

# **Privacy & Services for the IDEA Student in the Digital Age: Technology & FAPE**

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# A note about these materials....

- These slides are intended to summarize rules and cases that are often very complex. Neither the slides nor the presentation are legal advice.
- The focus is on federal requirements, with examples from around the country. Your state law may require additional analysis not provided here.
- Please consult a licensed attorney for questions with respect to a particular set of facts.

# Some IDEA History

*Daniel R.R. v. State Bd of Ed.*, 874 F.2d 1036, 1038 (5<sup>th</sup> Cir. 1989).

- Prior to the IDEA, two equally ineffective approaches for students with disabilities:

“they were excluded entirely from public education or were deposited in regular education classrooms with no assistance, left to fend for themselves in an environment inappropriate for their needs.”

# Some IDEA History

*Bd. of Ed. of Hendrick Hudson CSD v. Rowley, 458 U.S. 176 (1982).*

- *How do you know when FAPE is provided?*

1. Congress was focused on getting students with disabilities into school.

“By passing the Act, Congress sought primarily to make public education available to handicapped children.... the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”

# Some IDEA History

*Bd. of Ed. of Hendrick Hudson CSD v. Rowley, 458 U.S. 176 (1982).*

2. “Maximize potential” & “equal benefit” were both rejected by the Supreme Court as standards.

Instead, “the basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”

# Some IDEA History

*Bd. of Ed. of Hendrick Hudson CSD v. Rowley, 458 U.S. 176 (1982).*

3. So does benefit mean the same thing for everyone? No.

“The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.”

# Some IDEA History

*Bd. of Ed. of Hendrick Hudson CSD v. Rowley, 458 U.S. 176 (1982).*

3. So does benefit mean the same thing for everyone? No.

“One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills.”

# Some IDEA History

*Bd. of Ed. of Hendrick Hudson CSD v. Rowley, 458 U.S. 176 (1982).*

4. Sometimes, educational benefit is easy to track.

“The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible.”

“When that ‘mainstreaming’ preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child.”



# Some IDEA History

*Bd. of Ed. of Hendrick Hudson CSD v. Rowley, 458 U.S. 176 (1982).*

4. Sometimes, educational benefit is easy to track.

“Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit.”

# Some IDEA History

*Bd. of Ed. of Hendrick Hudson CSD v. Rowley, 458 U.S. 176 (1982).*

## 5. So what's the test for folks *not* mainstreamed?

“We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.”

A school satisfies the FAPE obligation when it provides “Personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”

# **“Assistive technology device” as defined by the IDEA (34 C.F.R. § 300.5)**

- “any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.”

# 1. Who decides what tech (if any) to use?

- The general rule: For students who are IDEA-eligible, the IEP Team will make the ATD decision.
  - But watch for a new dynamic where IDEA parents look to Section 504/ADA equal access (*Pollack v. Regional School Unit 75*, 114 LRP 15007, (D.C. ME 2014)). or ADA effective communication requirements to get the technology they want. *K.M. v. Tustin Unified School District*, 61 IDELR 182 (9<sup>th</sup> Cir. 2013), *cert den'd*, 114 LRP 9909 (U.S. 2014)(D.H.); *cert. den'd*, 114 LRP 9688 (U.S. 2014)(K.M.).

## **2. Is technology required for this student under the IDEA?**

- **“ § 300.324 Development, review, and revision of IEP.**
  - (a) Development of IEP —**
    - (1) General. In developing each child's IEP, the IEP Team must consider—**
      - (v) Consider whether the child needs assistive technology devices and services.”**

## 2. Is technology required?

*Letter to Fisher, 23 IDELR 565 (OSEP 1995).*

- “Public agencies are required to provide assistive technology devices or services to a disabled student if the participants on a student's individualized education program (IEP) team determine that the student needs an assistive technology device or service in order to receive a free appropriate public education (FAPE). *See 34 CFR § 300.308.*”

## 2. Is technology required?

*Letter to Fisher, 23 IDELR 565 (OSEP 1995).*

- “Consistent with this responsibility, each public agency must ensure that, as part of its Part B educational evaluation when warranted by the child's suspected disability, it assesses, in accordance with the evaluation requirements of 34 CFR § 300.532, the student's functional capabilities and whether they may be increased, maintained, or improved through the use of assistive technology devices or services. 34 CFR § § 300.5 and 300.6.”

## 2. Is technology required?

*Letter to Fisher, 23 IDELR 565 (OSEP 1995).*

- “The evaluation should provide sufficient information to permit the IEP team to determine whether the student requires assistive technology devices or services in order to receive FAPE.”



## 2. Is technology required for this student under the IDEA?

- Does every IDEA eligible student have to get a piece or two of technology?
  - After all, wouldn't every child benefit from more technology?

## 2. Is technology required for this student under the IDEA?

- *High v. Exeter Township Sch. Dist.*, 54 IDELR 17 (E.D. PA. 2010).

“...although assistive technology will almost always be beneficial, a school is only required to provide it if the technology is necessary. Moreover, the failure to provide assistive technology denies a student FAPE only if the student could not obtain a meaningful educational benefit without such technology.”

## 2. Is technology required for this student under the IDEA?

- Not an AT case, but note the fact-based analysis on need and solution. *Manalapan-Englishtown Reg. Bd. of Ed.*, 107 LRP 27925 (SEA NJ 2007).
  - The elementary student had an acute peanut allergy
  - Doctor required that EpiPen be used “expeditiously” following exposure to peanut protein (ingested, touched or inhaled).
  - If student waited for paramedics to administer the EpiPen, “there is absolutely no way” he would survive.

## 2. Is technology required for this student under the IDEA?

- *Manalapan-Englishtown, Continued*

- LIKELIHOOD OF EXPOSURE: “Peanuts are a common food and people, especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves and it is almost impossible to make the school environment completely peanut-free.”

## 2. Is technology required for this student under the IDEA?

- *Manalapan-Englishtown, Continued*
  - LIKELIHOOD OF EXPOSURE: “Therefore, it is probable that J.B., Jr., whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day.”

## 2. Is technology required for this student under the IDEA?

- *Manalapan-Englishtown, Continued*

- RESOURCES ON BUS: “A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen and, thereby allow the student to avoid the above-described problems. J.B., Jr., is too young to be responsible to monitor himself and to administer his own EpiPen.”

## 2. Is technology required for this student under the IDEA?

- *Manalapan-Englishtown, Continued*
  - SOLUTION: “Therefore, a nurse, aide or other trained adult is required for those purposes.”
  - Note the identification of a universe of appropriate service providers from which to choose (from very expensive to low-cost).

## 2. Is technology required for this student under the IDEA?

- *Grant v. St. James Parish Sch. Bd.*, 33 IDELR 212 (E.D.LA. 2000).
  - Student was § 504 & dyslexic under LA dyslexia law
  - Student's performance was on or above average academically even before accommodations. She consistently passed the statewide assessment.
  - She received extended time, repeated directions read aloud on tests, no penalty for misspellings, and 1 hour weekly in Project READ.



## 2. Is technology required for this student under the IDEA?

- *Grant v. St. James Parish, Continued*
  - Court rejected parent demand for IDEA FIE, assistive technology device assessment, and 1-2 hours per day small group tutoring.
  - WHY? Student is currently making progress despite mild-moderate impact from dyslexia.
    - If benefit is already received, how are *more* services necessary?

## 2. Is technology required for this student under the IDEA?

- *Smith v. District of Columbia*, 58 IDELR 155 (D.D.C. 2012).
  - Parent of an IDEA-eligible student argues that he would make *greater* progress with a laptop.
  - Student has daily classroom access to a computer, calculator, highlighters, and sticky notes, all of which were recommended in the AT Evaluation.
  - Student was making slow, but steady progress.

## 2. Is technology required for this student under the IDEA?

- *Smith v. District of Columbia, Continued*
  - Student could use (and take home) a Fusion Writer to assist in word processing, typing, and proofreading, and the school was in the process of installing Read Outloud and Draft Builder software, both of which were recommended by the Evaluation.

## 2. Is technology required for this student under the IDEA?

- *Smith v. District of Columbia, Continued*
  - District Court: “While it is certainly understandable that H.S.’s mother wants to provide him every possible educational opportunity, DCPS is not required to fund services that go considerably beyond the ‘basic floor of opportunity.’ The Court cannot conclude that, given all of this technological assistance, H.S. was denied a FAPE here because DCPS did not also provide him with a laptop or other software to take home.”

## 2. Is technology required for this student under the IDEA?

- Watch for these common (and problematic) approaches to choice:
  - “It’s new so it must be better than the old stuff we’ve been using” *Dear Colleague Letter (Electronic Book Readers)*, 110 LRP 37424 (OCR 2010).
  - “But a Tablet PC is cooler.” *Collier County Sch. Bd.*, 44 IDELR 80 (SEA FL. 2005); “iPad is cooler” *Carlsbad USD*, 59 IDELR 87 (SEA CA 2012).

## 2. Is technology required for this student under the IDEA?

- Parent preference vs. data
  - The solution: Encourage parents to explain to the IEP Team why a particular piece of technology is necessary for their child.
  - Then, focus IEP Team discussion on the data supporting need and if there is a need, the appropriate approaches that address the need.

## 2. Is technology required? Tension between remediation & accommodation

- Is it possible to accommodate in such a way that the student doesn't learn skills he's capable of learning? *Sherman v. Mamaroneck Union Free School District*, 340 F.3d 87 (2<sup>nd</sup> Cir. 2003).

## 2. Is technology required? Tension between remediation & accommodation

- *Sherman* (2<sup>nd</sup> Cir. 2003).
  - Student is IDEA-eligible with a learning disability in math.
  - Student has access to TI-82 calculator, but parent wants a TI-92 instead.
  - The problem: Math curriculum at his grade level requires students to learn and master factoring. The TI-92 factors for you.
  - Math teachers testify he can learn to factor if he keep TI-82, *but not if he uses the TI-92 that parent prefers.*



## 2. Is technology required? Tension between remediation & accommodation

- *Sherman* (2<sup>nd</sup> Cir. 2003). The court rejects the parent's proposed calculator.

“The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aides requested, to succeed but nonetheless fails. If a school district simply provided that assistive device requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires.”

## 2. Is technology required? Tension between remediation & accommodation

- *City of Chicago School District 299, 62 IDELR 220 (SEA IL 2013).*
  - The student is IDEA-eligible, with autism, multiple learning disabilities, and speech and language impairments.
  - He struggles in comprehension of basic math: he can only count up to the number 5, cannot complete most addition and subtraction calculations above a basic level, has problems with visual and spatial reasoning, and is unable to complete basic math facts.

## 2. Is technology required? Tension between remediation & accommodation

- *City of Chicago Sch. Dist.* (SEA IL 2013).
  - His IEP reflects that his level of performance in basic math skills has not changed significantly since 2010.
  - The District’s position: “Student will never be able to understand abstract mathematical concepts so that Student could understand the meaning behind basic math.” The Hearing Officer didn’t buy it.

## 2. Is technology required? Tension between remediation & accommodation

- *City of Chicago Sch. Dist. (SEA IL 2013).*
  - “District Summer Teacher testified that by using some of the techniques in multi-sensory instruction, Student was able to make progress on basic math. Moreover, Student’s IEPs suggest that ‘hands on learning’ is a way in which Student can learn. Hands on learning is a key component of multi-sensory researched based instruction. Therefore, the undersigned makes an inference that Student can learn basic math concepts when provided with an appropriate methodology which meets Student's unique needs.”

## 2. Is technology required? Tension between remediation & accommodation

- *City of Chicago Sch. Dist. (SEA IL 2013).*
  - The problem? “Student is currently not being taught basic math skills. Rather, Student is being provided the accommodations to make up for Student's failure to understand basic math in an attempt to teach advanced math skills.”
  - Translation: The student is using a calculator to handle basic math skills, but he does not understand the basic functions handled by the calculator because he's not been taught.

## 2. Is technology required? Tension between remediation & accommodation

- *City of Chicago Sch. Dist. (SEA IL 2013).*
  - To solve the problem, the Hearing Officer ordered:
    - (1) The IEP Team shall first formulate Student's present levels of performance in basic math calculations without the use of a calculator;
    - (2) The IEP Team shall then formulate whether Student needs any accommodations to learn basic math. The IEP Team shall not formulate accommodations designed to replace an understanding of basic math
    - (3) Third, the IEP Team shall then formulate benchmarks and goals designed to measure Student's progress in learning basic math.

## 2. Is technology required for this student under the IDEA?

- *Jefferson County School Dist. R-1, 39 IDELR 119 (SEA CO. 2001).*
  - Parent complained when school refused to provide an at-home computer for homework for a student with dysgraphia.
  - Student had access to computers at school (which he did not use).
  - Staff provided time at school to complete homework

## 2. Is technology required for this student under the IDEA?

- *Jefferson County, Continued*

- Hearing Officer: “It appears the teacher members of the IEP team believe this student to have the capability of writing in his own hand. It will require physical training and student working through his emotional frustrations while learning to do so. If this is so then student will not need a home computer.”



## 2. Is technology required for this student under the IDEA?

- *Jefferson County, Continued*

- Hearing Officer: “Further, he has failed to demonstrate that he will effectively use those computers which are available to him at school. The home computer requested is at this point a ‘want’ and not a ‘need’.”

## 2. Is this the right technology for *this* child?

- *Los Angeles Unified School District, 111 LRP 75098 (CA SEA 2011).*
  - IDEA-eligible student with ataxic Cerebral Palsy, mild/moderate intellectual disability, asthma, seizures and developmental delays.
  - Student is nonverbal. He communicates with vocalizations, expressions, some ASL, gestures and a School-provided communications device, a “Springboard”

## 2. Is this the right technology for *this* child?

- *Los Angeles USD, (CA SEA 2011).*
  - The student's technology needs are limited to his communication difficulties.
  - The Springboard was chosen after evaluating student's communication needs, and the determination that a dynamic display system with voice output would meet student's unique needs.
  - Parent demanded an iPad2 instead, arguing that "the iPad 2 would be better suited to meet his [communication technology] needs."

## 2. Is this the right technology for *this* child?

- *Los Angeles USD, (CA SEA 2011).*

**“However, a school district is not obligated to provide the most technologically advanced AT device, or a device that would serve other purposes. Instead, a district is required to assess and determine a student's unique AAC needs and then to provide the AAC which addresses the need. The District established that it properly assessed Student and that the SpringBoard and the SpringBoard Lite were AAC devices especially well suited to serve Student's augmentative communication needs.” (Emphasis added.)**

## 2. Is this the right technology for *this* child?

- *Los Angeles USD*, Some final notes on this case:
  - The District’s Augmentative & Alternative Communication (AAC) Assessor not only approved the device, but also programmed the screens, and trained the student, teacher, aide to use it. He was available for maintenance as well.
  - When a new version of the device became available, “he met with Student and Mother to work on the setups that would be required for the fall semester and for home. He trained the AT provider, the SE teacher, and the AA, who was primarily responsible for cuing and redirecting Student, and for encouraging him to use his Springboard voice output device.”

### **3. Is this the right technology for the child? The child confined to home**

- Much can be lost when the student is confined at home, for example ready access to:
  - An environment designed for instruction, with limited distractions.
  - Broad range of instructional personnel, service providers, and other resources.
  - Near-constant supervision for behavior, motivation, and redirection.
  - Peers and socialization opportunities.

### 3. Technology and the student receiving FAPE at home

- An initial point... while technology can help, it may not be *required* for the student confined to home.
  - “The use of a web camera or video phone, *while desirable and enriching*, is not required to provide a free appropriate public education where, as here, the evidence shows significant educational progress by the student without the assistance of those devices.” *Georgetown ISD.*, 45 IDELR 116 (SEA TX 2005).

### 3. Tech & the student confined to home: Webcams & direct instruction

- *Southern York County Sch. Dist., 55 IDELR 242 (SEA PA 2010).*
  - The phases of mevalonic aciduria result in student missing school for approximately 10 days per month.
  - Student also has a learning disability and gets five hours tutoring to help with missed work.
  - District offers a webcam room *at school* for recovery phase, *but did not discuss a webcam for the home, despite parents' request.*



### 3. Tech & the student confined to home: Webcams & direct instruction

- *Southern York County, (SEA PA 2010).*
  - “The student’s absences lead to large amounts of incomplete work and overwhelming amounts of makeup work. This is due almost exclusively to the fact that the student misses extensive periods of direct instruction and tutoring cannot and does not provide it.”
  - In-school webcam proves ineffective, apparently due to student discomfort during recovery phase.

### 3. Tech & the student confined to home: Webcams & direct instruction

- *Southern York County, (SEA PA 2010).*
  - “[A]t any one time, the student falls markedly into one of three categories—non-episodic where the student requires no remote modifications, acutely episodic where the student is not instructional, or episodically recovering where the webcam room has proven ineffective; *the District webcam room is inappropriate for any of these three categories.*”

### 3. Tech & the student confined to home: Webcams & direct instruction

- *Southern York County, (SEA PA 2010).*
  - Result: School ordered to provide a webcam at home during the recovery phase OR provide recorded audio/video of instruction to student on a portable storage device.
  - Interesting side issue regarding quality of area broadband service and school's assumptions on utility of a home webcam.

### 3. Tech & the student confined to home: Webcams & social interaction

- *Eric H. v. Methacton Sch. Dist.*, 38 IDELR 182 (E.D. Pa. 2003).
  - The second-grade student qualifies as other health impaired due to acute lymphoblastic leukemia.
  - Because of his compromised immune system, the student has received no vaccinations, and must miss school when the risk of infection to him is high.

### 3. Tech & the student confined to home: Webcams & social interaction

- *Eric H. v. Methacton Sch. Dist.*, (E.D. Pa. 2003).
  - Student's IEP identified a variety of goals to address social and behavioral needs.
  - Parents want video-teleconferencing (VTC) in order to work on socialization goals.
  - The school would provide direct instruction at home and eliminate socialization goals in the homebound IEP that can't be implemented at home.

### 3. Tech & the student confined to home: Webcams & social interaction

- *Eric H. v. Methacton Sch. Dist.*, (E.D. Pa. 2003).
  - A Video Tele-Conferencing (VTC) experiment was attempted, with mixed results.
    - Student was able to participate in classroom activities and routines, interact with the teacher, enjoy recess, make friends, and maintain friends better than in the past.
    - “Some of his targeted social and behavioral conduct become worse when he is on VTC. He acts as if he is ‘on stage,’ gets off-task, breaks rules and engages in attention-seeking behaviors.”

### 3. Tech & the student confined to home: Webcams & social interaction

- *Eric H. v. Methacton Sch. Dist.*, (E.D. Pa. 2003).
  - Court determined VTC was not necessary for FAPE.
  - What about social goals that can't be completed during homebound? “[W]e believe that he and the District have a significant opportunity to address these needs on the days when he is physically present in classroom.”

### 3. Tech & the student confined to home: Cyberschools & online education

- **Students with motivational, social, or behavioral issues.** *Plano ISD, 62 IDELR 159 (SEA TX 2013.)* (“Homebound placement is not the best educational placement for Student. Student does not perform well in academic settings where student is asked to work independently.”)
  - Cyberschool and the self-starter problem when the instructor is not in the same location as the student.



### 3. Tech & the student confined to home: Cyberschools & online education

- The expanded role of parents in online or cyber education. *Virtual Community Sch. of Ohio*, 43 IDELR 239 (SEA OH 2005).
  - Parents of a severely disabled, low-functioning child with Down syndrome and associated impairments alleged that the virtual school district's program failed to provide an appropriate IEP or confer FAPE.
  - The hearing officer noted a significant difference between the brick-and-mortar school and the online or virtual school:

### 3. Tech & the student confined to home: Cyberschools & online education

- *Virtual Cmty. Sch. of Ohio*, (SEA OH 2005).
  - “FAPE delivered in a virtual school has a different method of operation and a different mechanism for the evaluation of its students.... When parents elect to enroll their children in a virtual school they assume the responsibility of their new role as education facilitator and eyes and ears for the teacher.”
  - But what if the school does the “electing?”

### 3. Tech & the student confined to home: Cyberschools & online education

- *Benson USD, 56 IDELR 244 (SEA AZ 2011).*
  - The student was on homebound due to a variety of environmental sensitivities (including chemicals in paper).
  - The parent disagreed with placement in an online academy, as the academy did not provide sufficient one-to-one instruction and neither parent was available to serve as a “learning coach.”

### 3. Tech & the student confined to home: Cyberschools & online education

- *Benson USD, (SEA AZ 2011).*
  - The treating psychologist testified that he believed the online program was not appropriate because the student could not “self-motivate.”
  - The homebound teacher felt that the student was responsible and that requiring the student to do more work independently with the help of an online program would be beneficial.

### 3. Tech & the student confined to home: Cyberschools & online education

- *Benson USD, (SEA AZ 2011).*
  - In response to parent concerns, the team added six hours of paraprofessional support in the home.
  - Hearing Officer: The program could provide instruction with no printed materials whatsoever, and made available a certified teacher either online or in person. The paraprofessional, moreover, could fulfill the role of the “learning coach.” The program was appropriate.

### **3. Tech & the student confined to home: Cyberschools & online education**

- Some additional concerns to address via IEP Team:
  - Technology problems and the key role of technicians.
  - Managing the instructional “shift” in the way material is organized and delivered, and students are supervised.
  - Need for student computer literacy.

### 3. Tech & the student confined to home: Robot Avatars

- The next trend in technology may come from homebound students seeking robot avatars.
  - *Trend Alert: Prepare for robot technology requests for homebound students, LRP'S SPECIAL ED CONNECTION®*, March 19, 2013 (discussing use of the VGo robot avatar in West Seneca (N.Y.) Central Schools for a student on homebound with a life-threatening allergy to milk and peanuts).

# 3. Tech & the student confined to home: Robot Avatars

- Some sources for additional information
  - Robbie Brown, *A Swiveling Proxy That Will Even Wear a Tutu*, THE NEW YORK TIMES, online edition, June 7, 2013.
    - “The VGo is four feet tall, weighs 18 pounds and is shaped like a white chess pawn, with a video screen on its face. Lexie controls its movement with her computer mouse. Video of the classroom ...appears on her computer screen, and video of her face appears on the robot’s display screen. The robot and Lexie’s computer support two-way voice communication, and Lexie can flash her VGo’s lights to get the teacher’s attention.”.



## 3. Tech & the student confined to home: Robot Avatars

- A mix of interesting capabilities.
  - Like the webcam, the robot avatar can transmit to the homebound student in real time the goings-on of the classroom.
  - The camera and microphone are not anchored in place.
  - Students and teachers interact with the avatar as they would with the student.

### 3. Tech & the student confined to home: Robot Avatars

- A mix of interesting capabilities.
  - The student moves the avatar about the building, empowering the student to be inquisitive and focus on things or people of interest.
  - The homebound student gains a physical presence in school.

# 3. Tech & the student confined to home: Robot Avatars

- **Some things to think about:**
  1. Projected length of homebound.
  2. The student's ability to control the avatar throughout the school day (vitality and/or alertness issues).
  3. Behavior concerns (Think *Methacton*).
- **The important question: Can the student achieve meaningful benefit without it?**

## 4. Do teachers and students know how to use the technology?

- What good is the technology in the hands of a teacher or student who can't use it?
  - When choosing tech, consider need to train student, staff, and perhaps parents to assist with the device (see *LA Unified* above)
  - Monitor use to determine when additional training may be required
  - Does the student not use the technology? That's something to be discussed by the IEP Team.

## 5. Evaluating the effectiveness of technology in use

- Since the IEP Team made the choice to use technology on the basis of data, evaluating effectiveness is easy.
  - What concern was the device chosen to address?
  - How is the student now performing in the problem area?
  - Has there been progress or improvement or are things about the same?
  - Does the IEP Team need to make a change?

## 6. Other issues of concern

- Voice Recording Pens or devices: Won't recordings of the classroom violate the privacy rights of other students under FERPA?

As a general rule, No.

- FERPA only applies to education records
- An education record, by definition, is maintained by the school. 34 C.F.R. § 99.3.
- If the student makes the recording and preserves it for personal, educational use, it never becomes an education record subject to FERPA

## 6. Other issues of concern

- Aren't there copyright or other intellectual property issues involved when K-12 classroom instruction is recorded?
- As general rule, no.
  - The school owns the property (work for hire)
  - If concerned, the school can always impose an acceptable use policy prohibiting commercial or public use of the recording

## 6. Other issues of concern

- What happens when Tommy breaks or loses the iPad provided through his IEP?
  - Can the school make him or his family pay for it, or does that violate the “Free” part of FAPE?
  - If the device is lost or damaged, does the school have to give him another one?



## 6. Other issues of concern

- *Alamo Heights ISD*, 110 LRP 36348 (SEA TX 2010), *aff'd*, 60 IDELR 60 (5<sup>th</sup> Cir. 2012).
  - A DynaVox was required by the student's IEP
  - Parent was required to sign a School District Technological Device Lending Agreement in order for the student to access the device
  - Parent signed the agreement under protest.

## 6. Other issues of concern

- *Alamo Heights ISD, Continued*
  - Hearing Officer: “However inappropriate it may have been for the District to shift the risk of loss/costs of a necessary educational device to the Student’s parents; the attempt alone, did not result in a denial of FAPE for the student.”
  - [Of course, had the device been damaged or lost and *had the District attempted to enforce the agreement*, a different result on the denial of FAPE question is likely.]

## 6. Other issues of concern

- If the device is lost or damaged, does the school have to provide another one?
  - As long as the device is determined by the IEP Team as required for FAPE, the device has to be provided.
  - If the device is lost or broken, the school will have to replace it OR provide FAPE in some other way (following changes to the IEP).

## 6. Other issues of concern

- What about technology that is already in the classroom or is available to everybody? Does it have to be accessible to students with disabilities?

Yes, see *Dear Colleague Letter on Electronic Book Readers* noted previously, and next slides.

## 6. Other issues of concern

- In re: Student with a Disability, 59 IDELR 29 (SEA IA 2012).
  - The District has a 1:1 laptop program, and C.T. participated in that program.
  - He received his laptop on August 10, 2011
  - On September 11, 2011 the District identified C.T. as needing additional technology not already available on standard, district-issued laptops (almost one month after the start of classes).

## 6. Other issues of concern

- *In re: Student with a Disability, Continued*
  - The speech-to-text software, which was ordered in June 2011, was not installed and prepared for use until October 2011.
  - In response to parental complaints about text-to-speech software, a District official wrote the following: "The program is on his machine now; she was just not happy with it taking seven weeks."

## 6. Other issues of concern

- *In re: Student with a Disability, Continued*
  - “The District considers itself in compliance with the IEP because C.T. had access to assistive technology in a classroom-based computer, even [though] C.T. did not have that technology on his 1:1 laptop for home use.”

## 6. Other issues of concern

- *In re: Student with a Disability, Continued*
  - “This argument must be rejected. First, the speech-to-text program was specifically designed for completing “longer writing assignments,” the kind of assignments that high school students would be expected to complete at home.”



## 6. Other issues of concern

- *In re: Student with a Disability, Continued*
  - “Second, the District's interpretation would deny C.T. an equal opportunity for participation in the 1:1 laptop initiative. **By not having IEP-required assistive technology on his 1:1 laptop, C.T. was denied equal access to the "full variety of educational program and services available to nondisabled peers.'** The Department will not accept an interpretation of C.T.'s IEP that renders the District's 1:1 laptop initiative inaccessible to C.T. ”

**Privacy & Services for the IDEA Student in the Digital Age: Posting Grades and Test Scores, Transcript/Report Card Notations, Records Management, Posting on the Internet and Cyberbullying**

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## Essential Definitions under FERPA

- FERPA and IDEA's records provisions prohibit the disclosure of "personally identifiable information" (PII) from an education record without the prior written consent of a parent or adult student.

# Essential Definitions under FERPA

## The definition of PII

FERPA regulations define PII as information that includes, but is not limited to:

- The student's name;
- The name of the student's parent or other family member;
- The address of the student or student's family;
- A personal identifier, such as the student's social security number, student number, or biometric record;
- Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

# Essential Definitions under FERPA

## The definition of PII (cont'd)

- 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; or
- Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

# Essential Definitions under FERPA

## The definition of directory information

FERPA regulations define “directory information” as information that would not generally be considered harmful or an invasion of privacy if disclosed that includes, but is not limited to:

- Name
- Address
- Telephone listing
- E-mail address
- Photograph
- Date and place of birth
- Major fields of study
- Grade level
- Enrollment status
- Dates of attendance
- Participation in sports
- Weight and height (athletes)
- Degrees/honors received
- Most recent school attended

# Essential Definitions under FERPA

Directory information can be disclosed without consent if the agency has given public (annual) notice to parents/adult students of the following:

- The types of PII that the agency has designated as directory information;
- A parent's/adult student's right to refuse to let the agency designate any or all of those types of information about the student as directory information; and
- The period of time within which a parent/adult student has to notify the agency in writing that he/she does not want any or all of those types of information about the student designated as directory information.

# Student Privacy Issues Related to Posting Grades and Test Scores

First of all, posting grades, test scores and grade-point averages implicates FERPA:

Letter to Jones, 109 LRP 7715 (FPCO 2008)

FERPA was violated where student's grade-point average was posted in a display case outside the gym for public viewing.



# Student Privacy Issues Related to Posting Grades and Test Scores

## What about posting grades with SSN's?

### Letter to Hunter College, (FPCO -May 29, 2001)

College professor violated FERPA by posting a student's grades using the last four digits of his SSN on a web page without the student's consent. This is because a SSN, or portions thereof, are PII by definition. FERPA does not prevent an educational agency from posting grades without consent when it is not done in a personally identifiable manner, however. "[N]othing in FERPA would preclude a school from assigning individual numbers to students for the purpose of posting grades as long as those numbers are known only to the student and the school officials who assigned them."

# Student Privacy Issues Related to Posting Grades and Test Scores

FPCO reiterated this position with respect to a school district's practice of posting grades using SSN's:

Letter to Anonymous, 107 LRP 38473 (FPCO 2006)

Letter to Schwartz, 109 LRP 25237 (FPCO 2009)

“[I]f a teacher uses a special code known only by the teacher and the student (or parent) to identify the student, such as for posting grades, this code is not considered [PII] under FERPA because the only reason the teacher can identify the student is because of the teacher's access to personal knowledge of the relevant circumstances, i.e., the key that links the code to the student's name.”

## Student Privacy Issues Related to Notations on Transcripts/Report Cards

As a general rule, FERPA requires districts to obtain written permission before disclosing a student's transcript to a third party, such as a prospective employer. 34 C.F.R. § 99.30.

An exception to this rule includes disclosure to “officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.” 34 C.F.R. § 99.31(a)(2) (as long as parents/student are given prior notice of the intent to release and an opportunity to challenge the transcript).

## Student Privacy Issues Related to Notations on Transcripts/Report Cards

But if disclosing a transcript or report card, are there limitations to what notations can be made on them?

Answer: It depends upon who you ask!

FERPA does not answer this question; however, the Office for Civil Rights (OCR) has!

## Student Privacy Issues Related to Notations on Transcripts

Letter to Runkel, 25 IDELR 387 (OCR 1996). Viewing it as a potential discrimination issue under 504/ADA, OCR has stated that a district may not identify special education classes on a high schooler's transcript in order to indicate that the student has received modifications in the general classroom. However, course designations with more general connotations that do not give rise to a suggestion of special education programs are permitted, depending upon how the labels are used in a specific state or region.

# Student Privacy Issues Related to Notations on Report Cards

Report card notations and transcript notations are different in OCR's eyes! See:

In re: Report Cards and Transcripts for SWD's, 51 IDELR 50 (OCR 2008). Report cards may disclose a student's disability status or refer to special education and/or related services, because report cards are designed to inform parents about progress and are not made available to potential employers or other entities outside the district. Transcripts may not contain such information.

# Student Privacy Issues Related to Notations on Report Cards

A different angle: Can we email these report cards and other documents to parents?

Letter to Breton, 63 IDELR 111 (OSEP 2014). As long as districts ensure that steps are being taken to secure the information, states can allow for the distribution of IEPs and progress reports via e-mail where parents agree to it and states take the necessary steps to ensure that there are appropriate safeguards in place to protect the integrity of the process.

# Modern Student Privacy Issues Related to Electronic Records Management

Due to constant advances in technology, further changes to FERPA are on the horizon:

“Protecting Student Privacy Act of 2014” - discussion draft issued on 5/12/14 by U.S. Senators Markey and Hatch.

Proposes additional protections to modernize FERPA and to address personal details about students that schools can share with app developers and other such companies.



# Modern Student Privacy Issues Related to Electronic Records Management

Among other things, this new legislation would:

- Require schools to maintain and make available a list of all outside companies that have access to student information;
- Give parents the right to review and correct personal information collected by educational apps, online homework software, etc.;
- Minimize the amount of personal details that schools could transfer to companies;
- Prohibit the use of personal information to market products or services to students; and
- Require data security safeguards to protect sensitive student data collected by companies.

# Modern Student Privacy Issues Related to Electronic Records Management

IDEA and FERPA already contain safeguarding requirements that apply to all PII, including electronically stored information:

- Each agency must protect the confidentiality of PII at collection, storage, disclosure and destruction stages;
- (IDEA only) One official at each agency shall assume responsibility for ensuring the confidentiality of PII;
- All persons collecting or using PII must receive training or instruction regarding the state's policies/procedures under IDEA and FERPA; and
- Each agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who have access to PII.

# Modern Student Privacy Issues Related to Electronic Records Management

So, what methods have been suggested to protect electronically stored records and PII as technology has become more modern and advanced?

Letter re: St. Tammany Parish Sch. Bd., 105 LRP 6995 (FPCO 2004). Schools are expected to take “reasonable and appropriate steps” consistent with current technological developments to control access to, and safeguard the integrity of, education records in electronic data storage and transmission.

# Modern Student Privacy Issues Related to Electronic Records Management

## Is there anything more specific than that?

In 2008, the FERPA regulations were amended to address increasing concerns related to electronic records management and required steps for agencies to take. Highlights include the following:

1. Change to “directory information” definition to address whether SSN’s and Student ID Nos. could be designated and disclosed as directory information. SSN’s cannot be; however, student ID Nos. can be, but only if they qualify as “electronic personal identifiers.”

# Modern Student Privacy Issues Related to Electronic Records Management

## More on “electronic personal identifiers”

The 2008 regulations allow agencies to designate electronic personal identifiers as directory information, including student ID numbers, but only if they function essentially as a name and cannot be used by themselves to access education records. In other words, a unique electronic identifier can be disclosed as directory information but only when it is combined with other authentication factors known only to the user, such as a secret password or PIN to authenticate the user's identity and ensure that the user is a person authorized to access records. “This change will ensure that institutions can use advanced technologies to deliver student services and access to student records....”

# Modern Student Privacy Issues Related to Electronic Records Management

This change was also designed to prevent districts from attaching these identifiers to students' names on sign-in sheets in classrooms, health clinics, etc.; prevent schools from disclosing lists with these identifiers attached to students' names, addresses and other directory information; and prevent teachers from using them to post grades. "This change is intended to help reduce the risk of unauthorized access to personal information and identity theft by ensuring that schools do not make these identifiers available publicly. School officials will still be able to use class lists with ID numbers but cannot make them available to students or parents. Teachers that still post grades publicly will have to use a code known only to the teacher and the student."

(U.S. DOE "Section-by-Section Analysis of the FERPA Regulations—December 2008")

# Modern Student Privacy Issues Related to Electronic Records Management

Additional changes to the regulations in 2008:

2. Expansion of the “school officials” disclosure exception to cover outsourcing to contractors, consultants, volunteers and “other outside service providers used by a school district or postsecondary institution to perform institutional services and functions” (if included in the annual notice to parents).

(34 C.F.R. § 99.31(a)(1)(i)(B))

# Modern Student Privacy Issues Related to Electronic Records Management

Additional changes to the regulations in 2008:

A contractor must:

- Perform a service/function for which the district/institution would otherwise use employees;
- Be under the “direct control” of the district/institution and subject to the same conditions of use and re-disclosure that apply to other “school officials;”
- Ensure that only individuals with legitimate educational interests have access to PII from records it maintains or creates on behalf of the district/institution; and
- Refrain from re-disclosing PII without consent unless the district/institution has authorized it under a FEPPA exception and the subsequent disclosure is recorded.



# Modern Student Privacy Issues Related to Electronic Records Management

Additional changes to the regulations in 2008:

3. Steps a district/institution must take to enforce the “legitimate educational interests” requirement in the school officials’ exception.

(34 C.F.R. § 99.31(a)(1)(ii))

# Modern Student Privacy Issues Related to Electronic Records Management

## Additional changes to the regulations in 2008:

This addition requires districts/institutions to use “reasonable methods” to ensure that teachers and other school officials (including outside contractors) obtain access to only those records—paper or electronic—in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is “effective” and that it remains in compliance with the “legitimate educational interest” requirement.

# Modern Student Privacy Issues Related to Electronic Records Management

Additional changes to the regulations in 2008:

So, what does that mean?

- “Reasonable methods” applies whether district uses physical, technological, or administrative controls to restrict access;
- Districts and institutions should consider restricting or tracking access to education records by school officials to ensure they remain in compliance; and
- If a parent/student alleges that a school official obtained access without legitimate educational interests, the burden is on the district to show that the official had such interests.

# Modern Student Privacy Issues Related to Electronic Records Management

Additional changes to the regulations in 2008:

Anything more specific on “reasonable methods”?

In terms of assessing the “reasonableness” of methods used to control access by school officials, the preamble to the final 2008 regulations explains that the likelihood that records may be targets for compromise and the harm that could result is important. “Methods are considered reasonable if they reduce the risk to a level commensurate with the likely threat and potential harm. Thus, the greater the harm that would result, the more protections a school/district must use to ensure that its methods are reasonable.”

# Modern Student Privacy Issues Related to Electronic Records Management

Additional changes to the regulations in 2008:

An example?

High-risk records, such as SSN's and other information that could be used for identity theft, should generally receive greater and more immediate protection than medium or low-risk records, such as those containing only publicly available directory information. "We note that reasonableness depends ultimately on what are the usual and customary good practices of similarly situated institutions, which, in turn, requires ongoing review and modification of methods and procedures as standards and technologies change."

(U.S. DOE "Section-by-Section Analysis of the FERPA Regulations—December 2008")

# Modern Student Privacy Issues Related to Electronic Records Management

Additional changes to the regulations in 2008:

4. The 2008 regulations also added a requirement for districts/institutions to use “reasonable methods” to identify and authenticate the identity of parents, students, school officials, and any other parties to whom they disclose education records.

(34 C.F.R. § 99.31(c))

# Modern Student Privacy Issues Related to Electronic Records Management

Additional changes to the regulations in 2008:

In explaining this new regulation, DOE noted that “[a]uthentication of identity is more complex for disclosure of electronic records as new methods and technologies are developed,” noting that districts “may use PINs, passwords, personal security questions, ‘smart cards’ and tokens, biometric indicators, or other factors known or possessed only by the user.”

(U.S. DOE “Section-by-Section Analysis of the FERPA Regulations—December 2008”)

# Modern Student Privacy Issues Related to Electronic Records Management

So, after 2008, has any further guidance been provided by FPCO in terms of “reasonable measures”?

Letter to Keller, 110 LRP 45092 (FPCO 2010).

The responsibility for ensuring that school officials are permitted access only to education records in which the official has a legitimate educational interest rests with the disclosing entity. Thus, it is up to the district or school to take appropriate measures to protect education records from improper disclosure. Because available methods for protecting electronic records continue to evolve, “schools and districts are best able to determine the combination of physical, technological, and administrative controls needed to provide appropriate protections to its own education records.”



# Modern Student Privacy Issues Related to Electronic Records Management

Anything else that might be useful on this topic?

“Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices,” issued by the Privacy Technical Assistance Center (PTAC) on February 25, 2014.

“Best Practices for Data Destruction,” issued by the PTCA in May 2014.

Visit <http://ptac.ed.gov>

PTAC was established by DOE as a “one-stop” resource for educators to learn about data privacy, confidentiality and security practices.

# Modern Student Privacy Issues Related to Electronic Records Management

One final question: What about unintentional disclosures/breaches?

Letter to Fagan, 113 LRP 7161 (FPCO 2012). Where a flash drive containing student education records went missing from a classroom, the district's response will determine its compliance with FERPA. When FPCO investigates such a FERPA complaint based upon an unauthorized disclosure, it considers, among other things, whether the agency:

- Has reported the incident to law enforcement;
- Taken steps to retrieve data and prevent further disclosure;
- Looked for and taken steps to remedy weaknesses in its protective measures; and
- Notified students of the steps they can take if they believe they might be victims of identify theft.

# Modern Student Privacy Issues Related to Electronic Records Management

One final question: What about unintentional disclosures/breaches?

Letter to Anonymous, 113 LRP 31201 (FPCO 2013). Where teacher typically sent out separate e-mails to students who failed a test but accidentally sent one e-mail to everyone who failed as a group, FPCO's guidance to teacher is that FERPA was violated. FPCO provided teacher with a FERPA fact sheet and guidance document and advised that it would launch an investigation should it receive a complaint on this matter from one of the students.

# Modern Issues Related to Staff and Student Postings on the Internet

To say the least, this issue is a school attorney's nightmare!

The typical over-riding questions (without absolutely clear answers) are:

1. Can that teacher be fired for posting this?
2. Can this student be disciplined for posting that?

# Modern Issues Related to Staff Postings on the Internet

Can this teacher be fired for posting this?

The typical over-riding responses:

1. No, that would violate her First Amendment right to free speech.
2. Yes, the school district's interest in the efficient operation of its schools outweighs her right to free speech.

# Modern Issues Related to Staff Postings on the Internet

Can this teacher be fired for posting this?

Pickering v. Board of Educ., 391 U.S. 563 (1968). Public employees, such as teachers, retain a 1<sup>st</sup> Amendment right to make statements “of public concern” even when they involve the subject matter of their employment. A balancing test applies that considers “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.”

# Modern Issues Related to Staff Postings on the Internet

Can this teacher be fired for posting this?

Connick v. Myers, 461 U.S. 138 (1983). A court must first determine as a threshold matter whether the speech at issue involves a matter of public concern before conducting Pickering's balancing test. Government employers must be given "wide latitude" to restrict employee speech that does not involve a matter of public concern because federal courts should not get involved in personnel decisions regarding employee speech that involves a matter "only of personal interest."

# Modern Issues Related to Staff Postings on the Internet

## Bottom line:

According to applicable case law, it seems that in order to be protected speech, postings must relate to a “matter of public concern” (which is not clearly defined) and not mere personal statements that are detrimental to the school district or otherwise interfere with the efficiency of education (not clear either).



# Modern Issues Related to Staff Postings on the Internet

Although there are numerous news reports about teachers who have been disciplined for online conduct who brought lawsuits or obtained settlements, I have found only one decided court case addressing the issue:

In re Tenure Hearing of Jennifer O'Brien, No. A-2452-11T4 (N.J. Super. Ct., App. Div. Jan. 11, 2013). Teacher's remarks about her students did not constitute protected speech because they were personal statements motivated by her dissatisfaction with her job and the behavior of some of her students. Even if the remarks were on a matter of public concern, the school district's interest in the efficient operation of its schools outweighed her right to free speech.

# Modern Issues Related to Staff Postings on the Internet

What about staff posting pictures or other information about students, whether it is on the school's website or some social networking profile?

Even if a parent agrees, be very, very careful! Things to remember:

1. Images may well remain available online forever;
2. Images may inadvertently cause embarrassment for someone in the short or long term;
3. Future employers may conduct internet searches;
4. Images published online can be edited or misused by anyone;
5. Tagging or identifying a student without consent could violate FERPA and privacy rights;
6. There are federal laws that apply to publishing images of minors.

# Modern Issues Related to Staff Postings on the Internet

## Things for school staff to think about when posting pictures:

1. Just don't post anything about your students on the internet, particularly on your own pages;
2. When/if posting pictures to a school website:
  - Focus on group activities, rather than photos of an individual;
  - Do not use names of students and, if used, keep them separate from images;
  - Lock video and photo galleries on the school's ICT system;
  - Follow the school's Acceptable Use Policy (AUP), which should include, among other things, educating students and staff about the risks associated with taking, using, sharing, publishing and distributing images or other information; requirements for images to be taken and distributed using only school equipment; requirements that students are appropriately dressed and engaging in appropriate activities; requirements that written consent be obtained before taking, using, sharing or publishing images; and requirements related to careful and appropriate selection of images.

# Modern Issues Related to Student Postings on the Internet

Can this student be disciplined for posting that?

The typical over-riding responses:

1. No, that would violate her First Amendment right to free speech.
2. Yes, the student's posting caused a substantial disruption to the school environment.

# Modern Issues Related to Student Postings on the Internet

Can this student be disciplined for posting that?

Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969). It was a violation of the First Amendment when the school suspended students for wearing black armbands to school in protest of the Vietnam War. School officials cannot suppress expression “akin to pure speech” without a showing that “the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’” Here, the students’ protest would not have created a material and substantial disruption.

# Modern Issues Related to Student Postings on the Internet

Can this student be disciplined for posting that?

Making a determination of “substantial disruption” related to postings on the internet will require a fact-specific, case-by-case analysis. There are, however, some general factors that would suggest a substantial disruption:

- The materials are misleading or false, in a manner that would create a need for the school to actively correct the information;
- There is evidence of a past disruption in a similar circumstance; and
- A number of staff members or students have expressed anxiety about the online materials or their safety because of the online material, or missed significant amounts of class because of their concerns about the material.

# Modern Issues Related to Student Postings on the Internet

Can this student be disciplined for posting that?

There are a few exceptions to Tinker relevant to internet postings by students:

1. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).  
Because school officials have an “interest in teaching students the boundaries of socially appropriate behavior,” they can censor student speech that is “vulgar and lewd” and would “undermine the school’s basic educational mission.”

# Modern Issues Related to Student Postings on the Internet

Can this student be disciplined for posting that?

2. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are “reasonably related to legitimate pedagogical concerns.”
3. More v. Frederick, 551 U.S. 393 (2007). Speech at a school-supervised event reasonably regarded as encouraging illegal drug use is not protected by the First Amendment.



# Modern Issues Related to Student Postings on the Internet

Can this student be disciplined for posting that?

Some recent cases have been decided regarding student discipline for internet postings:

J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011), cert. denied, 132 S. Ct. 1097 (2012). School district violated a middle-schooler's First Amendment rights when it suspended her for creating an online "imposter" profile on her home computer over the weekend for her principal that included his picture and contained content that portrayed him as a pedophile and a sex addict. Applying the Tinker "substantial disruption test," the fake profile, "though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did." The integral events occurred outside of school and during non-school hours and the student made the profile private so that it could only be accessed by her and her friends.

# Modern Issues Related to Student Postings on the Internet

Can this student be disciplined for posting that?

Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011). District had no authority to punish a student for creating a fake profile of his principal on MySpace at his grandmother's house. The principal was able to limit other students' access to the site at school, his parents grounded the student and the student apologized. However, he was suspended for 10 days, placed at the alternative school for the remainder of the school year, banned from all extracurricular activities, and barred from participating in graduation ceremonies. The district admitted that the fake MySpace page did not cause a severe disruption to the school environment, but argued that the student's use of the school's website to obtain the photo of the principal entitled it to impose discipline. The student's use of the District's website to procure the photo did not constitute "entering the school" sufficient to punish him for on-campus behavior and the school could not punish him for engaging in free speech outside of the schoolhouse.

# Modern Issues Related to Student Postings on the Internet

Can this student be disciplined for posting that?

Wynar v. Douglas Co. Sch. Dist., 728 F.3d 1062 (9<sup>th</sup> Cir. 2013). Expulsion of student is upheld for off-campus comments made online about carrying out a violent shooting at school. When school officials are “faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of Tinker.”

D.J.M. v. Hannibal Pub. Sch. Dist. #60, 647 F.3d 754 (8<sup>th</sup> Cir. 2011). District did not violate First Amendment when suspending a student for using online instant messages to discuss bringing a gun to school and shooting students. The messages constituted a “true threat” and the punishment was reasonable. “It was reasonably foreseeable that the student’s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment.”

# Modern Issues Related to Student Postings on the Internet

Can this student be disciplined for posting that?

Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008). School's discipline upheld of student who called the Superintendent and other school officials "douchebags" in a blog post that was written off-campus and that encouraged students to call an administrator and "piss her off more." The discipline did not violate the First Amendment because the blog entry was "purposely designed...to come onto the campus."

Wisniewski v. Board of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007). Schools are permitted to punish a student for off-campus speech even if it creates a "foreseeable risk of substantial disruption within a school." Here, student's instant message icon depicting a gun firing at a person's head with the message "Kill Mr. VanderMolen" did so, as it was reasonably foreseeable that it would come to the attention of school authorities and would "materially and substantially disrupt the work and discipline of the school."

# Modern Issues Related to Student Postings on the Internet - Cyberbullying

Can districts discipline a student for cyberbullying other students?

Kowalski v. Berkeley Co. Schs., 652 F.3d 565 (4<sup>th</sup> Cir. 2011), cert. denied, 112 LRP 3081 (2012). District's punishment of a student who used the internet "to orchestrate a targeted attack on a classmate" was allowed where the posting was sufficiently connected to the school environment. At home, the high school senior created a discussion group on MySpace called "S.A.S.H." (Students Against Sluts Herpes") that ridiculed another student about herpes. Here, the senior's speech caused the interference and disruption described in Tinker as being immune from protection, as it was a direct verbal attack on a classmate. Administrators must be able to prevent and punish such harassment and bullying to provide a safe environment conducive to learning. While the senior "pushed her computer's keys in her home," she had to realize that the response would be "published beyond her home and could reasonably be expected to reach the school or impact the school environment."



Stay-tuned! There will be more case law to come on these issues!