Pinellas County School Board Attorney's Office

Legally Speaking

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We make a living by what we get.
We make a life by what we give.
- Winston Churchill

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ESE Rules Updated

David Koperski, Assistant School Board Attorney

In December 2004, the Individuals with Disabilities Education Act (IDEA) was significantly amended, and most of the changes became effective on July 1, 2005. Although the law itself has changed, most of the practical guidance is located in the federal and state regulations promulgated by the federal and state departments of education (DOE). While U.S. DOE final IDEA regulations are now in effect, Florida DOE still is working on finalizing the state rules. Some of these state rules provide more protection to Exceptional Student Education (ESE) students and their families than the federal law and regulations. This article will highlight some of the more significant changes to the law and rules so that all district personnel have a basic understanding of the new ESE rules.

One of the more noticeable changes for educational personnel in the district will be the renaming of several categories of disabilities. For example, "Emotionally Handicapped" (EH) and "Severely Emotionally Disturbed" (SED) will be reclassified as a new eligibility category called "Emotional/Behavioral Disabilities" (EBD). In addition, there are new eligibility requirements for many of the disability classifications, including "Specific Learning Disability" (SLD). There is also a new requirement to implement a more comprehensive program of general education interventions prior to determining ESE eligibility, known in the law as "Response to Intervention" (RTI). Most experts predict that the RTI process will result in fewer

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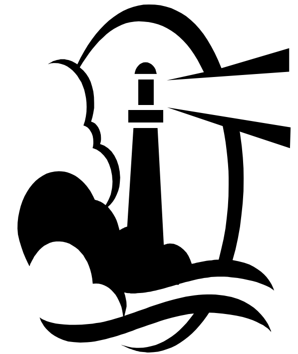


Mission Statement

The mission of the School Board Attorney's Office is to provide the highest quality legal services to the Pinellas County School Board and district by ensuring timely and accurate legal advice and effective representation on all legal matters.

Free Speech

Jim Robinson, School Board Attorney

Laurie Dart, Staff Attorney

Two articles in this issue of *Legally Speaking* are prompted by two recent cases from the United States Supreme Court that add to the body of case law defining the First Amendment rights of public employees and students. The first addresses the right of a public employee (deputy district attorney) to speak freely to his supervisors on a matter within the scope of his official duties and the second case addresses the ability of a public school to regulate a student's speech when the content of the speech is believed to promote the use of illegal drugs. ■

Free Speech Rights of Public Employees

Jim Robinson, School Board Attorney

In ruling on free speech rights of public employees, the Supreme Court has refined what has become known as the "Pickering balancing test," which arose out of the Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*, the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. The Court found that the teacher's speech was protected by the First Amendment because the teacher was speaking on a matter of public concern and the speech did not impede the teacher's performance of his duties.

When government employees speak out as employees upon matters of personal interest only, the First Amendment offers no protection. When as in *Pickering* the employee speaks as a citizen upon matters of public concern, however, the balancing test applies. Thus, even when employee speech is on matters of public concern, it is not necessarily protected if it is disruptive or interferes with an employee's job performance. What about a government employee who speaks out on a matter of public concern in the course of his or her ordinary duties as a government employee? This was the question presented in *Garcetti v. Ceballos,* 547 U.S. 410 (2006), decided by the Supreme Court at the end of its last term.

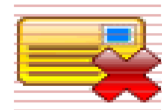
Garcetti involved a deputy district attorney, Ceballos, who examined an affidavit that had been used to obtain a search warrant in a pending criminal case and determined that the affidavit contained serious misrepresentations. He wrote one of his supervisors a memorandum recommending dismissal of the case. The supervisors nevertheless proceeded with the prosecution.

Ceballos alleged that he had been subjected to a series of retaliatory employment actions as a result of the memorandum and initiated an employment grievance, which was denied. He then brought suit against the supervisors asserting that the supervisors had violated his free speech rights under the First Amendment. The District Court concluded that Ceballos was not entitled to First Amendment protection as he had written the memorandum pursuant to his employment duties. The United States Court of Appeals for the Ninth Circuit reversed, finding that the memorandum was a matter of public concern, and Ceballos' interest in his speech outweighed the supervisors' interest in responding to such speech.

On appeal, the Supreme Court reversed the Court of Appeals, finding in favor of the employer. In an opinion by Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito, it was held that when public employees make statements pursuant to their official duties, they are not speaking as private citizens for First Amendment purposes. Thus the deputy's allegation of unconstitutional retaliation failed, for the deputy had spoken not as a private citizen but pursuant to his official duties as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case.

The question becomes whether the government entity has an adequate justification for treating the employee differently from any other member of the public. This consideration reflects the importance of the relationship between the speaker's expressions and his or her employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to adversely affect the entity's operations. ■

Employee Responsibility for Retaining E-mails



Delete Message?

Jim Robinson, School Board Attorney

The term "public records" means "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software or other material, regardless of the physical form, characteristics or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Thus, e-mail messages that meet this definition are subject to the same records retention and disposition requirements as typewritten letters, memos or any other form of public record. Each employee is responsible for retaining his or her e-mails, both sent and received. Contrary to what some might think, the District's Management Information Systems (MIS) Department does not maintain e-mails beyond a certain point, and e-mails that you delete before the daily backup do not even make it into the hands of MIS. Thus, you cannot rely on that office to keep copies of e-mails you send or receive.

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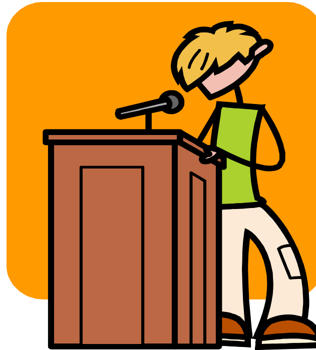
Free Speech Rights of Public School Students

Laurie Dart, Staff Attorney

In *Morse v. Frederick*, 127 S. Ct. 2618 (2007), the United States Supreme Court concluded that a student's First Amendment right to free speech did not prevent the school district from suspending him for displaying a banner that the principal reasonably thought promoted the use of illegal drugs. The incident that gave rise to the discipline occurred as the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers traveled along a street in front of the student's high school and just as they passed, the high school student and his friends, in the presence of the television cameras, unfurled a large banner that stated "BONG HiTS 4 JESUS." The principal demanded that the students take down the banner, and all of them complied except Frederick. The principal suspended him, and ultimately the student filed suit against the principal and the school district alleging that he was disciplined for exercising his constitutional right to free speech.

In an opinion written by Chief Justice Roberts, the Court reviewed the Supreme Court precedents addressing the limitations on free speech in the public school setting. The Court started its analysis with the case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which involved a group of students who decided to wear black armbands to school to protest the Vietnam War. The school officials learned of the plan and then adopted a policy prohibiting the students from wearing the armbands and disciplined those students who violated the policy. The *Tinker* Court ruled that the First Amendment protects students' right to express their opposition to the war and held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school."



In *Morse*, the majority decision did not find that there was any material disruption caused by the student displaying the banner, but rather, relied on two student speech cases subsequent to *Tinker* that confirm that the "substantial disruption" rule of *Tinker* is not the only basis for restricting student speech. The first of the two cases relied upon was *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), which involved the suspension of a student for delivering a speech before his high school assembly in which he employed "an elaborate, graphic, and explicit sexual metaphor." The lower courts found that his speech did not cause or threaten to cause a material disruption, and, therefore, there was no basis for discipline. The Supreme Court reversed holding that the

> "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions on the students wearing armbands in *Tinker,* the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."

In so holding, the Court recognized that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."

> In so holding, the Court recognized that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."

The next case analyzed by the Supreme Court was *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which addressed the degree to which the school administration can exercise editorial control over a school-sponsored newspaper. Following a decision by the principal not to publish two of the articles, staff members of the high school newspaper sued in federal court alleging that the decision violated their First Amendment rights. The Supreme Court in *Hazelwood* did not find that the students' First Amendment rights were violated and stated that "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."

The *Morse* decision offers little guidance to school administrators except for speech promoting illegal drug use. We expect the courts to continue to look to the Supreme Court's decisions in *Tinker* (substantial disruption), *Fraser* (socially inappropriate language) and *Hazelwood* (curriculum-related speech) to address most free speech issues in the public school context. ■

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Employee Responsibility … E-mails
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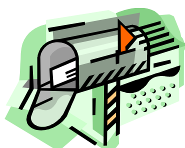
The Florida Department of State, State Library & Archives regulates record retention and disposal through the publication of General Records Schedules. The schedules list different records series and their minimum required retention. The length of time records must be retained depends on which series the records fall under. E-mail is not a record series but rather a records media. How long you must keep an e-mail message is determined by the information it contains.

For example, if an e-mail relates to a school board contract, the e-mail must be kept for the period of time applicable to contracts, which is five fiscal years after completion or termination of the contract. To determine the dates of records eligible for destruction, check the current Disposal Authorization. It is published on the district website at http://www.pcsb.org/recman/home1.html.

MIS recommends that e-mails you are keeping be copied to personal folders stored on your hard drive and backed up to another storage device such as CD, flash drive or server. For assistance in determining whether an e-mail is a "public record," consult with the School Board Attorney's office at 727-588-6219. For assistance in determining whether an e-mail can be deleted, consult with the district's records custodian, Robin Tew, at (813) 854-6077, ext.1000. ■

Please send comments or suggestions for future articles to Melanie Davis at davisme@pcsb.org.



ESE Updated
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students being determined eligible for ESE services. However, disabled students who do not qualify for ESE services still may qualify for certain accommodations in school under a federal law known as Section 504, which defines "disability" as a physical or mental impairment that substantially limits that person in some major life activity, including learning.

Another significant change is the alignment of ESE rules with the federal No Child Left Behind Act (NCLB). The new IDEA contains more than 40 references to the NCLB. These references range from new requirements for the qualifications of special education teachers to a variety of new provisions dealing with assessments of disabled students. For example, all special education teachers now must be certified in special education and new special education teachers teaching multiple subjects must meet the NCLB highly qualified teacher standard in at least one core subject area (language arts, math, or science).

Other changes relate to a student's individual educational plan (IEP). For example, special education and related services and supplementary aids and services must be based on peer-reviewed research to the extent practicable. This issue will arise when a parent asks for a specific program or methodology that is not based on any studies or past practices. On the other hand, the programs and methodologies we propose should be based on peer-reviewed research. Furthermore, appropriate measurable postsecondary goals must be included in IEPs beginning no later than the first IEP to be in effect when the child is 16, and any transition services needed to assist the child in reaching those goals must be included in the IEP.

Also related to IEP meetings, the new rules allow a member of the IEP team to be excused from attending the IEP meeting, or a part of it, if the parent and school district agree that the attendance is not necessary because the member's area of curriculum or related services is not being modified or discussed or because the member already has submitted input to the team in writing. Agreements to excuse a member must be noted in writing on the Notice of Meeting form and written input must still be provided to the team by the excused member. Without this agreement, all IEP team members, including a general education teacher, must attend the full IEP meeting. Finally, in order to expedite IEP meetings, changes to IEPs can be made without convening the IEP team if both the school and the parent agree. Schools should review district processes for implementation of these provisions.

Many other technical changes have been made to the law and rules. Pinellas County Schools' ESE Department has been engaged in staff training over the last year and will continue to do so as more state rules are finalized. ■