



Ohio School Boards Association Capital Conference and Trade Show

November 13 – 16, 2011

Greater Columbus Convention Center
Columbus, Ohio

2011 case law update

Legal

Wednesday, November 16, 2011

9:00 a.m.

C 210–212

Sara Clark, deputy director of legal services, OSBA

Arbitration Services

OSBA offers many services to help you find solutions to meet all of your district's ever-changing needs. When considering solutions for your district, consider OSBA's Arbitration service.

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Please complete an online conference evaluation either during or after the event at:

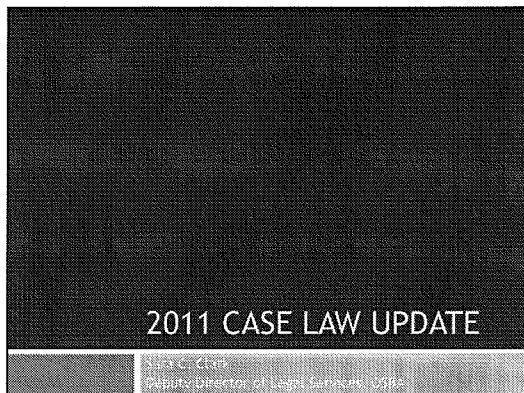
<http://links.ohioschoolboards.org/CC11Evaluation>

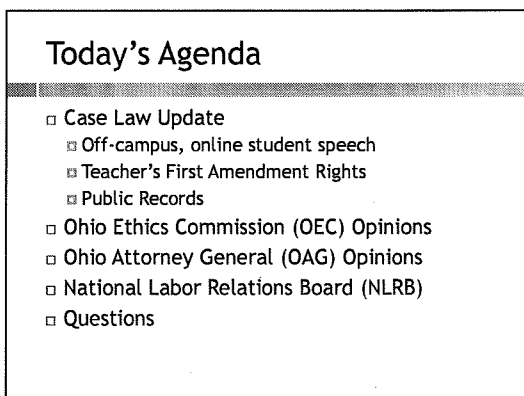
OSBA Mission

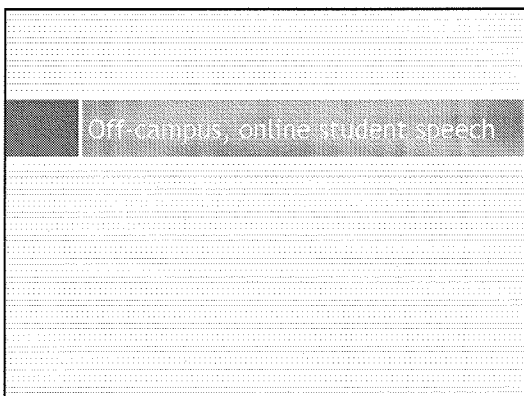
OSBA leads the way to educational excellence by serving Ohio's public school board members and the diverse districts they represent through superior service and creative solutions.

Ohio School Boards Association

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Overview

- **Issue:** district's ability/obligation to regulate a student's off-campus, online conduct
- 20 decisions to date - 8 wins; 12 losses
- Courts are all over the map
 - ▣ Divergent views of how cases should be decided
 - ▣ Circuit courts are split
 - ▣ No opinion from the 6th Circuit
 - ▣ Awaiting decision from US Supreme Court

Overview

- **The Law:**
 - ▣ Student speech may be regulated if:
 - It "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school or collides with the rights of others." *Tinker v. Des Moines*
 - It is otherwise "vulgar or lewd." *Bethel v. Fraser*
 - It encourages the use of illegal drugs. *Morse v. Frederick*
 - It constitutes a "true threat."

MySpace Cases - 3rd Circuit

(June 13, 2011), C.A.3 No. 08-4138, unreported; & (June 13, 2011), C.A.3 No. 07-4465, unreported

JS v. Blue Mountain & Layshock v. Hermitage School District

- **Facts:**
 - ▣ Students created fake MySpace profile of principle
 - ▣ Profiles contained crude content and vulgar language
 - ▣ Students disciplined

MySpace Cases - 3rd Circuit

□ Holding:

- District Court - split
 - JS - school wins
 - JS's conduct didn't cause a substantial disruption
 - Lewdness of speech justified an exception
 - Layshock - student wins
 - No sufficient nexus between speech and disruption to the school environment

MySpace Cases - 3rd Circuit

□ Holding:

- Court of Appeals - students win
 - Found that "lewdness" standard doesn't apply to off-campus speech
 - 1st Amendment can't tolerate the district "stretching its authority" into off-campus houses and reaching students while they are sitting at their computers after school
- School district in JS case appealed to US Supreme Court

Doninger v. Neff - 2nd Circuit

(C.A.2, 2011) 642 F.3d 374

□ Facts:

- "Jamfest" cancelled
- Student sends mass email to parents, students and others urging them to contact administration
- Avery Doninger (junior class secretary) blogs that Jamfest is cancelled "due to douchebags in central office" and encouraged readers to write something or call the SU to "piss her off more"
- SU refuses to allow Doninger to run for senior class secretary

Doninger v. Neff - 2nd Circuit

□ **Holding:**

- District court - school wins
 - Qualified immunity claim
 - 1st Amendment is so confusing that school officials shouldn't be held personally liable under these circumstances
 - School officials are entitled to benefit of the doubt

Doninger v. Neff - 2nd Circuit

□ **Holding:**

- Court of Appeals - school wins
 - Did not reach a conclusion about whether school officials violated Doninger's 1st Amendment rights
 - Any 1st Amendment right Doninger may have had was not "clearly established" given the uncertainty in the legal decisions in this area to date
- Appealed to US Supreme Court

Kowalski v. Berkeley Cty Sch - 4th Circuit

[July 27, 2011], C.A.4 No. 10-1098, unreported

□ **Facts:**

- MySpace.com webpage called "SASH" (Students Against Shay's/Sluts Herpes)
- Website largely dedicated to ridiculing a fellow student (Shay N)
- District suspended student for 5 days

Kowalski v. Berkeley Cty Sch - 4th Circuit

□ **Holding:**

- District court - school wins
 - Webpage created for the purpose of inviting others to indulge in disruptive and hateful conduct
 - Caused an "in-school disruption"
 - Vulgar and offensive speech

Kowalski v. Berkeley Cty Sch - 4th Circuit

□ **Holding:**

- Court of Appeals - school wins
 - Schools have responsibility to protect students from harassment and bullying in school environment
 - Speech caused an interference under *Tinker*

DJM v. Hannibal Public Sch. Dist. - 8th Circuit

(August 1, 2011), C.A.8 No. 10-1428, unreported

□ **Facts:**

- Off-campus, online instant message conversation
- DMJ made statements re: getting a gun, "getting rid" of certain students, borrowing a gun from a friend, etc.
- DMJ placed in juvenile detention and suspended for the remainder of the school year

DJM v. Hannibal Public Sch. Dist. - 8th Circuit

□ **Holding:**

- District court - district wins
 - Speech was unprotected true threat
 - Disruptive impact on school environment
- Court of Appeals - district wins
 - *Tinker* applies to conduct "in class or out of it"
 - Extremely disruptive behavior here

Teacher's First Amendment Rights

Evans-Marshall v. Tipp City Bd. Of Educ.

(October 21, 2010), C.A. 4 No. 09-3775, unreported

□ **Facts:**

- Censorship classroom assignment
- Public/media outcry
- School board nonrenewal
 - Evaluations critical of attitude, demeanor and use of materials that pushed limits of community standards
 - "Problems with communication and teamwork"

- **Claim:** Terminated in retaliation for exercising 1st Amendment rights in classroom

Evans-Marshall v. Tipp City Bd. Of Educ.

□ The Law

- **"Matters of Public Concern" Requirement:** 1st Amendment protects the speech of EEs only when it involves "matters of public concern." *Connick v. Myers*.
- **"Balancing" Requirement:** balance interests of teacher, as a citizen, in commenting upon matters of public concern vs. interest of state, as an ER, in promoting the efficiency of the public service it performs through its EEs. *Pickering v. Board of Education*.
- **"Pursuant To" Requirement:** statements made by public EEs pursuant to their official duties are not protected by the 1st Amendment. *Garcetti v. Ceballos*.

Evans-Marshall v. Tipp City Bd. Of Educ.

□ Holding: school district wins

- Evans-Marshall cleared the first two hurdles, but not the third
- Curricular and pedagogical choices were made in connection with her official duties as a teacher
- "When a teacher teaches, the school system does not regulate that speech as much as it hires that speech."
- Government retains control over what the ER itself has commissioned or created: the EE's job

Evans-Marshall v. Tipp City Bd. Of Educ.

□ Impact?

- In-class speech is rightfully controlled by the local board of education
- OSBA's Model Policy IB
- Other implications? Politicking in the classroom?

Public Records

Rhodes v. City of New Philadelphia

129 Ohio St.3d 204, 2011-Ohio-3279

□ **Facts:**

- Public records request for reel-to-reel audio tapes from police dispatchers from 1974-1995
- All communities had stopped using the technology and disposed of tapes and machines
- Everyone but New Philadelphia documented that their destruction of tapes was accomplished pursuant to records retention policy
- New Philadelphia had no records retention schedule; no approval prior to destruction

Rhodes v. City of New Philadelphia

□ **Claims**

- Rhodes
 - Violation of public records act
 - Sought \$4,968,000 in damages
- City
 - Rhodes was not "aggrieved"
 - No interest in receiving or reviewing the tapes
 - Requested information for sole purpose of collecting forfeitures from the city

Rhodes v. City of New Philadelphia

□ Holding:

- District Court - City
 - Rhodes had no interest in the tapes
 - Rhodes was not "aggrieved"
- Court of Appeals - Rhodes
 - Successful in showing that he was denied access and that records were unlawfully destroyed
 - Remand to trial court—how many violations?

Rhodes v. City of New Philadelphia

□ Holding:

- Supreme Court - City
 - "Any person unable to access a requested record" vs. "Any person who is aggrieved"
 - Show some actual harm or prejudice as a result of record-keeper's violation

Rhodes v. City of New Philadelphia

□ Legislative Amendments (HB 153):

- RC 149.351 - a person is not aggrieved if clear and convincing evidence shows that the request for a record was contrived as a pretext to create potential liability
- Other amendments:
 - Caps civil forfeiture to \$10k
 - Attorney's Fees
 - Prevents double-damages
 - 5-year statute of limitations

Rhodes v. City of New Philadelphia

- Impact?
 - Good news for school districts
 - Limits the class of potential plaintiffs
 - Doesn't limit awards arising from genuine public records request
 - Presumption that a request is made to access the records; district must have facts to prove that requester had no intent to access the records

Ohio Ethics Commission Opinions

OEC 2011-05: student teacher stipends

<http://www.ethics.ohio.gov/opinions/2011-05.html>

- Background information:
 - Must complete minimum of 100 hours of field experience and 12 weeks of student teaching
 - Prior agreements between college and district
 - District will host students and assign staff to act as mentors and program coordinators
 - College provides district or cooperating employees with cash stipend or fee waiver for courses

OEC 2011-05: student teacher stipends

□ Opinion asked two questions:

- ▣ Can a school district employee accept compensation from a college or university for serving as a mentor for a student teacher?
- ▣ Can colleges or universities provide compensation to a school district employee for serving as a mentor for a school teacher?

OEC 2011-05: student teacher stipends

□ RC 2921.43(A)(1) - district employees are prohibited from accepting supplemental compensation, which is payment:

- ▣ For performing any duty, act or service required in their official capacities as public servants
- ▣ For the general performance of their duties
- ▣ As a supplement to their public compensation

OEC 2011-05: student teacher stipends

□ Is the employee performing in their official capacities as public servants?

- ▣ Yes
- ▣ Employment link between employee and district
- ▣ Mentoring activities occur during the school day, using school facilities and school resources

OEC 2011-05: student teacher stipends

- **HOLDING:** School district employees are prohibited from accepting any payment or other benefit from a college or university for serving as a mentor for a student teacher
- Statute also prohibits college or university from providing the compensation.

OEC 2011-05: student teacher stipends

- **Impact?**
 - ▣ College/university prohibited from providing direct payments to individual teachers
 - ▣ College/university **NOT** prohibited from providing payment to the district
 - ▣ District could then use the funds provided in any way it chooses

OEC Informal: conversion community schools

- Companion opinion to OAG 2010-020
- **Question:**
 - ▣ Can a district SU/TRE also serve in the same roles at a conversion community school sponsored by the district?

OEC Informal: conversion community schools

- RC 2921.43 - no public official shall knowingly have an interest in the profits/benefits of a public contract entered into by or for the use of a political subdivision or governmental agency or instrumentality with which the public official is connected
- Unless he/she can meet an exception in the law, employee can't serve in dual capacity

OEC Informal: conversion community schools

- Official Capacity Exception
 - Governmental entity must create or be a participant in the nonprofit organization
 - Appointing governing body must formally designate the position to represent the governmental entity
 - EE must be formally instructed to represent the governmental entity and its interest
 - There must be no other conflict of interest on the part of the designated representative

OEC Informal: conversion community schools

- 2921.42(C) Exception
 - Goods and services are necessary goods and services
 - Products/services the conversion community school provides to the district are "unobtainable elsewhere for the same/lower costs"
 - The treatment the community school will accord the school district is either preferential to or the same as that accorded to other clients in similar transactions
 - The entire transaction is conducted at arm's length

OEC Informal: conversion community schools

- Other potential conflicts under Ethics Laws:
 - ▣ Authorization of public contract
 - ▣ Conflicts of interest
 - ▣ Representation
 - ▣ Disclosure of confidential information

OEC Informal: conversion community schools

- Impact?
 - ▣ Makes it extremely difficult for SU/TRE to continue dual employment with both their public school district and a conversion community school sponsored by the district
 - ▣ Work with board counsel to see if you fall within one of the permitted exceptions

Ohio Attorney General Opinions

OAG 2011-019: "Financial Reasons"

<http://www.chicattorneygeneral.gov/Legal/Opinions/2011-Opinions/2011-019>

- Background information:
 - RC 3319.17
 - Authorizes a BOE to reduce the number of teachers it employs within the district
 - "...may make a reasonable reduction...for financial reasons"
 - "Financial reasons" is not defined by statute

OAG 2011-019: "Financial Reasons"

- Question: can the term "financial reasons" be defined in a collective bargaining agreement (CBA) between a district and its employees?
- Holding: No, CBA may not define "financial reasons"

OAG 2011-019: "Financial Reasons"

- Rationale:
 - Plain language provides BOE with sole authority to determine when reduction is necessary
 - Defining the term limits when BOE may determine that a reduction is necessary
 - Legislative Intent - purpose of RC 3319.17 is to give BOEs the flexibility to adjust teaching staff levels should the need arise

OAG 2011-025: SU Vacation Leave

<http://www.chicostatenevangelical.gov/Legal/Opinions/2011-Opinions/2011-025>

□ Background Information:

- RC 3319.01 authorizes a BOE to provide for payment of a SU's accrued, unused vacation leave upon the SU's death or separation from employment
- Many districts allow annual payments of SU's accrued, unused vacation leave
- Statute does not specifically authorize the annual payment

OAG 2011-025: SU Vacation Leave

- Question: Can a BOE adopt a policy that provides for the annual payment of the SU's accrued, unused vacation leave?
- Holding: Yes, the BOE may adopt such a policy

OAG 2011-025: SU Vacation Leave

□ Rationale:

- BOE may grant a SU fringe benefits in excess of those authorized by RC 3319.01
- Authority under RC 124.39(C)
 - Board may adopt policies similar to provisions contained in RC 124.382-124.386
 - RC 124.384—director of administrative services may establish a plan for early payment of accrued sick leave and vacation leave

OAG 2011-025: SU Vacation Leave

□ Impact:

- Not enough to just have this language in SU's individual employment contract
- BOE must adopt a "policy"
- Absent adoption of a policy, BOE may not provide for the annual payment of a SU's accrued, unused vacation leave
- Sample language in OSBA policy CBC

National Labor Relations Board

NLRB Social Media Decisions

<https://www.nlrb.gov/news-acting-general-counsel/releases-report-social-media-cases>

□ Background Information

- August 18, 2011
- NLRB's General Counsel issued a memo to regional directors that summarized NLRB's resolution of 14 "social media cases"
- Attempts at providing guidance on the types of social media conduct that are protected under the National Labor Relations Act (NLRA)

NLRB Social Media Decisions

□ Examples:

- While preparing for meeting with management, EE asked coworkers on her Facebook page for their reaction to another EE's complaints about work quality and staffing levels of the ER
- An EE complained on her Facebook page about her supervisor's refusal to permit a union representative to assist her in responding to a customer complaint about the EE

NLRB Social Media Decisions

□ Examples:

- A salesman at a car dealership criticized on his Facebook page the dealership's handling of a sales event intended to promote a new car model and posted mildly mocking photographs that included his coworkers
- EEs posted on Facebook about ER's failure to withhold state income taxes, resulting in EEs' receiving payment demands from state tax authorities

NLRB Social Media Decisions

- NLRB concluded that ER's discipline in all four cases violated the NLRA

□ Rationale:

- Subject matter of the posts related to:
 - Terms and conditions of employment
 - The exercise of rights conferred under the NLRA
 - Other matters traditionally considered "protected activities"
- Employees were collaborating ("concerted activity"). Not individual gripes.

NLRB Social Media Decisions

- ❑ "My boss is a scumbag" posts
 - ❑ Offending Facebook posts included swearing, sarcasm, or the use of a "short-hand expletive"
 - ❑ NLRB is not concerned
 - Didn't interrupt work; occurred outside of the workplace and during nonworking time
 - Not accompanied by verbal or physical threats
 - Postings provoked by supervisor's unlawful conduct
 - ❑ Essentially telling ERs that they must have thicker skin when it comes to these posts

NLRB Social Media Decisions

Problem Provisions

- ❑ Inappropriate discussions
- ❑ Defamation
- ❑ Disparagement
- ❑ Privacy
- ❑ Confidentiality
- ❑ Contact information
- ❑ Logo
- ❑ Photographs

Permissive Provisions

- ❑ Can't be pressured to "friend" coworkers
- ❑ Confidentiality about "sensitive" information
- ❑ Direct media inquiries to company's public affairs office

NLRB Social Media Decisions

- ❑ Impact?
 - ❑ ERs routinely include these challenged provisions in their social media policies
 - ❑ Removing these prohibitions would eviscerate most social media policies
 - ❑ Add disclaimer - policy will not be construed or applied in a manner that improperly interferes with EEs' rights under section 7 of NLRA
 - ❑ Emphasize ER's legitimate purpose
 - ❑ Take this information for what it's worth

Questions

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