



Association of  
Title IX Administrators

# Idaho Department of Education Title IX & the First Amendment

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December 13, 2022



# **THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

1791



# **FREE SPEECH TENSIONS**

# THE CONFLICT OF VALUES

- Public schools strive to create and sustain a learning environment that promotes diversity, maintains civility, and establishes an atmosphere of mutual respect.
- At the same time, schools want to support and promote exploration of new ideas.
- These important goals can create conflict when the expression of an individual's opinion is articulated in such a way that it offends, embarrasses or degrades another.
- This challenge is a complex one for public schools who must uphold the First Amendment rights of students, faculty and staff while maintaining the values of civility.

# INTERSECTION OF TITLE IX WITH FREE SPEECH ISSUES

- There is an inherent tension between addressing biased speech in the educational community and promoting free speech.
- Expression/speech protected by the **First Amendment**
  - Merely offensive conduct cannot be disciplined at a public school
  - Must be **severe, pervasive (persistent), and objectively offensive**
  - Subjectively offensive conduct cannot be disciplined at a public school unless it is also objectively offensive

# GUIDING PRINCIPLES

- Sexual harassment by students is governed by Title IX.
- Title IX of the Educational Amendments of 1972 is a Federal law that prohibits gender discrimination in the education context.
- The U.S. Supreme Court established the context of sexual harassment (hostile environment) in a K-12 case called *Davis v. Monroe County Board of Education*, that involved a 5<sup>th</sup> grade girl by the name of Lashonda Davis who was subjected to persistent sexually harassing behavior by a boy in her class.
- The Court stated that the language directed toward Ms. Davis must be unwelcome sexual expression and must be so “severe, pervasive and objectionably offensive” such that it undermined her educational experience and denied her equal access to the school’s resources and opportunities”.

# NAVIGATING FIRST AMENDMENT PROTECTIONS



# NAVIGATING FIRST AMENDMENT PROTECTIONS

*“Congress shall make no law...abridging the freedom of speech...”*

- The Department of Education reaffirms First Amendment protections in the Title IX Regulations
- An important concern for all public schools
- Impacts policy language regarding expression
  - Be clear about what is acceptable and not acceptable
    - Location
    - Standards



# NAVIGATING FIRST AMENDMENT PROTECTIONS

- **Issues to consider:**

- Content neutral time, place, and manner restrictions (sound level, sign size, location)
- Understand importance of location: Public Forum, Designated Public Forum, Limited Public Forum, and Non-public Forum and the degree you can limit speech in each category
- Policy Language
- Speech unprotected by the First Amendment (see next slide)

# UNPROTECTED SPEECH SEMINAL CASES

## ▪ FIGHTING WORDS

- Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)

## ▪ OBSCENITY

- Miller v. California, 413 U.S. 15 (1973)

## ▪ INCITEMENT OF IMMINENT LAWLESS ACTION

- Brandenburg v. Ohio, 39 U.S. 444 (1969)

## ▪ TRUE THREAT

- Virginia v. Black, 538 U.S. 343 (2003)

## ▪ DEFAMATION

- Milkovich v. Lorain Journal Co., 497 U.S. 1 (1993)
- Hustler Magazine v. Falwell, 485 U.S. 46 (1988)



# **THE IMPORTANCE OF ANALYZING THE ACTIVITY BEFORE TAKING ACTION**

Considerations  
Three-Step Analysis

# CONSIDERATIONS

- Free expression in public schools does not guarantee unfettered access to property simply because it is owned or controlled by a government entity
- Public schools have the right to impose reasonable regulations compatible with the educational mission by carefully applying the type of expression to the location of the expression and using a viewpoint neutral time, place and manner approach based on the location
- Not all locations on campus have the same type of standards on restricting expression

# THREE-STEP ANALYSIS

## **STEP 1: Are there 1<sup>st</sup> Amendment implications in the activity presented?**

- Does it include any components of “expression” (not conduct)
  - Consider: not just speech, but leafleting, signs, bulletin boards, chalking, clothing, etc.
- Does it have a religious component?
- Does it involve a campus newspaper, radio, TV station?
- Does it involve a group activity on school property, i.e., demonstration, protest, walkout, rally?
- Is there a request for meeting room space in one of the classrooms?

# THREE-STEP ANALYSIS (CONT.)

## STEP 2: Are there any clear exceptions to the 1<sup>st</sup> Amendment at issue?

- Each potential exception requires a separate analysis to the specific set of facts presented
- Courts will apply exceptions **very narrowly**
- Must be applied with extreme caution

# THREE-STEP ANALYSIS (CONT.)

## **STEP 3: Analysis of facts identified in Steps 1 & 2 in consideration of the location on campus (the “forum”)**

- Any restriction based solely on the message to be delivered will always be prohibited (unless it’s one of the exceptions)
- The school can apply a content (message) neutral “time, place, and manner” limitation, but it must do so with careful consideration of the facts and the location and document the decision



# **UNDERSTANDING THE IMPORTANCE OF LOCATION IN REGULATING A FIRST AMENDMENT ACTIVITY**



# UNDERSTANDING LOCATION (FORUM)

- **Traditional Public Forum**

- Campus mall, public streets through campus, public sidewalks (most limited restrictions on speech)

- **Designated Public Forum**

- Areas the institution designates for “free speech” such as green space, green space around the school (also limited in ways we can restrict speech the same as Traditional Public Forum)

- **Limited Public Forum**

- Auditoriums, meeting rooms, athletic facilities (any limitations on speech must be reasonable based on the nature of the space)

- **Non-public Forum**

- Classrooms, offices (the broadest limitations applied here)



# EXAMPLES OF SPEECH CHALLENGES

# **SPEECH ON SOCIAL MEDIA AND TRUE THREATS**

# LAYSHOCK V. HERMITAGE SCHOOL DISTRICT J.S. V. BLUE MOUNTAIN SCHOOL DISTRICT

- These were two, almost identical, cases that went before separate 3-judge panels of the 3<sup>rd</sup> Circuit Court of Appeals with different results.
- Ultimately the full court, sitting en banc rendered a decision reconciling the two cases.
- The court held that public school students cannot be punished for off-campus speech that fails to cause a substantial disruption to the in-school activities
- The facts of each case are as follows:

# J.S. V. BLUE MOUNTAIN SCHOOL DISTRICT

- In the J.S. case, two eighth grade students created a fake MySpace profile for the principal of their school
- Although the page did not identify the principal by name, it included his picture from the school's website and referred to him as "principal"
- The profile characterized him as a sex-obsessed pedophile, and included profanity and negative comments about the principal's family

# J.S. V. BLUE MOUNTAIN SCHOOL DISTRICT

- The school determined that, based on the creation of the fake profile, the students violated the school’s discipline code and computer use policy
- The students were suspended
- “J.S.” sued for violation of her 1<sup>st</sup> Amendment rights for engaging in out of school speech
- The court ruled the school could discipline for lewd and vulgar off-campus speech that had an effect on campus, even though the effect did not rise to a “substantial disruption” under *Tinker v. Des Moines*

# LAYSHOCK V. HERMITAGE SCHOOL DISTRICT

- Mr. Layshock created a MySpace profile of his school principal (from his grandmother's house)
- The profile poked fun of the principal, made references to sexuality, steroids, intimidation and drinking
- He identified himself as the author of the profile and was suspended for 10 days, given an alternative education program and barred from all school activities.

# LAYSHOCK V. HERMITAGE SCHOOL DISTRICT

- Layshock filed a lawsuit arguing that his free speech rights had been violated
- The school argued that the speech began on campus, and they should have the right to respond to student off-campus speech and discipline students for improper conduct
- The 3-judge panel ruled in favor of Mr. Layshock stating that the parody of the principal did not disrupt school and thus the discipline violated his rights



# DISTRICT

# J.S. V. BLUE MOUNTAIN SCHOOL

- LESSONS FOR CAMPUSES
  - Provocative, even offensive speech will generally be protected – even if created on-line
  - Institutions must apply standards set forth by courts for on-campus speech that are exceptions to free speech rights, such as “clear and present danger”, “true threat”, and the framework set forth in Tinker that states that expression must pose a substantial (not speculative) challenge of campus disruption before it can be prohibited.

# RESPONDING TO OFF- CAMPUS SPEECH

# MAHANAY AREA SCHOOL DISTRICT V. B.L

141 S. CT. 2038 (2021)

- Freshman student, Brandi Levy learned that she did not make the varsity cheer squad and also did not get her desired position on a softball team (unaffiliated with the school)
  - As a part of her tryouts she agreed to a set of rules requiring cheerleaders to respect the school, coaches, other teams and other cheerleaders
- On a Saturday afternoon, off the school grounds, she posted a snapchat that read, “F\*\*\* school, f\*\*\* softball, f\*\*\* cheer, f\*\*\* everything”
- A member of the cheer squad saw the post and showed it to the coach. The school felt because she used profanity in her postings in regard to cheer she violated the cheer team rules
- The school suspended her from cheering for one year

# MAHANAY (CON'T)

- Ms. Levy sued, arguing that her comments were protected by the First Amendment.
- The trial court (federal) ruled in favor of Ms. Levy as did the Court of Appeal for the 3<sup>rd</sup> Circuit saying her post did not create a substantial disruption at the school as established in the Tinker case (1969).
- The school appealed to the U.S. Supreme Court arguing that participating in cheerleading is a privilege and there are conduct standards for the cheerleaders. She was not suspended from school itself so there was not a disruption to her education.

# MAHANAY (CON'T)

- The Court said:
  - Schools do not stand in loco parentis to students in regard to off-campus speech
  - Courts are skeptical of school official's regulatory interest in policing student social media speech
  - Schools should have an interest in protecting even unpopular speech as a “nursery of democracy”
  - However, schools should have an interest in social media speech that is harassing, threatening or breaches school security

# SPEECH AND COUNTER SPEECH

# FRESNO STATE UNIVERSITY

- A student group at Fresno State sought to write their message, which was controversial, by chalking it on the sidewalk.
- A faculty member recruited his class to help him erase the message on campus. When confronted by the student group he claimed that he was engaging in his own free speech by erasing the messages.
- The group filed a lawsuit against the professor stating he was acting as the “speech police” on campus and was teaching students that the correct way to deal with speech you disagree with is to censor it. The court found in favor of the students.

# PORTLAND STATE UNIVERSITY

- In March 2019, the Portland State University College Republicans student organization hosted Michael Strickland to discuss his appeal from a conviction for brandishing a firearm during a demonstration.
- The police took no action when a protester disrupted Mr. Strickland's talk for over an hour by ringing a cowbell and standing in front of the projector.

**Was this the protester's right?**



# HECKLER'S VETO

- Generally, No, because the Constitution requires the government to control the crowd in order to defend the communication of ideas, rather than to suppress them.
- What the protester and the professor engaged in is called the “Heckler’s Veto”
  - Occurs in circumstances when opponents to a message block the delivery of that message by direct action or shouting down a speaker through protest
  - Also occurs when a representative of the public entity accepts limits or restrictions on speech that overrides another speaker, or when the public entity restricts or cancels a speech based on anticipated or actual reactions of the opponents of the speech
  - Only when the opposition moves from counter speech to violence the government may step in and is expected to protect the speaker and others.

# CONSIDERATIONS FOR RESPONDING TO SPEECH AND EXPRESSION

# SEXUAL HARASSMENT POLICY LANGUAGE

- In order to avoid First Amendment challenges, schools should ensure that their student sexual harassment policies contain language that clearly articulates what behavior or expression is prohibited and the context within which this prohibited behavior will rise to the level of sexual harassment (hostile environment) leading to discipline.
- Incorporating words such as “offends”, “belittles an individual”, etc. in a sexual harassment policy makes the school vulnerable to challenges of having a policy that is too vague, that is, the student must guess at how this would translate to their actions.

Or

- Using language that encompasses a substantial amount of protected speech along with prohibited speech, which would be considered overbroad.



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**Questions?**



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