issues to an applicant; may suspend, revoke, or limit a license that has been issued to any person; or may revoke a license that has been issued to any person and has expired:

a. *Engaging in an immoral act*, incompetence, negligence, or *conduct that is unbecoming to the applicant's or person's position*; . . .

G. The Ohio Education Association Weighs In Social Networking Sites

1. OEA 2009 Update

Teachers are role models. The inappropriate use of social networking sites can expose them to employment consequences. To that effect, the Ohio Education Association, in October 2009, put out the following update, advising members in effort to minimize the chances of adverse employment consequences and licensure issues. [SOURCE: http://www.ohea.org/social-networking-recommendations]

a. *Members should not post, do, say or write anything on a social network that they would not want to see on the front page of the local newspaper or would not say or do in front of students, parents, or the board of education.*

b. *Members should not post material to their sites that may be considered inappropriate or unprofessional, including pictures and links. Members should monitor the content of their "pages" and remove anything inappropriate or questionable immediately. Members should not join and should end affiliations with sites that are unprofessional or inappropriate.*

c. *Members should never post any information that would identify a student, and members should refrain from posting critical comments about students and school officials. Unfortunately, school employees do not have the same free speech rights as the general public, and the content and impact of some speech may subject members to discipline including termination.*

d. *Members should educate themselves about and take all appropriate precautions available on the social networking sites they are using. For example, "pages" should be marked private, and all requests to become "friends" should be approved by the member. A member should never grant access to his or her "page" without knowing who the person making the request is.*

H. "Conduct Unbecoming the Teaching Profession" – the Ohio State Board of Education Responds:

1. "Licensure Code of Professional Conduct for Ohio Educators" (LCPCOE)

The LCPCOE applies to all individuals licensed by the state Board of Education. It ensures that educators receive their entitled due process. Disciplinary actions range from letter of admonishment to revocation or denial of a license. The disciplinary guidelines only apply to licensure issues. Aggravating and mitigating factors will be considered for each case on an individual basis.

The Code does not change the reporting requirements of H.B. 79, i.e. what and when to report. H.B. 428 changed mandated reporters from school boards and governing entities to individuals, e.g. superintendents, administrators, etc. Mandated reporters are now subject to criminal penalties and licensure discipline for failing to report misconduct as required by H.B. 79.

a. According to R.C. 3319.313, superintendents, directors, etc. are required to report to ODE if:

   (1) teacher is convicted of a criminal offense listed in R.C. 3319.31 or 3319.39;

   (2) termination/non-renewal proceedings initiated due to *conduct unbecoming;*

      Query: "in whole or in part?"

   (3) teacher resigned under threat of termination/non-renewal for *conduct unbecoming;* and/or

   (4) teacher resigned in the course of an investigation for *conduct unbecoming.*

b. Principle 1 - Professional Behavior

   Educators shall behave as professionals realizing that their actions reflect directly on the status and substance of the education profession.

   An educator serves as a positive role model to both students and adults and is responsible for preserving the dignity and integrity of the teaching professional and for practicing the profession according to the highest ethical standards.

   Examples of Conduct Unbecoming:

   (1) Failing to adhere to the Code of Conduct

   (2) Violating state or federal laws

   (3) Disparaging a colleague, peer, or other school personnel while working in a professional setting

   (4) **Inappropriate use of technology, i.e. Using technology to intentionally host or post improper or inappropriate material that could reasonably be accessed by the school community**

c. Principle 2 - Professional Relationships with Students

Educators shall maintain a professional relationship with all students at all times, both in and out of the classroom.

An educator's responsibility includes nurturing the intellectual, physical, emotional, social, and civic potential of all students and providing a safe environment free from harassment, intimidation and criminal activity. An educator creates, supports, and maintains an appropriate learning environment for all students and fulfills the roles of trusted confidante, mentor and advocate for students' rights. An educator must serve as a champion against child abuse and be cognizant of student behaviors that suggest abuse or neglect.

Examples of Conduct Unbecoming:

(1) Committing any act of sexual abuse or engaging in sexual conduct

(2) Committing an act of cruelty to children, including child endangerment, physical abuse, mental injury, or emotional abuse

(3) **Soliciting, encouraging, engaging, or consummating an inappropriate relationship with a student**

(4) Disparaging students

(5) Using inappropriate language or expressions
(6) Failing to provide appropriate supervision

(7) Knowingly contributing to or knowingly failing to intervene in the harassment, intimidation, or bullying of a student

(8) **Using technology to promote inappropriate communications with students**

d. Principle 3 - Accurate Reporting

Educators shall accurately report information required by the local board of education or governing board, state education agency, federal agency or state or federal law.

An educator communicates appropriate representation of facts concerning qualifications for professional practice, student information, school board policy, and other educational matters. An educator must report, to the superintendent or designee, conduct by a licensed educator that

substantially impairs his or her ability to function professionally or any conduct that is detrimental to the health, safety, and welfare of students.

Conduct Unbecoming:

(1) Falsifying, misrepresenting, omitting, or being negligent in reporting information

(2) Failing to report to superintendent conduct of an educator that places students at risk

(3) Failing to make a mandated report

SOURCE: Board of Ohio Educator Standards, Summer 2008

2. **Recent ODE Statistics**

As indicated previously, recent statistics from the Ohio State Board of Education indicate that investigations of teachers for "Conduct Unbecoming" nearly doubled from 2008 to 2009.

II. The United States Constitution: A Major Player in Addressing the Digital Revolution and Employee and Student Discipline

The legal landscape of technology in public education has for its background the United States Constitution. Specifically, the First Amendment directly impacts the extent to which public schools can control teacher and student expression and conduct. Meanwhile, the Fourth Amendment restricts the extent to which public schools may investigate violations of school policy involving electronic communication devices and how to use technology to monitor the school environment.

These amendments state:

"*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 of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*"

–United States Constitution, First Amendment.

" The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

–United States Constitution, Fourth Amendment.

A. **<u>Basic Legal Principles of the First Amendment</u>**

1. The First Amendment generally prevents government from proscribing speech ... because of disapproval of the ideas expressed. *R.A.V. v. City of St. Paul* (1992), 505 U.S. 377.

2. To survive constitutional scrutiny, a state must narrowly tailor any regulation that limits the content of unprotected speech unaccompanied by conduct. *State of Wisconsin v. Douglas D.* (2001), 243 Wis.2d 204, 626 N.W.2d 725.

3. State regulation of speech must be content-neutral. *State of Wisconsin v. Douglas D.* (2001), 243 Wis.2d 204, 626 N.W.2d 725.

4. It is well understood that the right of free speech is not absolute at all times and under all circumstances. *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568. Some categories of speech are "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest":

    a. Fighting words;

    b. Speech that incites others into imminent lawless action;

    c. Obscenity;

    d. Libel and defamatory speech; and

    e. True threats.

B. First Things First: Employee Discipline vs. Free Speech:

Employee Speech v. the Employer's Right to Promote Efficient Operations – The U.S. Supreme Court Weighs In

"The Big Four" U. S. Supreme Court Cases on Employee Speech:

- ***Pickering v. Bd. of Education*** (1968), 391 U.S. 563
- ***Connick v. Myers*** (1983), 461 U.S. 138
- ***Mt. Healthy v. Doyle*** (1977), 429 U.S. 274
- ***Garcetti v. Ceballos*** (U.S. 2006), 126 S. Ct. 1951

1. *Pickering v. Bd. of Education* - The Balancing Test

After a second failed attempt by the Board to pass a bond issue, a public high school teacher drafted a newspaper article that was highly critical of the Board and its pattern of expenditures. Following publication of the article in a local newspaper, the teacher's employment was terminated. The Board defended itself by claiming that many of the statements were false and would therefore lead to disruption among teachers, administrators, the Board and the residents of the district. The teacher responded that his letter was protected by his right to free speech under the First Amendment.

The Illinois Supreme Court rejected the teacher's claim on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools "which in the absence of such position he would have an undoubted right to engage in."

In reversing the decision of the Illinois Supreme Court, the United States Supreme Court formulated a balancing test approach and provided:

> *The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.*

In reaching its ultimate conclusion that the termination of the teacher was a violation of his First Amendment rights, the Court primarily considered the following five factors: 1) was there a close working relationship between the teacher and the individuals that he criticized?; 2) was the substance of the letter a matter of public concern?; 3) Did the letter actually result in a detrimental impact

upon the administration?; 4) were the teacher's daily duties impeded as a result of the letter?, and 5) was the teacher acting in a professional capacity or as a private citizen?

Because the bond issue was a matter of great public debate at the time the article was written by the teacher and published, the Court concluded that the teacher's interest in commenting on a *matter of public concern* outweighed the school district's desire to suppress employee speech, assuming of course that the speech was not made with knowing or reckless disregard for the truth. Therefore, the teacher could not be terminated on the basis of the content of the news article that was published by the local newspaper. As noted by the Court:

> *[s]tatements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal supervisors.*

2. ***Connick v. Myers*** **- Matter of Public Concern or Private Grievance?**

This case, considered the benchmark for analyzing the free speech rights of public employees, dealt with the termination of an assistant district attorney following her distribution of a questionnaire to other office employees that was highly critical of their supervisors. Initially, Myers was notified that she was to be transferred to another department. Dissatisfied, she went home and prepared a survey that she distributed the following day at work to her colleagues that included among other things, questions about their feelings toward the office transfer policy, office morale, the level of confidence in supervisors and whether employees felt pressured to work in political campaigns. Following the distribution of the questionnaire, Myers' supervisor, Connick, informed her that she was being terminated for her failure to accept the transfer.

Myers filed suit contending that her employment was wrongfully terminated because she had exercised her constitutionally protected right of free speech under the First Amendment. The District Court agreed finding that the facts showed that although Myers was told she was terminated for refusing to accept the transfer, the real reason resulted from her distribution of the questionnaire. The Fifth Circuit Court of Appeals affirmed.

In borrowing the rationale from its earlier decision in *Pickering*, the Court reversed the decision of the lower courts on the basis that the employee speech exhibited through the questionnaire *did not touch on a matter of public concern*. The Court concluded that Myers' questionnaire, with the exception of the political

campaign question, did not fall under the rubric of "public concern." As such, the Court noted:

> *We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employer's behavior.*

Noting its concern with including all matters which transpire within a government office or every remark directed at a public official as planting the seeds of a constitutional claim, the Court rejected Myers' position that her termination was in violation of her right to free speech. In the Court's view, the questionnaire was more accurately characterized as an employee grievance concerning internal office policy. In order to successfully challenge her termination under the Court's rationale, Myers would have had to demonstrate that her speech was directed a matter of *public concern*. Since she could not, her claim was without merit.

> *The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment.*

> [*See also,* ***City of San Diego v. Roe*, 543 U.S. 77 (2004)** – applying *Connick* and *Pickering* to expressions in employment context

Roe was a San Diego police officer who took pornographic videos of himself undressing out of a police uniform, selling the videos on ebay, in addition to selling other products related to his police work. Termination proceedings started when he failed to respect orders to stop the practice. Roe brought suit alleging that the employment termination violated his First Amendment Right to Free Speech. The U.S. Supreme Court found that creating the pornographic videos of himself in which he was associated with his employment was not protected speech, unrelated to his employment. Rather, the expression had an adverse impact on the employer as it was directly detrimental to the mission and functions of the employer. As such, it could not have been a "concern to the community" under *Connick*. Moreover, it did not merit the *Pickering* balancing because it did not yet touch upon a matter of "public concern."

"Although Roe's activities took place outside the workplace and purported to be about subjects not related to his employment, the SDPD

demonstrated legitimate and substantial interests of its own that were compromised by his speech. Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer."]

3. ***Mt. Healthy v. Doyle* - the "But- For" Test**

A teacher who had several altercations with other teachers, school staff and students was non-renewed following a telephone call made by him to a local radio station in which he proceeded to discuss the district's new dress policy and the relationship between teacher appearance and the passage of an upcoming bond issue. One month later the superintendent made his annual recommendations to the Board regarding the rehiring of non-tenured teachers. The superintendent recommended that Doyle not be rehired. The Board adopted the recommendation and sent Doyle a notice indicating that, among other reasons, the decision was based upon the phone call to the radio station that "raised much concern not only within this community, but also in neighboring communities."

Doyle filed a lawsuit arguing that his non-renewal based on the telephone call to the radio station was a violation of his First Amendment rights. The District Court agreed and found that the "telephone call to the radio station was clearly protected by the First Amendment" and because it played a "substantial part" in his non-renewal, awarded him reinstatement with backpay. The Court of Appeals affirmed.

In adopting the balancing test utilized earlier in *Pickering*, the Court accepted that Doyle's communication was protected by the First Amendment. However, the Court did not entirely agree that Doyle should be reinstated with backpay. Specifically, the Court held that there was ample evidence that the Board would have chosen to non-renew Doyle had the telephone incident never occurred. Therefore, a proper decision turned on causation. Once Doyle showed that the speech played a substantial role in his dismissal, the Board would have to demonstrate that if would have non-renewed the teacher absent the constitutionally protected speech.

[*See also*: *Givhan v. Western Line Consolidated School District* (1979), 439 U.S. 410

A teacher, feeling that the district's employment practices were racially discriminatory, made a complaint *in private* to her principal. After lodging the complaint, the teacher's contract was non-renewed and she sued, claiming that the non-renewal resulted in a violation of her First Amendment free speech rights. The Supreme Court, recognizing the time, place and manner restrictions of private speech, agreed with the teacher and held that the fact that the teacher made the

statements in private did not result in a forfeiture of her rights under the First Amendment. Specifically, the Court held:

> *[N]either the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.*

Based on this rationale, the Court held that public employees do not forfeit their First Amendment protection against governmental abridgement of freedom of speech when they arrange to communicate privately with their employer to express their views rather than to express those views publicly.]

4. ***Garcetti v. Ceballos* (2006), 126 S. Ct. 1951**

Ceballos was employed as a deputy district attorney for the county district attorney's office. Ceballos was asked by a defense attorney to review a case in which, counsel claimed, the affidavit the police used to obtain a critical search warrant was inaccurate. According to Ceballos, it was not unusual for defense attorneys to ask deputies to review pending cases. After conducting an investigation, Ceballos determined that the affidavit made serious misrepresentations. Ceballos relayed his findings to his supervisors (who are the petitioners in this case) and followed up with a disposition memorandum recommending dismissal of the case. Despite his recommendations as contained within his memorandum, Ceballos's supervisors made the decision to proceed with the prosecution. At a hearing on a motion challenging the warrant (brought by the defense attorney), Ceballos was called by the defense. He recounted his observations about the affidavit but the trial court ultimately rejected the motion.

Ceballos alleges that in the aftermath of this situation, he was subject to retaliatory employment actions as a result of his memorandum including a reassignment and the denial of a promotion. Ceballos filed a lawsuit in the United States district court, alleging that his supervisors violated his First and Fourteenth Amendment rights. His case was appealed all the way to the United States Supreme Court. The Supreme Court looked into the issue of what type of public employee speech is afforded First Amendment protection. In determining this, the court utilized a two-part inquiry. First, the court looked to whether or not the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on the employer's reaction to the speech. If the answer is yes, the possibility of a First Amendment claim arises. The question then becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public. This consideration is reflective of the importance of the relationship between the employee's speech and the employment. The court

reasoned that without a significant degree of control over its employees words and actions, a government employer would have little chance to provide public services efficiently. A government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some sort potential to affect its operations.

In this case, the controlling factor is that Ceballos' statements were made pursuant to his official duties. He wrote his disposition memorandum because that is what he was employed to do. The First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Restricting speech that is pursuant to an employee's professional responsibilities does not infringe on any liberties that the employee might have enjoyed as a private citizen. It simply reflects the lawful exercise of employer control over what the employer itself has commissioned or created. The court also recognized that employers have a heightened interest in controlling speech made by an employee in his or her official capacity as official communications can have official consequences.

5. The Post *Pickering/Connick/Mt.Healthy/Garcetti* Analysis for "Free Speech" Claims

The following analysis should be undertaken prior to taking adverse employment action against a public school employee:

a. Does the speech in question involve a matter of public concern?

b. If so, and the adverse board action is challenged, a court will weigh the employee's interest in the expression against the district's interest in regulating the speech of its employees so that it can carry on an efficient and effective workplace.

c. To prevail, the employee must show that the speech was a "substantial factor" in driving the challenged governmental action.

d. If so, the district may still prevail if it can show that it would have taken the same employment action against the employee even in the absence of the protected speech.

e. Where speech is made by an employee who is acting as employee, the speech is NOT accorded 1st Amendment protections (i.e., they are not speaking as a "citizen").

f. Where speech is not on a matter of public concern, the speech is NOT protected under the 1st Amendment.

g. Where speech is made by an employee who is speaking as a private citizen on matters of public concern, the speech is SOMETIMES protected, unless the public employer can demonstrate sufficient reason for treating the employee differently than a member of the general public.

C. Select Cases Involving Teacher Expression/Misconduct via Email, Online Social Networking (Blogs, MySpace, Facebook), Etc.

Although we do not have a book containing "lawsuit-proof" answers for handling specific situations, we do have the benefit of reviewing how courts decided cases involving similar issues or circumstances. The primary way of benefitting from these cases is to look at how the courts analyzed the facts and applied the law. These cases are merely a resource. They should not be treated as controlling how a specific set of facts will always be decided as there are specific court rules governing what, if any, effect a prior court's decision has on the court deciding your case.

1. What Do You Do With a Drunken Pirate? - Teacher Denied Credentialing

Snyder v. Millersville University (E.D. Pa.), 2008 WL 5093140

A college student who was completing her student teaching through a local public high school was denied her education degree and teaching certificate from Millersville University in Pennsylvania after the school in which she was student teaching refused to allow her to complete her practicum. The school decided to bar the student teacher from completing her student teaching because she had disobeyed the administration's caution about communicating about personal matters with her students on MySpace.com. The school determined that the student teacher had acted unprofessionally by criticizing her cooperating teacher to her students online. Also noted on her MySpace page was a picture of the student teacher wearing a pirate hat and holding up a Mr. Goodbar cup with the caption "Drunken Pirate."

The university determined that the student teacher had not met the prerequisites for obtaining an education degree and allowed her to graduate with an English degree. The student teacher sued her university in court claiming that her First Amendment rights were violated when the teaching program failed to certify her allegedly due to postings on her MySpace page. In upholding the university's actions, the court treated the student teacher as a public employee and determined that she did not have any valid First Amendment claims because her posts were not matters of public concern. The First Amendment does not protect public employees' purely personal speech.

2. **MySpace Speech by "Spiderman" Teacher is Off Job, Not Public Concern and Can Serve as the Basis for a Non-Renewal**

Spanierman v. Hughes (D. Conn. 2008), 576 F.Supp.2d 292

A Federal District Court held that a board of education did not engage in First Amendment Retaliation when it decided to non-renew a teacher after learning of certain items on his MySpace pages. The MySpace pages (wherein the teacher, Mr. Spanierman, referred to himself as "Spiderman") included pictures of students, pictures of naked men, and contained communications with students regarding matters not related to school.

The Court determined that the bulk of the teacher's MySpace postings were not part of his job duties or related to his teaching position. However, the Court found that one of the items on the MySpace pages was speech on a matter of public concern (i.e. a poem by the teacher opposing the Iraq war). Nevertheless, because the teacher presented no evidence of a causal connection between the non-renewal and the poem, the Court dismissed the claim and upheld the non-renewal.

It is noteworthy the Court recognized the board could still have prevailed if there was a causal connection between any protected speech (the anti-war poem, for example) and non-renewal by:

(1) Demonstrating the board would have taken the same action in the absence of the protected speech (*Mt. Healthy*); or

(2) Showing the speech was likely to disrupt school activities and said disruption was sufficient to outweigh the First Amendment value of the speech (*Tinker*).

3. **Internet Creates Notice and Invites Possible Liability for Those Having Knowledge of Potentially Dangerous MySpace Content and Failing to Act**

Schroeder v. San Diego Unified Sch. Dis*t.,* 2009 U.S. Dist. LEXIS 40422 (S.D. Cal. 2009)

A peer tutor made derogatory comments about special education students on his MySpace page. To discipline him, the school administrators assigned him to tutor special education students. He later molested one of the students. The victim sued the board of education, teacher, school counselor, and vice-principal under § 1983 action. The court denied defendants' motions for summary judgment on individual liability because they had *knowledge* of the offensive comments toward special education students that were posted on the internet, and still allowed him near the special education students, thus placing her in a position of danger and failing duty to prevent harassment.

4. **N.C. Teachers Face Consequences for Facebook Posts About Students**

A teacher in Charlotte-Mecklenburg Schools (CMS) faces firing for posting derogatory comments about students on Facebook, while four others have been disciplined for posts involving "poor judgment and bad taste." Superintendent Peter Gorman has recommended firing a teacher who listed "teaching chitlins in the ghetto of Charlotte" as one of her activities and drinking as one of her hobbies. In her "About Me" section she wrote: "I am teaching in the most ghetto school in Charlotte." Reporter Jeff Campbell of WCNC, a news partner of the *News & Observer*, showed district officials pages involving seven CMS teachers. CMS spokeswoman Nora Carr said four faced unspecified discipline less than suspension or dismissal. As part of the school's investigation, administrators also found "suggestive" exchanges among teachers as well as "suggestive" poses in posted photos. CMS is still reviewing the case of a high-school special-education teacher who used a Facebook "mood box" to post "I'm feeling p---ed because I hate my students!" CMS officials are working on a memo reminding all 19,000 employees that information they post on the Web can be viewed by the public and should be appropriate. "When you're in a professional position, especially one where you're interacting with children and parents, you need to be above reproach," Ms. Carr said. The teachers in question chose to identify their employer and skipped an option that blocks public viewing of their pages. "I think they just didn't think these things through," she said. "That's kind of mind-boggling."

CMS has an investigator who specializes in online issues, including reports of inappropriate material posted by students about teachers. Ms. Carr noted that "several" employees a year are disciplined for inappropriate posts. CMS generally responds to complaints, rather than randomly viewing pages. She added CMS and other districts also check Web pages, especially popular networking sites such as MySpace and Facebook, before hiring. Teachers across the country have faced similar situations ─ enough so that *NEA Today*, the journal of the National Education Association, published a roundup this year. "There's an old lawyer's saw that goes something like this: Never put in writing anything that you wouldn't want read in open court or by your mother," concludes the article, written by Michael Simpson of the NEA's legal office. "Maybe it's time for an updated adage: Never put in electronic form anything that you wouldn't want viewed by a million people, including your colleagues, students, and supervisors ─ and your mother."

SOURCE: Ann Doss Helms, *Raleigh News & Observer*, Nov. 12, 2008

5. **Board May Terminate Teacher's Contract for Offensive Language and Email Jokes**

Oleske v. Hilliard City School Dist. Bd. of Edn. **(2001), 146 Ohio App.3d 57**

At various times during the 1999 school year, a Hilliard (Ohio) teacher disseminated and/or condoned the dissemination of patently offensive (both in terms of explicit and vulgar sexual content and extreme ethnic insensitivity) materials to a district student; told personally offensive jokes and/or stories of a comparable nature (referred to a student as a "f___ing little bitch"); and deliberately and for the purpose of denigrating and humiliating a fellow district teacher referred to that teacher with the term "turd."

Pursuant to R.C. 3319.16, the teacher demanded a hearing before a referee and after reviewing the evidence presented, the referee concluded that there was good and just cause to terminate the teacher's continuing contract (under the prior, more restrictive standard). The court of common pleas upheld the Board's decision to terminate.

On appeal, the court denied the teacher's claim that there was no good and just cause for her termination, holding that the ultimate responsibility for the school system lies with the Board ("*We do not sit as a super-school board*"). Therefore, the Board's action to terminate her contract was appropriate on the basis of the teacher's involvement in telling offensive and dirty e-mail jokes to students in person and through their e-mail. Also, the dirty jokes and the intentional mispronunciation of another teacher's name to that of "turd," was enough to justify the Board's decision.

D. Social Technology, Student Conduct, and the First Amendment

1. The Scope of the Problem

How students communicate and express themselves has drastically changed and we are witnessing the corresponding evolution of education and constitutional law as it relates to student expression and conduct in the public school environment.

2. Teen Social Networking Statistics:

a. Nearly all youth communicate online in same way (85%), with more than half of pre-teens and teens emailing with friends and family or engaging in social networking; 81% of teens use the internet for social networking, 12% "chat" with people they do or don't know, 45% use instant messaging, and 14% post to blogs.

b. 50% of pre-teens have at least one social networking account, while over 85% of teens 16-17 years old utilize social networking sites. Indeed, social networking is the primary method for today's youth to share information over the internet, and its use will only increase.

c. Facebook is the most popular social networking site, with 4 in 5 older teens having accounts. At least a third of youth also network on MySpace, Twitter, Bebo, or other sites.

d. The number of updates on these sites increases with age, while girls utilize the sites more and also update their social networking status more frequently than boys.

SOURCE: McAfee, *Youth Online Behavior Report*, June 2010.

3. Risky Online Behavior.

a. Almost all teens (94%) agree that they know how to be safe online.

b. 25% of teens download programs without their parents' knowledge; 22% "chat" with people they do not know; 11% view or download X-rated content; 7% use the internet to cheat for school; 5% posted content that they later regret.

SOURCE: McAfee, *Youth Online Behavior Report*, June 2010.

3. **First Amendment Limitations on Discipline for Student Speech**

Summary of the Traditional School Speech Analysis, for "Big Four:"

- ***Tinker v. Des Moines Indep. Community Sch. Dist.*** (1969), 393 U.S. 503.
- ***Bethel School Dist. No. 403 v. Fraser*** (1986), 478 U.S. 675.
- ***Hazelwood Sch. Dist. v. Kuhlmeier*** (1988), 484 U.S. 260.
- ***Morse v. Frederick*** (2007), 551 U.S. 393, 127 S.Ct. 2618.

a. Pursuant to *Bethel*, a school may categorically prohibit lewd, vulgar or profane language on school property.

b. Under *Hazelwood*, a school may regulate school-sponsored speech (i.e., speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern.

(1) Caution: The ability to regulate speech in student publications (electronic or otherwise) may be limited by the nature of the forum that has been created or emerged.

(2) If the student publication can reasonably be deemed a limited public forum, the ability to restrict speech based upon content becomes increasingly more circumspect.

c. Any speech that does not fall into one of the two categories addressed in *Bethel* and *Hazelwood* is analyzed under *Tinker* and *Morse*. Accordingly, student speech may be regulated only if it:

(1) Substantially disrupts school operations or interferes with the rights of others (or if there is a reasonable and particularized fear of a disruption or interference); or
(2) Promotes illegal drug use.

d. Courts have applied the *Tinker* analysis to the following types of cases:

(1) Speech on school property that is not school-sponsored speech;

(2) Speech off school property; and

(3) Speech promoting illegal drug use.

4. **Off-Campus Speech – How Far Does a School District's Authority to Regulate Conduct Extend?**

a. How courts are applying *Tinker* to off-campus speech demonstrates their reluctance to allow public schools to discipline students for speech occurring outside of school (But see the *J.S.* case, below, recently decided by a federal district court in Pennsylvania, where the judge curiously sidestepped *Tinker*).

b. According to the courts, disparaging remarks and criticism of the administration or teachers off campus through the Internet will not alone qualify as a material disruption to the educational process (even if the author uses foul or sexually suggestive language). (See the *Evans* case below).

c. In determining how to handle off-campus "cyber" speech, districts should consider the following four things – what we refer to as "LEND":

(1) **L**ocation of the speech – is there a viable nexus or connection to the district network or system?;

(2) The disruptive **E**ffect, if any, on the educational environment;

(3) The **N**ature or type of speech (personal, violent, lewd, vulgar, pro-drug, threatening?); and

(4) The manner in which the speech was **D**istributed (i.e., how did the speech make its way onto the campus?).

5. What's a District to Do When a *Student* Crosses Appropriate Boundaries Online? A Look at the Case Law

a. Third Circuit Court of Appeals Struggles with First Amendment Protection of Out-of-School Speech

Layshock v. Hermitage Sch. Dist.
593 F.3d 249 (3rd Cir. 2010)

J.S. v. Blue Mountain Sch. Dist.
593 F.3d 286 (3rd Cir. 2010)

Two different three-judge panels of the U.S. Third Circuit Court of Appeals reached opposite conclusions on whether a school district was prohibited from disciplining a student for out-of-school speech because of First Amendment protection. In both cases the student used a home computer to create a fake MySpace profile of a principal. The court ultimately vacated both decisions so that the entire court could rehear the cases and issue consistent decisions. The court was to rehear the cases on June 3, 2010. As of July 27, 2010, the court had not issued new decisions.

In *Layshock*, the school district disciplined a student who created a profane MySpace profile of the high school principal using his grandmother's computer. The profile made fun of the principal's weight, included references to drug and alcohol usage, and contained some sexual overtones. The only school resource used by the student was the principal's photograph that the student copied from the district's website. The student had accessed the profile in class and showed it to other students. The teacher had to redirect the students, who were congregating around the computer and giggling, to get back to work.

The district imposed the discipline for disruption of the normal school process; disrespect; harassment of a school administrator via computer/internet with remarks that have demeaning implications; gross misbehavior; obscene, vulgar and profane language; and computer policy violations (use of school pictures without authorization). The parents sued, claiming the discipline violated the student's right to free speech. The trial court granted the student summary judgment, and the court of appeals affirmed.

The court of appeals refused to allow the district to punish the student for the unauthorized use of the principal's photograph from the district's website. Contrasting the student's actions to a physical trespass onto school property, the court was apprehensive about allowing the district to punish a student who, from home, accessed the school's published website and legally copied material from it.

The court of appeals agreed with the trial court, and the school district did not disagree, that the student's showing of the profile in class on a school computer did not cause a "substantial disruption of the school environment" that would be the required nexus between the student's out-of-school conduct (creating the profile) and the discipline. As for the allegation of "obscene, vulgar and profane language," the court noted that although the profile could be characterized as such, there was no evidence student used such language in school; merely displaying the profile on a school computer was insufficient.

In *J.S.*, in an opinion issued the same day as *Layshock*, a different three judge panel reached the opposite conclusion in a case with similar facts, holding that the school did not violate the student's First Amendment free speech rights for disciplining the student for creating a MySpace profile of a principal. The student in *J.S.* created a MySpace profile using a computer in the home. The only school resource used by the student was the principal's photograph that the student copied from the district's website.

The district apparently did a much better job documenting actual disruption of the school environment caused by the student's creation and publication of the profile. There were two in-class incidents where teachers had to spend up to five minutes trying to get students who were talking about the profile to quiet down and return to their work, and teachers had to break up a gathering of 30 students in the hallway who congregated after other students decorated student's locker to celebrate her return from suspension. This was not, however, the reason the court of appeals decided the case in the school's favor. The court of appeals did not deem the disruption of the school environment to be "substantial," nor would the court consider the efforts school personnel expended in the disciplinary process as part of the disruption analysis. Instead, two aspects seemed to cause the different outcome. First, the content of the MySpace profile was much more sexually explicit than in *Layshock*, and suggested that the principal engaged in sexual conduct at school that would be illegal. Second, the court of appeals believed the district disciplined the student because of a reasonable fear of future substantial disruption of the school environment. The court noted that a school need not wait until actual substantial disruption of the school environment has taken place

before it acts to discipline a student. A reasonable fear of potential disruption can also justify school action. Here, the district had presented evidence that students upset with the profile had approached school administrators to complain, another employee approached the principal about the upsetting nature of the profile, and there was testimony that the administration had noticed a severe deterioration in discipline following publication of the profile and punishment of the student. This evidence served to satisfy the court that the district disciplined the student out of a reasonable concern for future substantial disruption of the school environment.

b. **District Discipline for Off-Campus Conduct NOT Upheld**

Evans v. Bayer, 2010 U.S. Dist. LEXIS 12560 (S.D. Fl. 2010).

Katherine Evans was a senior at Pembroke Pines Charter High School when she created a group on the social networking site Facebook about her teacher, Sarah Phelps. The group was entitled "Ms. Sarah Phelps is the worst teacher I've ever met" and its purpose was for others to express their dislike of Phelps. The posting was made after school hours from Evans' home computer, was not accessed at school and did not disrupt school activities. The posting was removed after two days. Bayer, the school principal, later learned of the posting and suspended Evans from school for three days and forced her to move from her advanced placement classes into lesser weighted honors courses. Evans then brought suit.

The court held that First Amendment rights are stronger for public school students' off-campus expressions than on-campus expression. Because Evans had made the posting at home, without any on-campus disruption, and without showing it to others at school, the court found that the posting was made off-campus. The court held that Evans' speech was protected by the First Amendment.

c. **When is a Parody Not a Parody?**

Barnett v. Tipton Cty. Bd. of Educ., 601 F.Supp.2d 980 (W.D. Tenn. 2009).

Two high school students created fake MySpace profiles of their assistant principal and a coach. The profiles contained pictures and biographies of the assistant principal and the coach copied from the board's website, along with sexually suggestive comments about female high school students. The school first learned about the profile of the assistant principal through phone calls from a concerned parent and a local reporter who believed

that the profile was real and that the assistant principal had engaged in inappropriate communications with high school students. The administration conducted an investigation and learned that the students had created the profiles and that one of the students had accessed one of the fake profiles during one of his classes in the school's computer lab. As a result of the investigation, the school suspended the students for eight and eleven days.

The students brought suit against the board and administrators alleging that their First Amendment rights were violated when they were disciplined for the fake profiles. The court found that the First Amendment protects "parodies that involve speech that cannot reasonably be understood as describing actual facts about [the subject of the parody]." The court found that the students offered no evidence to support their contention that a visitor to the websites would understand them to be parodies and not describing actual facts. Further, visitors to the fraudulent website believed it was authentic and that the assistant principal had engaged in inappropriate behavior. Based on this analysis, the court dismissed the First Amendment claims of the students against the school board and administrators.

E. The Fourth Amendment Freedom From Unreasonable Searches and Seizures: The Rights of Public Employees

> *In determining the appropriate standard for a search conducted by a public employer in areas in which an employee has a reasonable expectation of privacy, what is a reasonable search depends on the context within which the search takes place, and requires balancing the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace.*
>
> *– O'Connor v. Ortega (1987), 480 U.S. 709*

1. Overview

In general, the Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated. Over the years, cases decided under the Fourth Amendment have clearly found that public sector employees have reasonable expectations of privacy in the workplace. However, while courts attempt to determine which claims to privacy are legitimate and reasonable, conflicts over the degree of privacy employees should be afforded while at work continue to rise. Not only do such conflicts arise with respect to workplace behavior, but also develop when employers attempt to monitor employees off-duty conduct.

2. Reasonable Expectation of Privacy in the Workplace

a. *The Supreme Court Speaks in O'Connor v. Ortega*

An expectation of privacy in one's place of work is based on societal expectations that have deep roots in the history of the [Fourth] Amendment. However, the operational realities of the workplace may make some public employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable. Given the great variety of work environments in the public sector, the question of whether an employee has reasonable expectation of privacy must be addressed on a case-by-case basis.

While Dr. Magno Ortega, a physician and psychiatrist the Napa State Hospital, was on leave during an investigation of various charges of wrongdoing, hospital officials caused his office to be entered repeatedly and searched. The items that were seized from his office were later used in disciplinary hearings against him.

(1) Ortega filed suit claiming that the warrantless search of his office violated his Fourth Amendment rights. The Supreme Court found that the Fourth Amendment only applies when a public employee has "an expectation of privacy that society is prepared to consider reasonable." Whether such expectation exists, depends upon the circumstances and other factors, including the employer's policies, practices, and regulations.

(2) Although the Court found that Ortega had a reasonable expectation of privacy in his office, subject to the Fourth Amendment protection, the plurality was of the opinion that there was a genuine issue as to the reasonableness of the search. If the employee is found to have a reasonable expectation of privacy, the public employer may conduct a workplace search only if it is "reasonable under all of the circumstances"– including both inception and in scope. Such a search of an employee's office by a supervisor will usually be "'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory work-related purpose such as to retrieve a needed file."

(3) "Requiring an employer to obtain a warrant whenever the employer wishes to enter an employee's office, desk or file cabinets for work-related purposes" would not only be disruptive and unreasonable, but "would impose intolerable burdens" on an employer. Further, the Court found that the scope of a search will be appropriate if it is "reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct."

b. **Employee Has Reasonable Expectation of Privacy in Employer-Provided Messaging Service**

Quon v. Arch Wireless Operating Co., Inc., 2010 U.S. LEXIS 4972 (U.S. 2010)

A police officer for the city of Ontario, California brought suit against the city, alleging that it violated his Fourth Amendment rights by obtaining and reviewing the transcript of his pager messages sent and received on his city-provided pager. The city's plan provided for a monthly limit on the amount of text messages an employee could send and receive. When the police officer and others exceeded their monthly limit for several months running, the police chief sought to determine whether the existing limit was too low. The city did not want its employees to have to pay money out-of-pocket for city business messages but it did not want to pay for personal messages either.

The city requested transcripts of the police officer's text messages during a two-month sample period to determine whether or not the city's plan needed to be adjusted. The investigating officer discovered that many of the police officer's text messages were not work-related and some were sexually explicit. In fact, few of his messages were work-related and the police officer was disciplined. He filed suit thereafter.

The district court determined that the police officer had a reasonable expectation of privacy in his text messages and also concluded that the police chief's audit was reasonable and conducted for legitimate reasons. Since the police chief conducted the search for the purpose of determining the efficacy of the existing text limit to make sure officers were not paying work-related costs, there was no Fourth Amendment violation. The officer appealed and the Ninth District reversed on the grounds that the search was unreasonable because there were a host of less intrusive means than the audit that the police chief used. The city appealed further.

The United States Supreme Court concluded that because the search of the police officer's text messages was reasonable, the city did not violate the officer's Fourth Amendment rights, and the Ninth Circuit erred by concluding otherwise. The city's warrantless review of the police officer's pager transcript was reasonable because it was motivated by a legitimate work-related purpose, and because it was not excessively intrusive in scope. The proper analysis examines whether the scope of the search was excessively intrusive, not whether there may have been less intrusive means of conducting the search. However, the Supreme Court cautioned that "prudence counsels caution before the facts in this case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations of employees using employer-provided communication devices."

c. **Principal had Reasonable Expectation of Privacy in Employer-Provided E-Mail Account**

Brown-Criscuolo v. Wolfe, 601 F.Supp.2d 441 (D. Conn. 2009).

A middle school principal sued the superintendent for allegedly violating her Fourth Amendment rights by accessing and forwarding e-mails on her school computer. The superintendent moved for summary judgment which was denied by the court on this issue. Prior to the superintendent's actions, the parties had several disagreements regarding the new special education director who the principal believed was violating the rights of disabled students and intimidating school staff. The principal then took an extensive medical leave of about six months, during the final two months of which the superintendent served as the acting middle school principal. In this capacity, the superintendent accessed the principal's e-mails including a personal letter she sent to her attorney, which he then forwarded to his own e-mail address.

The court first addressed whether the principal had a reasonable expectation of privacy in e-mail messages sent or received on her employer's computer by looking at four factors: (1) did the district maintain a policy banning personal e-mail or other objectionable use of the district e-mail system; (2) did the district monitor the use of the computer or e-mail; (3) did third parties have a right to access the computer or e-mail; and (4) did the district notify or make the principal aware of the district's use and monitoring policies? The court found the principal had a reasonable expectation of privacy in her e-mail files on her work computer. The district's acceptable use policy indicated that system users had a limited expectation of privacy in the contents of their personal files on the district system, that routine maintenance and monitoring of the system may reveal a user has violated district policy or the law, that user

personal e-mails might be subject to disclosure under public records laws, and that individual searches would be conducted upon reasonable suspicion that a user violated district policy or the law. The acceptable use policy also provided, however, that users were prohibited from gaining unauthorized access to the system or going beyond their authorized access, including accessing another person's account or files. Indeed all accounts were password protected and only the principal and the district's computer administrator knew her password. Further, there was no evidence the district routinely monitored employee e-mail accounts or that such monitoring was the superintendent's responsibility.

The court also held that the nature and scope of the search conducted by the superintendent was not reasonable. First, he did not conduct the search because he thought he would find evidence of wrongdoing, but rather to ensure that no important e-mails were overlooked during the principal's medical leave. The court found that reading an e-mail sent *by* the principal, rather than sent *to* her, would not fall within the scope of a reasonable search of the principal's e-mail account by the superintendent. Further, the communication from the principal to her attorney was forwarded to the superintendent's account which also appeared to the court to be unrelated to the objective of the search.

d. **Based on University's Computer-Use Policies, Professor Did Not Have Reasonable Expectation of Privacy to Anything Loaded on School-Issued Computer**

U.S. v. Angevine, 281 F.3d 1130 (10th Cir., 2002).

Eric Angevine, a professor at Oklahoma State University, used the computer provided to him by the University to download over 3,000 pornographic pictures of young boys. The University has an acceptable computer and internet use policy that prohibited employees from using the computers to view obscene materials and clearly warned employees about the consequences of misuse. In addition, the University posted a "splash screen" to appear each time an employee turned on the computer stating:

Use of this computing system in any way contrary to applicable Federal or State statutes or the policies of Oklahoma State University or Computing and Information Services is prohibited and will make you subject to University disciplinary actions, including, possible immediate termination, and may also subject you to criminal penalties.

With the cooperation of Angevine's wife, police officers were able to obtain a warrant to look for child pornography on his computer and later seized it from his office. Although Angevine would delete some of the files after viewing the pictures and printing some of them, the police were able to retrieve the data from the computer's memory. As a result, Angevine was convicted of possession of child pornography. Angevine filed a motion to suppress the pornographic images, however the district court held that the University's policies and procedures regarding computer use clearly prevented him from having a reasonable expectation of privacy in the contents of his computer hard drive. In upholding the court's decision, the Tenth Circuit reasoned that in addition to considering whether public employees' expectations of privacy may be reduced by actual office rules, procedures, and regulation, it must determine, under its ruling in *Anderson*: "(1) the employee's relationship to the item seized; (2) whether the item was in the immediate control of the employee when it was seized; and (3) whether the employee took actions to maintain his privacy in the item." *States v. Anderson* (10th Cir. 1998), 154 F.3d 1225).

The Court ultimately determined that based on the University's computer use policies and procedures, Angevine did not have a reasonable expectation of privacy to anything he may have loaded onto his computer. In addition, the Court held that:

*Because the computer was issued to Professor Angevine for only work related purposes, his relationship to the University computer was incident to his employment. Reasonable people in Professor Angevine's employment context would expect University computer policies to constrain their expectations of privacy in the use of University-owned computers. Additionally, the pornographic images seized by the police were not within Professor Angevine's immediate control. ***. . .Professor Angevine did not have access to the seized data because he had previously attempted to delete the files from the University computer's memory. Police only recovered the data through special technology unavailable to Professor Angevine. Finally, Professor Angevine did not take actions consistent with maintaining private access to the seized pornography.*

Thus, although the Court recognized that it has found that employees have a reasonable expectation of privacy in information stored within their offices, they "have never held the Fourth Amendment protects employees who slip obscene computer data past network administrators in violation of a public employer's reasonable office policy."

e. **Alleged Misuse of School-Issued Webcams**

Robbins v. Lower Merion Sch. Dist., 2010 U.S. Dist. LEXIS 89524 (E.D. Penn. Aug. 30, 2010)

A group of students and parents have filed suit against Lower Merion School District (LMSD), the school board, and the superintendent, reports *Courthouse News Service*, alleging LMSD has been spying on students and families through the "indiscriminant use of and ability to remotely activate the webcams incorporated into each laptop issued to students," without the knowledge or consent of the students or parents. The schools issued webcam-equipped laptop computers to all 2,300 high school students as part of a "one-to-one" laptop initiative lauded by Superintendent Christopher McGinley as an effort that "enhances opportunities for ongoing collaboration, and ensures that all students have 24/7 access to school based resources and the ability to seamlessly work on projects and research at school and at home." But the parents and students say that, without their knowledge, the access went both ways. The legal complaint states that nowhere in any "written documentation accompanying the laptop," or in any "documentation appearing on any Web site or handed out to students or parents concerning the use of the laptop," was any reference made "to the fact that the school district has the ability to remotely activate the embedded webcam at any time the school district wished to intercept images from that webcam of anyone or anything appearing in front of the camera."

The complaint also states that the plaintiffs became aware that the school district had the webcam capability and was utilizing it when an assistant principal at one of LMSD's high schools informed a student that the school district was of the belief that the student "was engaged in improper behavior in his home, and cited as evidence a photograph from the webcam embedded in minor plaintiff's personal laptop issued by the school district." In addition, the complaint charges: "Defendants have never disclosed either to the plaintiffs or to the class members that the school district has the ability to capture webcam images from any location in which the personal laptop computer was kept." The plaintiffs seek class damages for invasion of privacy, theft of private information, and unlawful interception and access to electronic information, in violation of the Electronic Communication Privacy Act, the Computer Fraud Abuse Act, the Stored Communications Act, the Civil Rights Act, the Fourth Amendment, the Pennsylvania Wiretapping and Electronic Surveillance Act, and Pennsylvania common law.

School district contends that the webcams are only activated when the computers are lost or stolen.

[*Note: According* ABC Good Morning America*, the FBI and a Philadelphia-area prosecutor are investigating whether LMSD violated state or federal law when it activated the webcam function on individual laptops. The report says LMSD has admitted it made a mistake in not clearly explaining the technology available on the computers that it issues to every student as a way to enhance their educations. ABC also quoted Internet security experts as saying that while employers can regularly monitor employees' use of the Internet and e-mails, this case hinges on whether parents and students knew the school could monitor them.*

District officials have acknowledged that they had remotely activated webcams on school-issued laptops 42 times in the past 14 months to find missing computers. They said they never did so to spy on students. LMSD spokesman Doug Young acknowledged that in the paperwork students signed when they received the computers, families were not told that the webcams could be activated in their homes without permission. "It's clear what was in place was insufficient, and that's unacceptable," he said. Young also pointed out that LMSD has suspended the practice amid the lawsuit and the accompanying protests, and that only two employees were authorized to activate the cameras – and only to locate missing laptops.]

F. Inadvertent Violations: Even the Best of Intentions Can Go Awry in the Digital Age

1. Assistant Principal in Virginia Cleared of Child Pornography Charges for Possession

Commonwealth of Virginia v. Ting Yi Oei, 2009 Va. Cir. LEXIS 115 (Mar. 31, 2009).

The court found that the evidence failed to support a finding that the offending material satisfied the element of sexually explicit showing of a lewd exhibition of nudity required under Virginia law. As a matter of law, the photograph did not meet the requirements established by the Virginia appellate courts for child pornography. Defendant was also charged with two counts of contributing to the delinquency of a minor because it was alleged that defendant caused a student to transmit the photograph to his cell phone and to his computer. Those two charges were dependent upon a finding that the photograph constituted child pornography.

Court dismissed all charges against the Freedom High School assistant principal accused of possessing child pornography and contributing to the delinquency of minors. Ting-Yi Oei obtained the photograph of a partially nude student as part of a school investigation into whether the photo was being passed around via cell

phone. Judge Thomas D. Horne said the photograph in question did not amount to child pornography and ordered the charges dismissed. Originally charges were brought against Oei for failing to report potential child abuse, but those charges were dropped last summer, before the child pornography charges were brought. At the time, the Loudoun County Sheriff's Office said there was no crime depicted in the photograph, but county prosecutors moved ahead with the case.

Steven Stone, Mr. Oei's attorney, maintained the school administrator was simply doing his job when he obtained copies of a cell phone photo that showed a female torso partially undressed. "It was certainly Mr. Oei's job to do this. And it was certainly done in the course of conducting his professional duties," Stone said.

Assistant Commonwealth Attorney Nicole Wittmann, however, questioned why the photo remained in Oei's possession. "Had he deleted it from his personal cell phone, had he deleted it from his computer, we may very well not be here," she said. Wittmann admitted that the facts of the case place it in a "difficult area," but added Oei should not be involved in any capacity with Loudoun students. Stone pointed out judges, attorneys, doctors and scientists are among those who are protected if they are in possession of explicit photos as part of their responsibilities, and Oei was left outside such protection simply because school administrators are not listed under state code. Oei was placed on administrative leave with pay by Loudoun County Public Schools pending the outcome of the case. Until the official ruling is given to the school system, no decision will be made on Oei's employment, spokesman Wayde Byard said.

SOURCE: Erika Jacobson, *Leesburg Today*, Apr. 1, 2009; s*ee also* Michael Birnbaum, "Child Porn Charges Against Freedom Assistant Principal Dropped," *The Washington Post*, Apr. 1, 2009; Ting-Yi Oei, "My Students. My Cellphone. My Ordeal," *The Washington Post*, Apr. 19, 2009.

2. **Involuntary Pop-ups Ruin Teacher's Reputation**

41-year-old former substitute teacher, Julie Amero, was convicted of 4 felony counts of endangering minors when she allegedly exposed her students to inappropriate pictures and failing to shield them from the images on her classroom computer. She was using a classroom computer to enter attendance and multiple indecent images began popping up on the classroom computer. The more she tried to close the windows, the more pop-ups she created. Further investigation involving computer security experts, many lawyers, and thousands of dollars later, the court overturned her guilty verdict and she pled guilty to misdemeanor disorderly conduct. Ultimately, spyware and the school district's misunderstanding about computer security almost led to her imprisonment. For her sentence, she was assessed a $100 fine and required to surrender her teaching credentials. At the time of the incident, Ms. Amero was 4 months pregnant and well-liked by both coworkers and students. Afterward, her teaching career ended,

she miscarried her baby, she was diagnosed with a heart condition that caused her to regularly faint, and she was fired from her Home Depot job after the employer learned of her impending trial.

SOURCE: Robert McMillan, "How Spyware Nearly Sent a Teacher to Prison," *PCWorld*, Nov. 26, 2008

F. BEING PROACTIVE: What Schools Can Do to Avoid the Misuse of Technology

1. Implement new policies to address blogging and social networking websites for students and all employees, and *train your employees and students on those policies.*

2. GOOGLE your final candidates *before* hiring them.

3. On occasion, search YouTube for hits arising from search terms associated with your school, e.g. address, school name, mascot, etc.

4. Monitor changing trends in technology and regularly update "Acceptable Use" policies for all forms of technology.

5. Be clear that there is no reasonable expectation of privacy when using school-owned technology.

6. Clearly reinforce the prohibition against the release and/or use of confidential information, e.g. personal information on students, co-workers, and supervisors.

7. Report suspected child abuse – the involvement of technology does not minimize this critical responsibility.

8. Host meetings with teachers and staff and discuss the issues - show them examples.

9. Keep parents, teachers, and students educated on the issues.

10. Make coworkers aware that possession of "sexting" or other sexually-charged material may lead to prosecution for child pornography, solicitation, or child abuse.

11. Proactively and consistently address inappropriate behavior and/or disruptive conduct of any sort, especially involving social networking.

12. Post the rules regarding the use of technology on websites and in classrooms, highlighting rules pertaining to social networking and what to do if a student feels victimized.

13. Explain and demonstrate to employees, students, and parents how each time the Internet is accessed, an IP address is established (an electronic fingerprint) that can be used to trace all electronic communications between computers and/or cellular phones.

    a. No computer or cellular phone, or its user, is really anonymous in cyberspace.

    b. Behaviors in cyberspace are downloadable, printable, and sometimes punishable by law.

14. Communicate with Parents

    a. Parents should be encouraged to get involved in their children's use of Internet and hand-held devices and be aware of the pitfalls of such technologies.

    b. Parents should learn about the Internet and what their children are doing online.

    c. Ask parents to encourage children to report to adults if anybody says or does something online that makes them feel uncomfortable or threatened.

    d. Have parents encourage children to become good "cyber citizens" and to develop their own moral code so they will choose to behave ethically online.

    e. Encourage parents to take action if their child is being bullied online or on a cellular phone by contacting the Internet service provider or the cellular phone service provider or the local police if necessary.

    f. Encourage parents to keep computers in open spaces, not nestled away in the child's bedroom.

    g. Parents should not tolerate cyberspace behaviors that they would not tolerate in their own homes.

15. Communicate with Students

    a. Teach students how to protect themselves online.

    b. Instruct students to guard their contact information by not widely distributing their screen names, e-mail addresses, or cell phone numbers.

c. Encourage students to speak out and to tell a trusted adult if being harassed online or by a cellular phone user.

d. Explain that they should not reply to harassing messages.

e. They should save any harassing messages and forward them to the Internet service provider.

f. Notify the police if necessary.

16. Prohibit actions that blur lines between student and teacher

a. Example from **Pennsylvania**

On its Web site, the Pennsylvania State Education Association advises teachers to use caution when using online social networking sites such as Facebook because "an inappropriate page on one of these sites could lead to disciplinary action or dismissal."
SOURCE: Liz Zemba, *Pittsburgh Tribune-Review*, Jan. 27, 2010

b. Example from **Louisiana**

Louisiana law requires school districts to implement policies requiring documentation of every electronic interaction between teachers and students through a nonschool-issued device. Similar policies exist in many school districts across the country, and at least one other state has considered such legislation in recent years. But critics question the measures, saying they will likely restrict appropriate communication between teachers and students and discourage the use of new technologies.

Determining what communications between teachers and students are appropriate, especially in the emerging fields of electronic devices and social-networking Web sites, is an issue that districts nationwide are navigating, with policies ranging from fairly permissive to more restrictive. "We're at a point where [policies on this issue] are all over the map," said Ann Flynn, the director of education technology for the National School Boards Association, based in Alexandria, Va. "I think it is largely a local issue to be sorted out, ideally in a proactive [rather than reactive] way." Unlike in Louisiana, such policies typically are determined locally, rather than at the state level, although similar legislation has appeared in the Missouri legislature, at least, but not been enacted.

Louisiana Rep. Walker Hines, a Democrat, voted against the bill in his state. "I did not believe that this legislation would deter any teacher from having a sexual relationship with a student," he said. "In fact, I believe this legislation could have a major chilling effect on teachers' becoming mentors for students." Ray Bernard, the child-welfare supervisor for the 15,000-student Lafourche Parish, La., public school system, believes the law provides enough flexibility to both protect students and keep legitimate teacher-student relationships intact. The policy that his district will implement says that teachers, and all other school employees, must document any interaction through nonschool-issued electronic devices that happens with a student in that district, or any other district in the state, within 24 hours of the exchange. The Louisiana Association of Educators, an affiliate of the National Education Association, has released guidelines outlining what school policies on the matter could look like and how they should be carried out, said Joyce P. Haynes, the president of the state teachers' association. "We just see that it's like a necessary evil," she said of the new law's requirements. "Teachers jump through hoops all the time, and this is just another way of taking care of business."

SOURCE: Katie Ash, *Education Week*, Nov. 2, 2009

c. Example from **Texas**

In Texas, administrators in the 24,000-student McKinney Independent School District, north of Dallas, experienced an outcry from teachers, students, and parents after introducing a school policy that banned teacher-student communication through text messaging, e-mail, and social-networking Web sites. In the end, the MicKinney district's policy was revised to better reflect the needs of teachers and students, he said, by focusing more on a "professional code of ethics" than restrictions on specific technologies.

SOURCE: Katie Ash, *Education Week*, Nov. 2, 2009

d. Example from **Utah**

In Utah, the state department of education requires each school district to have a policy, or have plans to implement a policy, that addresses teacher-student electronic communications, but it does not stipulate exactly what a policy should look like. The department does provide two examples on its website of possible policies—one that is considered permissive, and one that is more restrictive. Terri Miller, the president of the group Stop Educator Sexual Abuse, Misconduct, and Exploitation, based in Las Vegas, says policymakers should not enact "reactionary" legislation regarding contact between teachers and students. "What they really need

to focus on is training in proper boundaries," Ms. Miller said. "You can pass laws ... that prohibit inappropriate behavior between students and teachers, but that's not going to stop true predators."

SOURCE: Katie Ash, *Education Week*, Nov. 2, 2009

e. Example from **Virginia**

The Virginia Department of Education (VDE) has backed away from specific policy recommendations that limit how teachers communicate electronically with students. VDE had considered advising teachers to avoid text-messaging students, or interacting with them on social-networking sites, such as Facebook or Twitter. However, 75% of the 79 comments it received criticized drafts of the guidelines, which were designed to prevent sexual misconduct and abuse.

The document has been pared down to three pages of general guidance to give local school divisions more flexibility in developing their own policies and procedures, said VDE spokesman Charles Pyle. "What we wanted to do is strike a balance and not be overly prescriptive but still provide useful guidance to school divisions in terms of where they need to focus," Pyle said

SOURCE: NSBA Legal Clips, http://legalclips.nsba.org/?p=5558, March 22, 2011

G. <u>"Acceptable Use" and Safety Policies/Guidelines</u>

1. An Acceptable Use Policy ("AUP") is the most important ingredient in a school district's formula for regulating technology use. The key to an effective AUP is striking a healthy balance between the need to protect the school district from potential liability, to harness the power of digital technologies to advance teaching and learning, and to respect the individual rights of students and staff.

2. AUP's are equally applicable to both students and staff. It is imperative that each school district develop an AUP comprehensive enough to address the various legal issues involved in the implementation and use of the Internet in the school setting. However, the policy must remain flexible enough to cover a broad spectrum of unexpected circumstances. A thorough and well-written AUP requires Internet users, both students and staff, to comply with certain guidelines and will ordinarily address the following topics:

a. Language Used in Internet Communications

Users must employ language appropriate in the school setting. They are prohibited from using obscene, profane, vulgar, sexually explicit, defamatory, threatening, or abusive language in their messages. Users must be respectful in their messages to others.

b. Privacy Issues

(1) Users (particularly students) must refrain from revealing their personal home addresses and phone numbers and the addresses and phone numbers of other students or colleagues.

(2) Students must not re-post (forward) personal communications without the author's prior consent and must never agree to get together with someone they "met" online without parental approval.

(3) Users must be placed on notice that electronic mail (e-mail) is not guaranteed to be private. To insure compliance with the Board's regulations, authorized individuals who operate the system shall have access to all messages relating to or in support of illegal and/or impermissible activities and such activities may be reported to the proper authorities/administrators.

(4) The user in whose name an on-line service account is issued is responsible for its proper use at all times. Users may only access the network using their own account login/password.

(5) Users may not read other users' mail or files, attempt to interfere with other users' ability to send or receive electronic mail, or attempt to read, delete, copy, modify or forge other users' mail.

c. Types of Activities Permitted and Prohibited

(1) The Internet and e-mail system must be used only for purposes related to education and administration. If a user has any doubt about whether a contemplated activity is educational, he/she should consult with the building principal.

(2) School computers and/or network may not be used for commercial activities, financial gain or illegal activity. They also may not be used for political purposes. Whether personal use of the system is permitted should be determined by the Board. The Board may

reserve the right to monitor any computer activity and on-line communications for improper use.

(3) Users shall not be permitted to use the system to encourage the use of drugs, alcohol or tobacco nor shall they promote unethical practices or any activity prohibited by law or Board policy.

(4) Users shall not be permitted to view, download or transmit material that is threatening, obscene, disruptive or sexually explicit or that can be construed as harassment or a disparagement of others based on their race, national origin, citizenship status, sex, sexual orientation, age, disability, religion or political beliefs.

(5) See discussion of CIPA below.

d. Copyrighted Materials

(1) All communications and information accessible via the network should be assumed to be private property. All copyright issues regarding software, information and attribution of authorship must be respected.

(2) Copyrighted material may not be placed on the system without the author's permission.

(3) Address up front the issue of who owns the copyright to software or a web pages generated as part of a class assignment and/or the use of school computers.

(4) Have student/parent agree to allow class work to be posted on the board's web page without any infringement of the student's copyright to the work (e.g., art work, English assignments, etc.).

e. User Etiquette

(1) Use of the Internet and any information procured over the Internet is at the user's own risk. The Board is not responsible for any damage the user suffers or the accuracy or quality of information obtained from the Internet.

(2) Users may not hack or gain unauthorized access to other computers or computer systems, or attempt to gain such unauthorized access.

(3) Users may not access and participate in online "chat rooms" or other forms of direct electronic communication (other than e-mail)

without prior written approval from a teacher, principal or computer network administrator.

(4) The network should not be used in such a way that it disrupts the use of the network by others.

(5) Users are expected to keep messages brief and use appropriate language.

(6) Vandalism results in the cancellation of user privileges. Vandalism includes uploading/downloading any inappropriate material, creating computer viruses and/or any malicious attempt to harm or destroy equipment or materials or the data of any other user.

(7) If users notice a security problem on the Internet and/or the school network, a principal or school administrator must be notified.

f. Each Parties' Responsibilities

(1) Proprietary rights in the design of the web sites hosted on the Board's servers remain at all times with the Board without prior written authorization.

(2) Users may encounter material which is objectionable. It is the user's responsibility not to initiate access to such material. If such material is encountered accidentally, it is the user's responsibility to exit immediately.

(3) Any user who violates the Board's Acceptable Use Policy or the applicable state and federal laws, is subject to loss of network privileges and any other appropriate disciplinary action.

(4) Student's may not disclose, use and/or disseminate student personally identifiable information via the Internet, except as authorized by the minor student's parent/guardian or the student, if he/she is 18 years of age or older.

3. SCHOOL STAFF AUTHORIZED AGREEMENT FORM

As with its students, a prudent board of education will ensure that its staff members sign an agreement and authorization form regarding the use of the district's computers and on-line services. By requiring school employees to sign such a form, the board will limit its liability in the unforeseen occurrence of any illegal or improper use by a staff member.

a. **The requirements for an effective staff agreement include:**

(1) An acknowledgment that staff members may only access e-mail and the Internet at school by completing the authorization form.

(2) Language indicating that the use of the Internet is a privilege and not a right and that inappropriate usage will result in the cancellation of that privilege.

(3) Language indicating a recognition on behalf of the staff member that he/she accepts full personal responsibility and liability, both civilly and criminally, for any inappropriate or illegal use of the Internet.

(4) An acknowledgment by a staff member to assign all proprietary rights to a web site developed during work time and hosted on the board's server to the board without any further compensation.

(5) A disclaimer permitting the board of education the right to monitor, review and inspect any directories, files and/or messages residing on or sent using the Board's network and that any illegal behavior will be reported to the proper authorities.

b. **Signature**

(1) Prior to being permitted to use the school's computers to access the district's on-line services, each staff member must sign and complete the agreement inclusive of name and school where employed.

(2) Each staff member must acknowledge that they have read and agreed to abide by the specific rules and regulations delineated in the board's AUP policy.

(3) Each staff member must further recognize that inappropriate use of the Board's computers and on-line services may constitute a criminal offense and that they agree to communicate over the Internet in an appropriate and lawful manner.

c. **Failure to Comply**

A staff members failure to comply with the board's AUP can include all disciplinary measures permitted in the parties' collective bargaining agreement as well as any applicable civil and/or criminal penalties.

4. STUDENT AUTHORIZED AGREEMENT FORM

Prior to making the Internet available for use by students, a signed student authorization form should be signed by each student accessing school computers for purposes of the Internet. The rationale for such a form is to protect a board of education from the unforeseen circumstances that arise in the course of student use of on-line services.

a. **The requirements for an effective agreement will include**:

(1) Language indicating that the use of the Internet is a privilege and not a right and that inappropriate usage will result in the cancellation of that privilege.

(2) Language instructing parents of the possibility that a student may gain access to information not used for educational purposes and that the parents assume such a risk by permitting their children to access the Internet.

(3) Language recognizing personal liability on behalf of the user and absolving the board of education from liability for any illegal activities, whether civil or criminal, conducted by any authorized user of the school's computers and Internet technology.

(4) Parental permission for students under 18 years of age.

(5) Students over 18 years of age may sign for themselves.

b. **Signature**:

(1) Prior to being permitted to use the school's computers to access the Internet and/or other on-line services, each student must sign the agreement inclusive of name, school, home address, home phone number and grade.

(2) Each student must acknowledge that he/she has read the board's computer policy and agrees to abide by the rules and regulations as specifically delineated in the school's AUP.

(3) For each student under 18 years of age, the student's parent(s) or guardian(s) must sign and acknowledge that they have also read and agreed to the terms and conditions of the school's AUP, and discussed their expectations concerning computer use with their children.

(4) For each student under 18 years of age, the student's parent(s) or guardian(s) assign any proprietary rights in the design of a web site created by the student as part of a class project.

(5) For each student under 18 years of age, the student's parent(s) or guardian(s) must give express permission for the Board to:

(a) use and access the Internet at school;

(b) use the student's image (photograph) over the Internet;

(c) transmit the student's "live" image via a web cam; and

(d) post the student's class work and first name on the Internet without infringing upon any copyright the student may have in his/her work.

(6) Only after each student and his/her parent(s) has agreed to the terms and conditions of the District's AUP and recognized as mush in writing should that student be permitted to access the board's technology and/or on-line services.

c. **Failure to Comply**

Failure of a student to comply with the Board's AUP can result in discipline, including but not limited to, detention, suspension, expulsion, permanent exclusion, as well as civil and criminal penalties.

H. RECAP: Internet Misconduct By Employees

1. Follow the Board's Internet AUP and the relevant sections of the collective bargaining agreement.

2. School employees generally have a "reasonable expectation" of privacy in the contents of their computers. However, an employee's reasonable expectation of privacy, or lack thereof, is largely determined by the employer's policies, regulations and common course of conduct concerning the school's computer system. This is why it is extremely important to have a specific AUP policy in effect. Such a policy effectively places employees on notice that personal privacy does not apply to school-owned computers.

[Note: In *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000), the Fourth Circuit Court of Appeals held that a statute barring all state employees from using state owned computers to download, print and store files consisting of "sexually

explicit content" does not violate the First Amendment's guarantee of Freedom of Speech.]

3. Discipline of school employees for sending sexually explicit e-mails and accessing sexually explicit web sites is becoming more commonplace – however, the process cannot be short-circuited, i.e., there must be effective policies in place and a fair and thorough investigation must be conducted.