



# Social Media: Privacy Rights and Accountability

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# Introduction

So much of interpersonal relations is conducted through the use of social media both in private life and in communications among school district officials, faculty, job applicants and students.

That raises the question of what privacy rights are enjoyed by students and employees?

How does the First Amendment Protect their speech in their personal but school related actions?

# Defining Social Media

*Social Media is an umbrella term that defines the various activities that integrate technology, social interaction, and the construction of words, pictures, videos, and audio.*

# Beneficial Uses of Social Media

- Ease of communication
- Reaching larger audiences
- Instantaneous response
- Getting out in front of a situation
- Group messages
- Addressing instructional, educational or extra-curricular programs or activities
- Official postings
- Informational
- Personal vs. professional social media sites.
- Recommend not friending students and parents

# Social Media Use in the Employment Hiring Process

There is no legal prohibition against reviewing social media made public by job applicants.

The New York State Human Rights Law protects the following classifications against employment related discrimination:

age, race, creed, color, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence.

*NYS Executive Law §296(a)*

# Social Media in Employment Recruitment

If the social media of job applicants is reviewed, great care must be taken in determining what to document and what to report - out to the employing authorities; namely the Superintendent of Schools and Board of Education.

After the fact of hire implications of information learned through social media may lead to early termination from employment and monies owed to a candidate if the hire is a probationary pedagogical employee. *(See Ed. Law §§3031 & 3019-a)*

# Social Media Policy For Employees

**School Districts would be well served in adopting a social media policy that holds employees accountable to the extent that there is a nexus to their employment and implicates their *role model status*. (*Ambach v. Norwick*, 441 U.S. 68 [1979])**

# Social Media Policy For Employees

*Example:* District provided communication tools, such as an employee's school email account, voicemail account and/or district website shall be the only means by which you engage students and/or their families and such communications should only pertain to your employment responsibilities. All staff are expected to serve as positive ambassadors for the District and as appropriate role models for students.”



# Contours of Employee First Amendment Speech Rights

## ❖ *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

- A deputy district attorney who issued an internal memo explaining that a case shouldn't be pursued because a police officer's affidavit in support of a warrant was factually inaccurate. The attorney was transferred and denied a promotion.
- The Supreme Court held that public employees speak as employees and *not citizens* when they make statements pursuant to their official duties.
- If the speech is related to performing job duties (whether or not in a job description) it does *not* enjoy 1st Amendment protection.

# Contours of Employee First Amendment Speech Rights

## Is Employee Speech Protected as “Citizen Speech”?

*Weintraub v. Bd. of Educ. City Sch. Distr. of City of N.Y.*, 593 F.3d 196 (2d Cir. 2010) – a teacher’s complaint and filed grievance about the failure of administration to suspend a student was in furtherance of a “core duty” of the teacher and **not citizen speech** that would be 1st Amendment protected.

# Contours of Employee First Amendment Speech Rights

## Is Employee Speech Protected as “Citizen Speech”?

*Massaro v. N.Y.C. Dept. of Educ.*, 2012 WL 1948772 (2d Cir. 2012) – a teacher complained of unsanitary working conditions in which she contracted scabies, for which she submitted an Injury/Accident report. The court concluded that her speech was employee and **not citizen speech**. When one of her classes was changed along with her schedule, there was **no** 1st Amendment protection against such employment action.

# Contours of Employee First Amendment Speech Rights

## Is Employee Speech Protected as “Citizen Speech”?

*Heller v. Bedford Cent. Sch. Dist.*, 2015 U.S. Dist. LEXIS 155060 (S.D.N.Y. 2015), *aff'd*, Index No. 16-242 (2d Cir. Nov. 4, 2016) – a teacher’s conversation on Words with Friends, during which he made violent threats, was **not** a matter of public concern, but rather, the teacher’s statements were themselves a cause for public concern

# Contours of Employee First Amendment Speech Rights

## *Matthews v. City of New York*, 779 F.3d 167 (2d Cir., 2015)

- Police Officer reported to Supervisor that the Precinct's Policy of implementing a quota system for arrests, summonses and stops was contrary to the Precinct's mission to improve community relations.
  - This reporting was not within the officer's job duties
  - The report was made through the same channels as citizen complaints.
  - The Second Circuit concluded that it was a matter of public concern, *not* reported pursuant to job requirements and made through citizen channels—thus
- **First Amendment Protected!!!**

# Contours of Employee Social Media Speech Rights/Liability

## ***Matter of Rubino, SED Case No. 17,116 (2011)***

The Hearing Officer, R. Lowitt, upheld disciplinary charges based upon a Facebook Post by a 5<sup>th</sup> grade teacher who commented that she hated the guts of her students and would like them to the beach and wouldn't lift a finger if one particular student would float away.

The fact that the comment was intended to be made privately was of no moment when it was in fact disseminated.

No First Amendment protection was found as the speech was not deemed to be citizen speech.

# Contours of Employee Social Media Speech Rights/Liability

## ***Matter of Le Trelle Manchand, SED Case No. 23,338 (2014)***

Hearing Officer James McKeever found just cause to terminate the employment of a teacher who made many Twitter and Facebook postings which were unrestricted as to access, exposing personally identifiable information (PII) about her students in violation of FERPA rights. The public exposure of the students was deemed to be quite concerning.

The teachers in the school had all been issued the Chancellor's social media use guidelines.

# Contours of Employee Social Media Speech Rights/Liability

## ***Matter of Giordano, SED Case No.24,437(2014)***

Hearing Officer Lisa Brogan terminated this teacher for sending numerous Face Book post comments to students, crossing appropriate personal boundaries regarding the content of his posts, in violation of an anti-fraternization policy. The teacher was also found to be insubordinate for rules violation.



# Contours of Employee Social Media Speech Rights/Liability

## ***Matter of Tate, SED Case No. 25,517(2015)***

Hearing Officer Eugene Ginsberg issued a fourteen(14) day suspension to this teacher who responded to a female students Face Book posts, including a comment about a picture the student posted of her body. The teacher was apologetic about his misconduct.

# Student Social Media Discipline Cases/ First Amendment Analysis

## ***Appeal of K.M., Commissioner's Dec. No. 17,847 (2020)***

A male student on the boys soccer team admitted to having created a screen shot which was posted on social media of a gesture or picture of a scissors, intended for viewing by girls on the girls soccer team as a reference to their sexual orientation.

The short term suspension meted out was considered to lack First Amendment Free Speech protection because it was reasonable for the school authorities to predict substantial disruption as a consequence of the post. (citing *Wisniewski v. Bd. of Educ.*, 494 F3d 43.

# Student Social Media Discipline Cases/ First Amendment Analysis

## ***Appeal of D.S., Commissioner Dec. No.17,171(2017)***

A student made a social media post on Twitter accusing the school of being racist and a video image of a young women handling a gun on another social media platform (Snapchat). Four students who viewed the posting expressed upset to the school's SRO. The suspension of the student from school was challenged in a federal litigation claiming 1<sup>st</sup> and 14<sup>th</sup> Amendment Claims. The Commissioner withdrew from exercising jurisdiction in light of the pending federal litigation.

# Student Social Media Discipline Cases/ DASA Regulations & First Amendment Analysis

The Commissioner's Regulations implementing the Dignity for All Students Act at 8 NYCRR §100.2kk include as the basis for findings of a violation of law bullying, including cyberbullying, as cited at Ed Law §11(8), including any form of electronic communication.

The use of off-campus social media platforms to threaten, intimidate or abuse through cyberbullying may lead to a DASA violation finding

# Student Social Media Discipline Cases/ DASA Regulations & First Amendment Analysis (cont'd)

**Bullying is defined as that which:**

has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being; including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm; or

1. reasonably causes or would reasonably be expected to cause physical injury to a student or to cause a student to fear for his or her physical safety;
2. Such definition shall include acts of harassment or bullying that occur:
  1. on school property, as defined in subparagraph (kk)(1)(i) of this section; and/or
  2. at a school function, as defined in subparagraph (kk)(1)(ii) of this section; or
  3. **off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property;**

# FERPA Student Privacy Rights-Remote Instruction

During the COVID 19 Pandemic questions were raised when remote livestreaming instruction was implemented regarding the privacy rights of students whose images and voiceprints were being transmitted into the homes of other students.

Some school districts addressed this matter through its FERPA Policy by adding streaming video with voiceprint to the list of *Directory Information* and by addressing Opt-outs, if any, through their technology means.