

**Georgia Association of
Educational Leaders**

Fall Legal Issues Conference

November 5, 2020

Presented by:
Harben, Hartley & Hawkins
340 Jesse Jewell Parkway, Suite 750
Gainesville, Georgia 30501
Telephone: (770) 534-7341
Facsimile: (770) 532-0399

1

TITLE IX
INVESTIGATION

2

Suppose
These Facts:

- Father of Girl tells administrator that Boy has been harassing his daughter, specifically points to an incident a week ago that she just told parents about
- Girl alleges that during class, Boy touched her butt on several occasions when she leaned over to talk to a friend and tried to reach down her pants; also claims he touched her between her legs over her clothing when she got up to leave
- Female student claims that another girl witnessed the incident
- Investigation begins and every student is asked to write a statement
- Teacher told to move girls to back of class

3

Suppose these facts:

- Girl tells story consistent with Dad's report
- Witness 1 says she saw everything, confronted Boy about it personally and texted him about it that night, produces texts; also claims at football game she called Boy to save her a seat and all during game he touched and tried to touch her outside her pants, front and back, she identifies two others
- Witness 2 says Boy has touched her multiple times and identifies another girl
- Witness 3 says she has never been touched
- Boy denies everything, but he is removed from class, parents of Girl seem fine as long as he is removed from class

4

Assume these facts:

- At some point, administrators accused of not reporting child abuse and GBI gets involved
- Girl chooses to go virtual, but claims she is being harassed on social media
- Boy charged by police with sexual battery, a misdemeanor in juvenile court
- Boy's Dad claims that son is being harassed at school by others; other students claim Boy is talking and bragging about it
- WHAT ARE THE OPTIONS FOR PROCEEDING?
- HOW WOULD AN INVESTIGATION GO UNDER TITLE IX?
- HOW IS IT DIFFERENT IF THERE IS A FORMAL COMPLAINT?

5

BASICS

Employee becomes aware of alleged sexual harassment

Title IX Coordinator is immediately made aware of allegation

Title IX Coordinator contacts school district lawyer

Determines if action rises to the level of sexual harassment under Title IX

All of this should happen as soon as possible and BEFORE school level administrator resolves discipline issue

6

	<h3>SEXUAL HARASSMENT?</h3> <p>Quid Pro Quo An employee of the recipient conditioning the provision of aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct</p> <p>Hostile Environment Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectionably offensive that it effectively denies a person equal access to the recipient's educational program or activity</p> <p>Clery Act/Violence Against Women Act sexual assault – example: seduction, incest, indecent exposure</p>
	7


7

<h1>IF NO</h1>	<p>Handle through discipline process, but don't forget supportive measures, but still need documentation of decision and if formal complaint will have to send to both parties</p>

8

	<h3>Notice of Allegation</h3>
	<p>Upon notice of allegation of sexual harassment:</p> <ul style="list-style-type: none"> - Promptly contact both parties - Offer supportive measurements

9

	<h3>Discussion with Complainant</h3> <ul style="list-style-type: none"> > What is her desired outcome? > Informal or formal process > Explain formal process <ul style="list-style-type: none"> • All happens prior to clock starting on formal process, assuming she has not filed a formal complain • Avoids the formal process
	

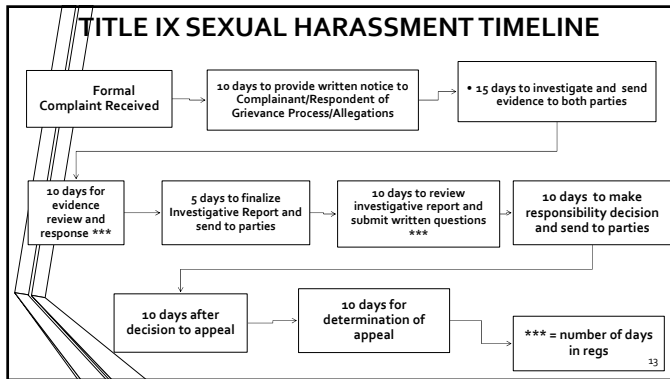
10

	<h3>Formal Complaint</h3>
	<p>Upon receipt, recipient must provide written notice to the known parties that includes:</p> <ol style="list-style-type: none"> 1) Notice of grievance process and informal resolution 2) Notice of allegations in sufficient detail and time to allow preparation of response <u>prior</u> to initial interview 3) Identities of known parties, alleged conduct, date and location of conduct, if known 4) Statement that respondent is not responsible for alleged conduct; determination made at conclusion of process 5) Notice that parties may inspect and review evidence 6) Notice of any provision in student code of conduct regarding making false statement
	11

11

	<h3>Previously issued guidance from OCR:</h3>
	<p>"the rights established under Title IX must be interpreted consistently with any federal guaranteed due process rights involved in a complaint proceeding"</p> <p>"These final regulations, however, provide recipients with prescribed procedures that ensure that Title IX is enforced consistent with both constitutional due process, and fundamental fairness, so that whether a student attends a public or private institution, the student has the benefit of a consistent, transparent grievance process with strong procedural protections regardless of whether the student is a complainant or respondent."</p>

12



13

Evidence

Burden of proof and gathering evidence is with the District

- *But be objective and impartial throughout the process*

14

Review Evidence

Investigator must gather evidence and send it to each party for review

10 days

- What about confidential evidence?
- Intimidation of complainant or witnesses?
- Exculpatory evidence by parties
- Does investigator have to follow up with exculpatory witnesses?

15

Investigation Report

1. Names of all parties
2. Allegations
3. Explanation of investigative process
4. Clear, plain statements of evidence from each witness for each allegation
5. Incorporation of answer to questions posed by parties
6. No opinion of investigator or decision as to responsibility

16

Review Investigative Report

Parties have an opportunity to review report and pose questions to witnesses

- Retraumatize complainant?
- Educational process v. litigation/discovery

17

Determination of Responsibility

Decision maker can't be Title IX Coordinator or Investigator

Must issue written determination that includes:

- Allegations
- Description of procedural steps taken, including notification to and interview of parties and witnesses
- Finding of facts
- Application of code of conduct
- Statement of and rationale for result as to each allegation
 - *Must include*
 - Determination of responsibility
 - Discipline sanctions, whether remedies to restore/preserve, equal access to educational program/activity will be provided by recipient to complainant

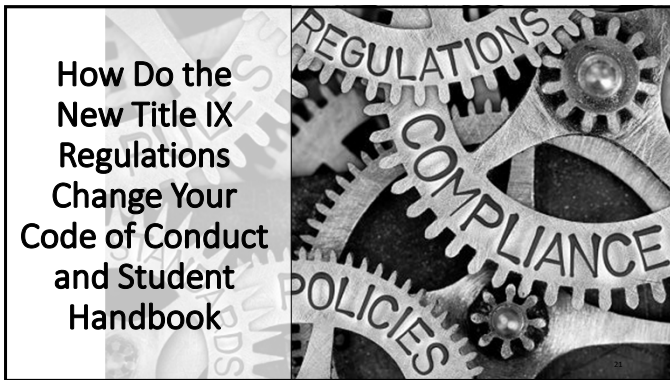
18

Appeals	<p>Must offer to both parties for:</p> <ol style="list-style-type: none"> 1) Determination of responsibility 2) Dismissal <ul style="list-style-type: none"> As to the following bases: <ol style="list-style-type: none"> a) Procedural irregularity that affects the outcome b) New evidence not reasonably available at time of determination c) Conflict of interest on part of Title IX Coordinator, Investigator or decision-maker
	19

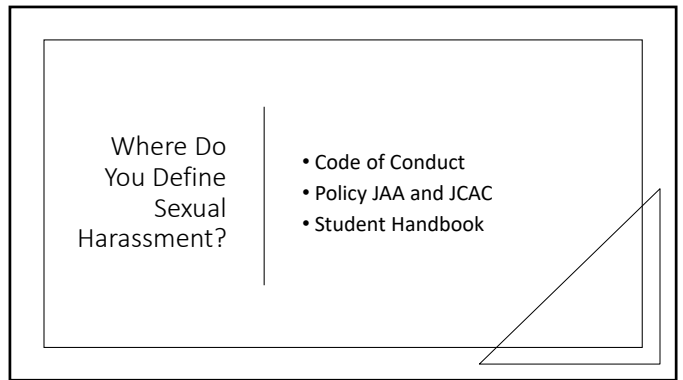
19



20



21



22

Sexual Harassment

Quid Pro Quo
An employee of the recipient conditioning the provision of aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct

Hostile Environment
Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectionably offensive that it effectively denies a person equal access to the recipient's educational program or activity

Clery Act/Violence Against Women Act
sexual assault – example: seduction, incest, indecent exposure

23

Domestic Violence

- Committed by:
 - Current/former spouse
 - Current/former intimate partner
 - Current/former cohabitation person
 - Person similarly situated as a spouse
 - Any other person

24

Dating Violence

- Committed by a person:
 1. Is or was in social relationship of romantic/intimate nature AND
 2. Existence of relationship determined by various factors (length, type, frequency)

25

Stalking

- Conduct directed at a person that would cause a reasonable person to:
 1. Fear for own safety or others safety OR
 2. Suffer substantial emotional distress

26

State Law: O.C.G.A. § 20-2-751.5

- (a) Each student code of conduct shall contain provisions that address the following conduct of students during school hours, at school related functions, and on the school bus in a manner that is appropriate to the age of the student:

- (4) Verbal assault of other students, including threatened violence or sexual harassment as defined pursuant to Title IX of the Education Amendments of 1972;
- (5) Physical assault or battery of other students, including sexual harassment as defined pursuant to Title IX of the Education Amendments of 1972;

27

O.C.G.A. § 20-2-751.4 The Original Act

Bullying still means:

- (1) Any willful attempt or threat to inflict injury on another person, when accompanied by an apparent present ability to do so;
- (2) Any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm; or
- (3) Any intentional written, verbal, or physical act, which a reasonable person would perceive as being intended to threaten, harass, or intimidate, that:
 - (A) Causes another person **substantial physical harm** within the meaning of the Code Section 16-5-23.1 or **visible bodily harm** as such term is defined in Code Section 16-5-23.1;
 - (B) Has the effect of **substantially interfering** with a student's education;
 - (C) Is so **severe, persistent, or pervasive** that it creates an intimidating or threatening educational environment; or
 - (D) Has the effect of **substantially disrupting** the orderly operation of the school.

28

O.C.G.A. § 20-2-751.4: Bullying

- The term also applies to acts of **cyberbullying** which occur through the use of electronic communication, **whether or not such electronic act originated on school property or with school equipment**, if
 - (1) **directed specifically** at students or school personnel,
 - (2) **maliciously intended** for the purpose of threatening the safety of those specified or **substantially disrupting** the orderly operation of the school, and
 - (3) creates a **reasonable fear** of harm or has a **high likelihood** of succeeding in that purpose.

29

O.C.G.A. § 20-2-751.4 Still Requires

- All Local BOEs must adopt a policy
 - How does it define bullying? Definition should mirror state law
- Bullying prohibition must be in Code of Conduct for **ALL** schools
- Alternative school assignment for grades 6-12 after tribunal finding of 3rd bullying offense
- Notification to parents of **bully** and **victim**
- Reporting – procedures, no retaliation, immunity for good faith


30

Administrators have to determine how different processes overlap, work together or complicate each other

Harassment
Bullying
Discipline Rules and Procedures

31

31



Coordinating Discipline with a Title IX Investigation

- Immediate Contact with Title IX Coordinator and Attorney Before Any Letter or Email Goes Out
- Has There Been A Formal Title IX Complaint?
- Does It Fit the Title IX, Bullying, Code of Conduct Definitions?
- Clearly Identify Everyone's Role
- But We Don't Want Inconsistent Findings
- The Coordinator Has to "COORDINATE"

32

32

What to Avoid:

- Sending a Discipline Letter or Notice that Charges Sexual Harassment Without Knowing How Title IX Issues Will Be Handled
- Suspending Student Short Term Before Knowing What the Long Term Plan Is – Starting the 10 Day Tribunal Clock Running
- Using Terminology Loosely Rather Than Specifically Referencing Bullying and Sexual Harassment Definitions
- Getting Law Enforcement Involved When Not Necessary or Not Getting Them Involved When Required – Time to Revisit Protocol
- Forgetting That If Student is IDEA and maybe 504 There Still Has to Be Manifestation Decision Within 10 Days of Change of Placement, But Not Before

33

33

Board Policy **Descriptor Code: JCAC**

Sexual Harassment of Students

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the District conditioning the provision of a District aid, benefit, or service on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District's education program or activity; or
3. "Sexual assault"- an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation; or

"Dating Violence"- sex-based violence committed by a person-

(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

- (i) The length of the relationship.
- (ii) The type of relationship.
- (iii) The frequency of interaction between the persons involved in the relationship; or

benefit, or service on an individual's participation in unwelcome sexual conduct;

34

34

COMPLAINTS PROCEDURE

Complaints made to the School District regarding alleged discrimination or harassment on the basis of race, color or national origin in violation of Title VI, on the basis of sex (except as stated below) in violation of Title IX, or on the basis of disability in violation of Section 504 of the Rehabilitation Act of 1973 or the Americans With Disabilities Act will be processed in accordance with the following procedure:

1. a. Any student, applicant for admission, employee, parent or guardian or other person with a complaint or report alleging a violation of Title VI, Section 504, the ADA or Title IX, excluding sexual harassment as described in 1b, shall promptly notify, in writing or orally, either the principal for his/her school or the appropriate coordinator designated by the school principal or the District. If the report or complaint is oral, either the coordinator or school principal to whom the report or complaint is made shall promptly prepare a memorandum or written statement of the complaint as made to him or her by the complainant and shall have the complainant read and sign the memorandum or statement if it accurately reflects the complaint made. If the complaint is made to a school principal, he or she shall be responsible for notifying the appropriate coordinator of the complaint. Reports or complaints other than those described in 1b shall be handled in accordance with the procedures starting in 2.
- b. Any person with a complaint or report alleging sexual harassment as defined in Policy JCAC (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual harassment), may report, in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator on the District's website, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator. Such reports will be handled in accordance with the procedures and grievance process specified in Policy JCAC.

35

35

What About the Code of Conduct?

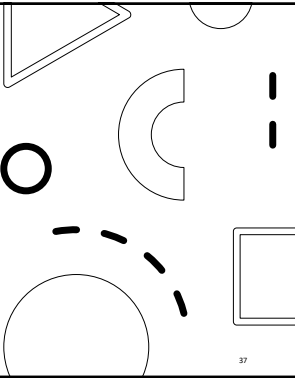
- Other Sexual Offenses
 - Consensual Acts – Make Sure They Stay Consensual Once Students Go Home
 - Sexual Misconduct – Doesn't Rise to the Level of Title IX Harassment But Still Punishable, May or May Not Have a Victim
 - Sexually Inappropriate Language – Rarely Alone Rises to the Level of Title IX Harassment
- Were Other Offenses Committed That Can Be Disciplined?

36

36

Recommendations

- Make sure new policies and procedures are in place and coordinators, investigators, decision makers identified
- Title IX Coordinator as Part of Job Title
- Train administrators and staff
- Strive for positive, harassment-free atmosphere for all students
- Be alert to gender stereotyping, bullying and investigate immediately
- Work with legal counsel to avoid being out on a limb



37

Concurrent Sessions

- **Understanding the Role of Tribunals: State Law v. Federal Law**
 - Timelines are Essential
 - Special Education Students and Manifestation Decisions
 - Elementary Students and Race or Sex Issues
- **The Role of SROs with the Focus on Racial Justice**
 - Knowing and Understanding Your Data
 - Training, Training, Training
 - Understand the Roles

38



39

Student Discipline in a Partisan and Race-Focused Season

40

Dress Codes or Mask Codes?

41

Does Tinker Help or Hurt?

42

The Free Speech “Rule”

Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

Tinker v. Des Moines Ind. Community Sch. Dist.
393 U.S. 503, 506 (1969)



43

43

Tinker and the Schoolhouse Gate

- Middle and high school students were suspended for wearing black armbands in protest of the United States participation in the Vietnam War.
- School administrators adopted a rule prohibiting the wearing of black armbands two days before the suspensions were imposed.
- The Supreme Court held that schools could not prohibit the expression of a particular opinion by students without evidence of a material and substantial interference with appropriate discipline, or a collision of the rights of others.

44

44

The Legacy of Tinker

“[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”

Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503, 506 (1969)

45

45

TEACHING CIVILITY IN THE AGE OF RACIAL JUSTICE

TEACHING CIVILITY IN THE AGE OF RACIAL JUSTICE

46

Lewd and Indecent

- Bethel School District No. 403 v. Fraser: At a school-wide assembly held for student government elections, Matthew Fraser gave a nominating speech which contained explicit sexual metaphor and innuendo. Prior to giving the speech, school authorities warned him that his speech would violate school rules prohibiting the use of vulgar language. Mr. Fraser was suspended for three days because of his speech. The Supreme Court upheld the school's action, distinguishing the sexual nature of Fraser's speech from the political nature of Tinker's armbands.



47

47

Bethel School District v. Fraser, 478 U.S. 675 (1986)

“The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.”

“The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”

“Constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings.”

“The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [Fraser's] would undermine the school's basic educational mission.”

48

48

The Confederate Battle Flag: Free Speech, Disruption or Indecent?

“[W]e note that this First Amendment freedom of expression case stands against the unique backdrop of a public school. Although public school students’ First Amendment rights are not forfeited at the school door, those rights should not interfere with a school administrator’s professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve.”

Scott v. Sch. Bd. of Alachua Cty., 324 F.3d 1246, 1247 (11th Cir. 2003)

49

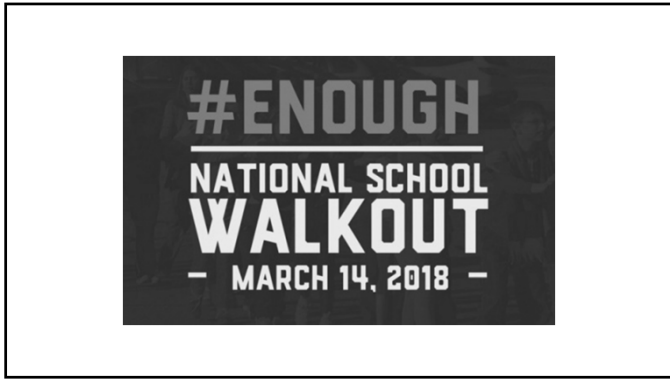
Confederate Battle Flag

“It is not only constitutionally allowable for school officials to closely contour the range of expression children are permitted regarding such volatile issues, it is their duty to do so.”

“One only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke.”

Scott v. Sch. Bd. of Alachua Cty., 324 F.3d 1246 (11th Cir. 2003)

50






51

M.O. by & through Oster v. Hononegah Cmty. High Sch. Dist. #207, No. 18 C 50260, 2019 WL 2124959, at 2 (N.D. Ill. May 15, 2019)

- A high school allowed students to participate in the #Enough National school walkout in March of 2018
- The walkout was to promote stricter gun control and promote school safety
- A small group of students wanted to host a counter protest
- They held signs that read “Pro Life, Pro God, Pro Gun”
- Administrators restricted the area the counter protesters could occupy

52

M.O. by & through Oster v. Hononegah Cmty. High Sch. Dist. #207

-  The school’s policy that limited disruptive speech was valid
-  Qualified immunity did not protect administrators from the claim
-  Administrators may have limited the plaintiff’s expression based on the content of her views

53

Surviving a Motion to Dismiss

“[P]laintiff has plausibly alleged [the administrators] prohibited [her] from expressing her views based on the content of those views, while allowing other students to express a contrary view, without evidence that prohibiting plaintiff’s expression of her views was necessary to avoid material interference with schoolwork or discipline.”

M.O. by & through Oster v. Hononegah Cmty. High Sch. Dist. #207

54

J.G. on behalf of K.C. v. Hackettstown Pub. Sch. Dist., No. 18CV2365PGSDEA, 2018 WL 3756952 (D.N.J. Aug. 8, 2018)

- Student uses the term “pig” in class when discussing a police officer
- The school claims that the term is offensive and is a form of bullying
- The student claims “pig” is political speech
- Prior to the classroom incident, the student was taken to the Assistant Principal’s office for discussing Black Lives Matter

55

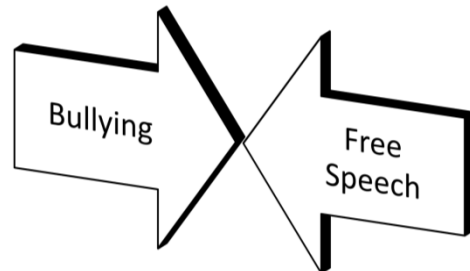
J.G. on behalf of K.C. v. Hackettstown Pub. Sch. Dist.

- The complaint successfully alleged that “pig” is protected political speech
- It was obvious that Black Lives Matter was protected speech
- On Black Lives Matter: “[I]t can hardly be argued that discussions involving political or social justice matters do not fall within the protections afforded under the First Amendment.”

56

BUT I WASN’T AT
SCHOOL!

57



58

Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011)

- Student was disciplined for beginning a MySpace page that successfully encouraged offensive comments directed at a fellow student.
- A three-judge panel found that the language of *Tinker* supports the conclusion that public schools have a compelling interest in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying.

59

Kowalski v. Berkeley cont’d

“[S]tudent-on-student bullying is a “major concern” in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide. . . . Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, schools have a duty to protect their students from harassment and bullying in the school environment.”

60

J.L. v. Hermitage School District, 650 F.3d 205
(3rd Cir. 2011)

- Student was disciplined for creating, off campus, a fake Internet profile of principal on social networking website.
- District Court and original panel of 3rd Circuit held that student's first amendment rights were violated.
- The full 3rd Circuit held that the First Amendment prohibits the school from "reaching beyond the school yard to impose what might otherwise be appropriate discipline."

61

J.S. v. Blue Mountain School District, 650 F.3d 915 (3rd Cir. 2011)

- Student was disciplined for creating, off campus, a fake profanity laced Internet profile for the Principal insinuating he was a sex addict and pedophile
- Panel of the 3rd Circuit held that school district could punish student
- The full 3rd Circuit held that the District acted outside of its authority in punishing the student for out of school speech. This holding turned on the Tinker standard that there was no "substantial disruption" to school, but a number of the judges disagreed.

62

B.L. v. Mahanoy Area School District, 3rd Cir. (2020)

- Cheerleader failed tryouts for varsity team and assigned to JV
- Posted "snap" with selfie and text that said "Fuck Cheer"
- Suspended from JV for one year
- "A student's on line speech is not rendered 'on campus' simply because it involves the school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment."
- "created...away from campus, over the weekend, and w/o school resources...shared on a social media platform unaffiliated with the school."
- Bethel does not apply to off-campus speech
- Tinker does not apply to off-campus speech

63

But.....

- What about threats against individuals?
- What about Georgia's Cyberbullying Law?
- What about threats to the school?
- What about racist posts?

64



65