

UPGRADING YOUR DISTRICT'S ACCEPTABLE USE POLICY



OSBA Cyberlaw 2017
March 17, 2017
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ACCEPTABLE



UNACCEPTABLE



What Laws & “Rules” Apply?

- **Children’s Internet Protection Act**
- **Children’s Online Privacy Protection Act (“COPPA”)**
- **Free speech protections**
- **Collective bargaining agreement**
- **Ohio Revised Code**
- **Federal law requirements (IDEIA, FERPA, etc.)**

What Laws Apply

- **Legal Backdrop**
 - **Children’s Online Privacy Protection Act (1998)**
 - Protect students under 13 from having their personal information collected without consent of parents or guardians (why many social networking sites require participants to be 13 or older)
 - **Children’s Internet Protection Act (2000)**
 - Schools provide Internet filtering to prevent student access to offensive /obscene content
 - Schools receive funds from federal E-rate program and must certify they have Internet safety policies addressing student access to inappropriate matter

Mandatory Reporting

- Ohio Revised Code 2151.421
- Applies to **ALL** school employees
- Any school employee with knowledge or **reasonable cause to suspect** a child under 18 years of age or a developmentally disabled child under 21 years of age suffers or faces a threat of suffering physical or mental abuse or neglect, that person must immediately report such knowledge or suspicion to children's services or a municipal or county peace officer



FERPA

FERPA

- The Family Educational Rights and Privacy Act (FERPA) is a federal law enacted in 1974 to protect the privacy of student educational records.
- FERPA applies to all educational agencies or institutions receiving funds from the U.S. Department of Education.
 - All public school districts must comply with FERPA and protect the privacy of student educational records

Education Records are...

- All files, documents, and other materials containing information directly related to a student; **and**
- Maintained by the education agency or institution, or by a person acting for such agency or institution.

Examples of Education Records

- Disciplinary records
- Health records
- Special education records
- Report cards
- Home/school communication logs
- Surveillance videos (maybe)

Education Records DO NOT Include...

- Information obtained through personal knowledge
- Personal notes not shared with others
- Employment records of students
- Law enforcement records
- Peer-graded papers

Disclosure

- As a general rule, education records cannot be disclosed without the written consent of the student's parent (or the 18 year old student)

Exceptions Where Consent is Not Required

- To school officials with a "***legitimate educational interest***"
- To officials of schools to which a student intends to or seeks to enroll or where the student is already enrolled
- To federal or state authorities conducting an audit or evaluation of programs

Exceptions continued

- To student financial aid officers
- To state and local officials in connection with juvenile justice system
- To organizations conducting studies on behalf of educational agencies
- To accrediting organizations

Exceptions continued

- ***By judicial order or subpoena***
- ***In the event of a health or safety emergency***
- When a registered juvenile sex offender is enrolled or attending school and the school has notice

Personally Identifiable Information

- Student's name or address, or the names or address of the student's parents or other family members.
- Personal identifiers, e.g., social security number, ID number or indirect identifiers.

Personally Identifiable Information

- Other information, that alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty

Ohio Law

RC 3319.321 – Confidentiality

Ohio's student confidentiality statute contains provisions very similar to those in FERPA. Ohio law also contains the following provisions that do not appear in federal law:

- Directory information cannot be released, or access granted to, third parties who intend to use the information in a profit-making plan or activity.
- Additionally, the third party may be required to disclose his/her identity or intended use of the student information so the school can determine whether or not it will be used for profit. R.C. 3319.321(A)

Who Has A Need To Know

- Want to know and need to know are very different
- All school employees must be mindful of the difference between sharing a student's personally identifiable information with those who have a "want to know" not a "need to know"

Remember...

- Keep in mind what educational records you deal with that will be protected by FERPA
- Do not post pictures of students on social media without parent written permission

What Laws & Rules Apply - Enforcement of AUPs through Employee Discipline

AAA's Seven-Factor Test

1. **Forewarning of possible/probable disciplinary consequences?**
 - AUP/RUP needs to clearly spell out discipline as a consequence of violation
2. Rule/order reasonably related to safe, effective operation of the enterprise?
3. Proper efforts to determine if there was in fact a violation? (i.e. was there an investigation?)

AAA's Seven-Factor Test

4. Was the investigation fair and objective?
5. **Substantial evidence to support employee's guilt?**
6. Rules and resulting penalties applied consistently without discrimination?
7. Degree of discipline in accord with seriousness of offense and employee's record with employer?

Enforcement – Free Speech On Campus Student Speech

Schools may categorically prohibit:

- Lewd, vulgar, profane language on school grounds
- School-sponsored speech because of any legitimate pedagogical concerns
- Speech that substantially disrupts school operations or interferes with others' rights
- Speech that is "a true threat," defamatory, drug-promoting
- "Fighting words"

What Laws Apply Off Campus Student Speech

Courts will usually uphold discipline for off-campus conduct if the conduct:

- **Substantially disrupted learning**
- Interfered with school discipline
- Was a true threat

Courts do not uphold policies that are vague or overbroad.



Enforcement of AUP/RUP – Student Free Speech

- When handling off-campus cyber speech, districts should consider 4 factors:
 - Location of the speech: is there a viable nexus or connection to the district network or system;
 - The disruptive effect, if any, on the educational environment;
 - Reasonable forecast of substantial and material disruption
 - The nature or type of speech: was it personal, violent, lewd, vulgar, pro-drug, threatening; and
 - The manner in which the speech was distributed: how/ did it make it to campus?

But that's not all . . .
Employee Free Speech

Is there potential for concerted union activity?

- Union activity deserves special attention and demands additional consideration because it may afford employees certain protections for union activity.
- Unfortunately, no SERB case is available involving the use of social media to criticize employers and promote a labor agenda.
- NLRB provides guidance where SERB precedent is insufficient.
- NLRB has found that Facebook postings can be “protected concerted activity.”

Additional Considerations

- Ohio law prohibits employees from campaigning for any cause, issue or candidate while on work time.
- Ohio law prohibits the use of District property to campaign for any cause, issue or candidate.

Case Study #1

Employee tweets, “My principal is an absolute “A**h***.”

Case Study #2

Employee tweets that Superintendent is an “A**h*** because he denied a grievance filed by a few of my fellow teachers who simply wanted to be paid as promised for work they did over the summer.”

Current Trends

- Moving away from the traditional AUP approach
 - Staff, students and family members sign a form “accepting” certain rules, with little action required after that
- Moving toward a “responsible-use policy” (RUP)
 - Emphasizes education and treats the staff/student as a person responsible for ethical and healthy use of the Internet and mobile devices.

Policy Considerations

- Consider transitioning from traditional “acceptable use policies” – which focus on website access issues – to “responsible use policies” (RUP’s)
- RUP’s emphasize education; treat students and teachers as persons responsible for ethical use of Internet and mobile devices
- Focus on digital literacy, *i.e.*, helping students learn how to use social media in safe, effective and appropriate way

Policy Considerations

- Set clear guidelines for teachers and students
 - Examples
 - Teacher must get a supervisor's approval to use social media in the classroom
 - Distinguish between personal and professional uses of social media
 - Identify how social media will advance learning in the classroom
- Emphasize need to access school-appropriate / non-obscene content
- Emphasize student privacy
- Establish discipline for students / staff who violate policies

Policy Considerations

- Include all functions of current technology
 - photos, video recording, live streaming, video chat, online access, texting and more
- Update policies to embed responsible use of technology throughout all relevant areas
 - Clarify expectations for appropriate use of technology/social media policies related to cheating, code of conduct, behavior expectations etc.

Policy Considerations

- If technology, such as social media sites, Google docs, classroom discussions, and use of smart phones, is incorporated into the curriculum, policies for appropriate/responsible use of personal technology should be adopted, in addition to policies for appropriate use of district-owned technology.

Policy Considerations

- Policies and practices should not promise return of mobile device following confiscation; as mobile device may have to be given to police if it contains evidence of a crime
- Letting users know that activity on district equipment will be monitored and the misuse will result in consequences
 - Spell out discipline as a consequence

Policy Considerations

- Add and highlight responsible technology use messages in all field trip and overnight trip permission slips
- Inform/educate parents and students regarding district policies and privacy concerns arising from digital equipment issued by the district that is taken from home to school.
 - E.g. when IEPs include assistive technology and digital equipment

Practical Tips

- Teachers/staff should be reminded that images viewed on social networking sites may trigger their mandatory child abuse reporting duties
- Expressly spell out consequences for violations
 - Suspension of District Network privileges;
 - Revocation of Network privileges;
 - Suspension of Internet access;
 - Revocation of Internet access;

Practical Tips

- Expressly spell out consequences for violations
 - Revocation of computer access;
 - School suspension;
 - Expulsion; or
 - Employee disciplinary action up to and including discharge.

Enforcement

- Consider incorporating adherence to AUP/RUP into job descriptions
- Employee training/student awareness
- Designate an individual to be responsible to monitor compliance
- Pop up notices
 - If a pop up notice is provided each time an individual accesses/logs on, helps to satisfy “notice” requirement for discipline

Case Law Update

- *Winland v. Strasburg-Franklin Local School District Board of Education, et al.*
- Fifth District Court of Appeals – Appeal from Tuscarawas County Court of Common Pleas
- Former teacher sought review of BOE decision to terminate his employment

Winland

- The school loaned Winland, a language arts/social studies teacher and track coach, a laptop for the summer
- Summer Equipment Sign-Out Sheet: “I further acknowledge that these devices are to be used exclusively for school-related purposes and that any misuse(s) of said devices, any misconduct, or any violation of the district acceptable use policy will be documented and reported to the building principal(s) for further action.”

Winland

- Sign Out Sheet: Laptop must be returned by June 30
- At the beginning of the school year, each teacher receives a copy of the District handbook
- Handbook contains an “Acceptable Use Policy” for staff members for the use of school computers
- Computer/Online Services Acceptable User and Internet Policy

Winland

- Acceptable Use Policy: “Users shall not view, download or transmit material that is threatening, obscene, disruptive or sexually explicit. . . If any users violate any of these provisions their accounts may be terminated by either the District . . . and future access may be denied.”
- Over the summer, Winland traveled and worked at several out-of-state football clinics

Winland

- Despite IT Department trying to notify Winland that he needed to return the school laptop by June 30, Winland returned his laptop on July 28
- IT Department examined the laptop closely (prior virus download) and discovered in the laptop's temporary internet files 84 thumbnail images of graphic, sexual images, each cached on July 26, when Winland was at a football clinic

Winland

- Winland indicated that while at the clinic, someone mentioned an actor named "Shane Diesel."
- Winland said he performed a Google search of Shane Diesel on the laptop
- After clicking on link from "Internet Movie Database," Winland testified that the graphic thumbnail pop-ups appeared on the computer

Winland

- At first, Winland apologized and offered to resign
- Later withdrew his offer of resignation
- The board proceeded with termination
- Two-Day Evidentiary Hearing Before Referee:
 - The principal testified that Winland was an effective teacher and during the prior 3 years Winland received the highest marks in all but one of 33 categories

Winland

- Winland had one prior disciplinary action a few years back:
 - 5-day suspension for abuse of sick leave
- Referee's Report & Recommendation: Actions could give rise to suspension or termination of contract but mitigating factors suggested a suspension rather than termination
- Referee recommended a suspension of 45 days without pay for insubordination for failure to timely return the laptop

Winland

- The referee also recommended an additional 45 days without pay for inappropriate use of the laptop
- Further recommendations:
 - banned from removing school property from school premises,
 - continuing education courses, and
 - written apology to school staff
- BOE accepted the referee's factual findings, but rejected the conclusion
- BOE determined Winland's contract would be terminated, effective immediately, for good and just cause

Winland

- Winland appealed the Board's termination decision to Tuscarawas County Court of Common Pleas
- The trial court reversed the Board's decision to terminate Winland's contract and reinstated him to his former position with back pay and benefits
- The board appealed to the Fifth District Court of Appeals

Winland

- The court of appeals affirmed the trial court's decision to reinstate Winland (reversing the BOE)
- R.C. 3319.16 (statutory procedure for termination for disciplinary reasons)
- "Good and just cause" = "fairly serious matter"

Winland

- "In order to constitute immorality and good and just cause within the statutory meaning of those terms, the conduct complained of must be hostile to the school community and cannot be some private act which has no impact on the teacher's professional duties."

Winland

- Trial court found that Winland's conduct was private
- Did not impact his professional duties or his students
- Cannot be construed as "hostile to the community"
- Private sexual practices of teachers, if perchance revealed, cannot serve as predicate for BOE discipline "if that conduct has not implicated or transgressed the sacred boundaries of student and school"

Winland

- BOE argued on appeal that there is no expectation of privacy in school-issued computer
- Court agreed, but determined that the case was not about an expectation of privacy
- Issue: whether Winland committed a private act that impacts his professional duties as a teacher

Winland

- The Court reasoned that all cases where termination was affirmed was where the employee's behavior had, or could have had, a serious effect on the school community
- Winland: action off school property, did not involve students, no criminal act
- Was not "fairly serious matter" and did not rise to level of "good and just cause" for termination
- Reversal of termination affirmed

Student Search and Seizure



Student Cell Phone & Other Electronic Device Searches

Legal Standard – whether search was

- justified at its inception; AND
- Reasonably related in scope to the circumstances which justified the search in the first place

- Reasonableness depends on the degree of certainty that a student has violated the law or school rules and the extent to which the student's expectation of privacy will be invaded. The lower the expectation of privacy, the less certainty required.
 - When conducting a search, school officials should take into account the student's age and nature of the violation
- Different standards may apply to searches conducted by school resource officers or local police officers at school

Judicial Decisions Addressing School Searches



J.W. v. DeSoto Cty. Sch. Dist.

2010 WL 4394059 (N.D. Miss. 2010)

- Seventh grade student's cell phone was confiscated by a teacher after he was caught using it in class in violation of school rules
- The teacher then opened the phone and looked through the stored photographs which were taken at the student's home
- In one photo, student is holding a BB gun and in another may have been flashing "gang signs"



J.W. v. DeSoto Cty. Sch. Dist., 2010 WL 4394059
(N.D. Miss. 2010)

- After review of the photos, student was directed to the principal's office who determined the photos evinced gang activity and was a "threat to school safety"
- The student was expelled and his mother filed a claim for violation of her son's 4th Amendment rights
- ***So what did the court decide?***

J.W. v. DeSoto Cty. Sch. Dist., 2010 WL 4394059
(N.D. Miss. 2010)

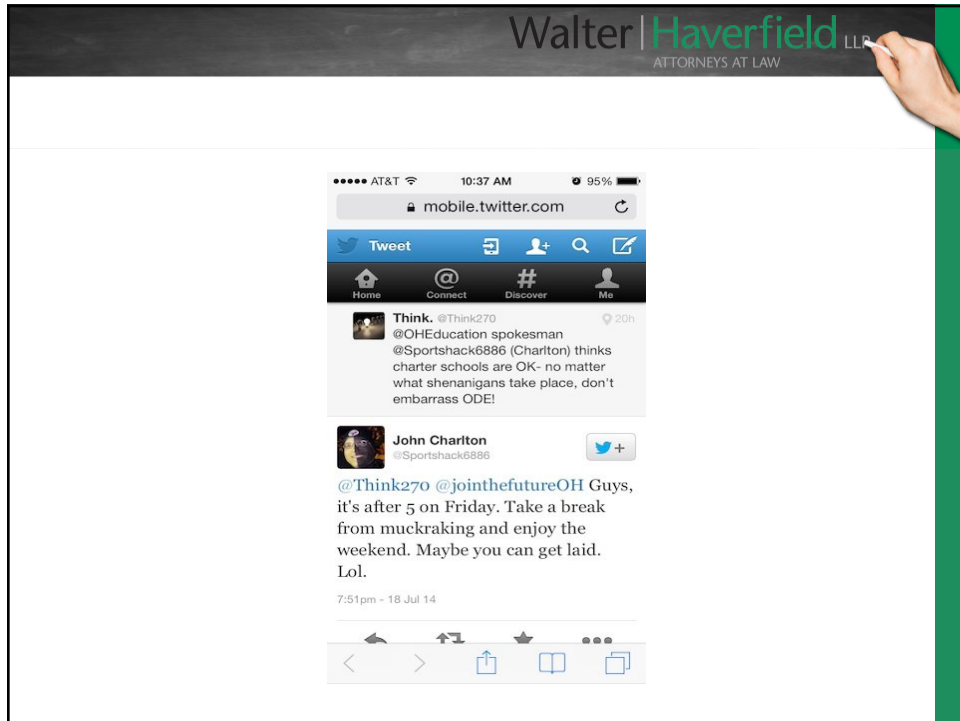
- The Court granted the district's motion to dismiss
- The faculty acted reasonably since the student's improper use of the phone in class allows the school to ascertain "to what end the student was improperly using that phone"

G.C. v. Owensboro Pub. Schs.711 F.3d 623 (6th Cir. 2013)

- Assistant principal read four messages in student's cell phone after it was confiscated because student sent texts in class
- Student had a history of angry outbursts, drug use and suicidal thoughts, and this recent violation resulted in revocation of his out-of-district status
- Student claimed the school violated his 4th Amendment rights by reading the messages without reasonable suspicion
- The AP claimed the purpose of the search was "to see if there was an issue with which [she] could help him so that he would not do something harmful to himself or someone else"
- ***And the survey says???***

G.C. v. Owensboro Pub. Schs.711 F.3d 623 (6th Cir. 2013)

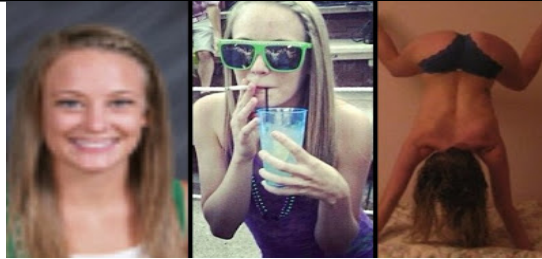
- District court granted summary judgment in favor of the district based upon the *J.W. v. DeSoto* decision
- Disagreeing with the holding in *J.W. v. DeSoto*, the 6th Circuit reversed the lower court's grant of summary judgment in favor of the district
- The court held that general background knowledge of drug abuse or depressive tendencies does not permit school officials to search a student's cell phone when a search would otherwise be unwarranted and there was no indication, at the time, that the student was engaging in illegal activity or was contemplating injuring himself or another student

A screenshot of a laptop displaying a Facebook page. The page header shows "facebook" and "News Feed". A post from "DR. Anne Felton-Style" is visible, with the text: "so not looking forward to another year at Cohasset Schools". The laptop keyboard is visible at the bottom.

Facebook Faux Pas

- Back to school ... Not so fast

Facebook Faux Pas ... Part 2



Tweets included:

- "Naked. Wet. Stoned."
- "Watching a drug bust go down in the school parking lot. It's funny cuz I have weed in my car in the staff parking lot."
- "Stoned showers are the best showers,"

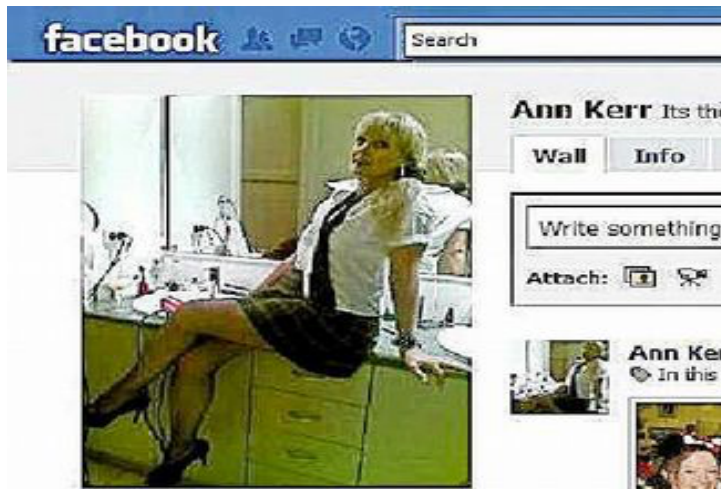
Facebook Faux Pas ... Part 2



Facebook Faux Pas ... Part 3




Facebook Faux Pas ... Part 4



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Perhaps a better way to go when it comes to the use of social media?

I don't have a Facebook or a Twitter account, so I just go around announcing out loud what I'm doing at random times...




I've got 3 followers so far but I think 2 are cops...

more awesome pictures at THEMETAPICTURE.COM

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Thank you!

Any questions?



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