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SCHOOL LAW BUZZ

January 2019 Texas School Law E-News Issue No. 24

Multiple Laws Protect Pregnant Employees

By Adam Courtin

When faced with an employee who needs a workplace accommodation, needs to take leave due to a serious health condition, or is pregnant, some employers get grumpy and forget about the laws that protect employees (and job applicants). The following is a brief reminder that there are pregnancy-related laws that protect your employees.

- The Family and Medical Leave Act (FMLA) allows qualified employees to take unpaid leave for certain serious health conditions (including those that arise while the employee or the employee's spouse is pregnant, or if the child has a serious health condition), allows male and female parents to take unpaid leave to care for a new child, and for an employee to take unpaid leave for placement of a child with the employee for adoption or foster care.

- The Americans with Disabilities Act (ADA) provides protection for employees and applicants who have disabilities (including those brought on by pregnancy) that may require workplace accommodations—including the possibility of unpaid leave that extends beyond unpaid FMLA leave.

- The Pregnancy Discrimination Act (PDA) protects applicants or employees from discrimination on the basis of pregnancy, childbirth, or related medical conditions.

- The Fair Labor Standards Act (FLSA) requires employers to provide reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth—but there is no limitation on the number of times per day an employee may do so. The time that an employee spends expressing milk does not have to be paid, but if an employer already provides paid breaks to employees, then an employee can utilize that same paid break time to express milk (time above and beyond the standard paid break time does not have to be paid). The FLSA further requires employers to provide a place—other than a bathroom—that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk (compliance could be reached by installing a lock or latch on the interior of the employee's office door to prevent intrusion). Be aware that the FLSA is federal law, and that Texas law has additional requirements that apply to public employers, and that extend employee protection provided by the FLSA. The Texas law applies to public

employers, regardless of size, and applies to all public employees (exempt and non-exempt). Although we do not believe that open-enrollment charter schools are considered public employers under this particular definition, it would be a safe practice to assume that the Texas law applies (i.e., assume that the FLSA exception for certain smaller employers does not apply, and that the FLSA limitation for only non-exempt employees also does not apply).

In general, treat women who are affected by pregnancy or related conditions the same way you treat other applicants or employees who have similar abilities or inabilities to perform their work. Pregnancy is not a basis for having higher return to work standards or for requiring more documentation for providing leave (i.e., do not require an employee to be at 100% health to return to work, and do not have a preset return to work limitation of a certain number of days following child birth). Finally, it is unlawful (discrimination) to fire/refuse to hire a pregnant woman if she is able to perform the essential functions of her job (always make sure those essential job functions truly are legitimate and essential), and it is unlawful to treat an employee differently based on current or former pregnancy with respect to matters including pay, job assignments, promotions, layoffs, training, fringe benefits, firing, accrual and crediting of seniority, vacation calculation, temporary disability, and any other term or conditions of employment.

Proposed Changes to Title IX Regulations

By Chris Schulz

The Department of Education proposed new regulations on Title IX, the federal civil rights law that prohibits discrimination on the basis of sex in education programs or activities that receive federal funding, and the federal government is accepting comments from the public on the proposed changes through January 28, 2019. The proposed changes attempt to provide more clarity to schools on the investigation process for sexual harassment claims. Under the proposed rules, a K-12 school must investigate a claim of sexual harassment when the school has "actual knowledge." This is defined as notice of sexual harassment allegations to a school's Title IX Coordinator, any official of the school who has authority to institute corrective measures on behalf of the school, or to a teacher in the elementary and secondary school. The proposed rules are unclear about whether a school has "actual knowledge" if a report was made to individuals such as a school counselor or nurse.

The proposed rules also set out criteria for a Title IX investigation, including equal opportunity for all parties to submit evidence, written notice of interviews, and equal access to review of evidence. A K-12 school may hold a hearing but the parties must be allowed to submit written questions to challenge each other's credibility before the investigator makes a determination as to whether the prohibited conduct occurred.

If you have any questions about the proposed Title IX regulations, please contact our office.

Student Discipline & Social Media: Off-Campus Speech Uncertainty

By Joseph Caldwell

Social media usage by students today is pervasive both inside and outside the classroom. While disciplining students for their speech is always a matter of concern for schools that should be approached with caution, determining when to take action against off-campus social media speech is far from a clear-cut process.

With respect to student speech, the United States Supreme Court has held that public school students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"; however, "these constitutional rights are not automatically coextensive with the rights of adults in other settings."[1] Four leading US Supreme Court school-speech cases govern different areas of student speech: (i) vulgar, lewd, obscene, and offensive speech – is governed by *Fraser*; (ii) school-sponsored speech – is governed by *Hazelwood*;[2] (iii) speech that falls neither into (1) or (2) – is governed by *Tinker*; and (iv) speech promoting illegal drug use – is governed by *Morse*.[3]

All four of the above Supreme Court school-speech cases involved speech that took place at school or a school-sanctioned event. Because these cases largely predated social media usage, and did not involve off-campus speech, great amounts of uncertainty remain regarding the boundaries of student speech discipline when the speech occurs off-campus. Until the Supreme Court distinguishes what kinds of student social media speech is permissible versus punishable or makes a more definitive ruling regarding off-campus student speech, Texas charter schools will continue to face this uncertainty as the caselaw from the Supreme Court, Firth Circuit, and the other circuits slowly attempt to catch up to this ever-growing amalgam of technology and social interaction.

While the caselaw for student social media discipline is lagging and often conflicts between different jurisdictions as to whether off-campus speech can even be disciplined, there are some cases worth examining so that Texas charter schools do not have to "go in blind" when dealing with these issues.

Generally, student discipline problems involving social media often arise under *Tinker*, and at other times *Fraser*. Under *Tinker* disciplining student speech is permissible when the speech "materially and substantially disrupts the work and discipline of the school."[4] Unfortunately, courts have different ideas as to what constitutes "material disruptions" and to what extent *Tinker* can be applied to off-campus speech. In *Bell v. Itawamba County School Board*,[5] the Fifth Circuit applied the *Tinker* Substantial Disruption Test to off-campus student social media speech involving a student-created rap song that allegedly harassed, intimidated, and threated two teachers at the high school.[6] The recording created and posted on the student's publicly available Facebook and YouTube accounts accused two teachers of having sexual misconduct with female students. The student was eventually suspended and

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1 *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

2 *Hazelwood School Dist. V. Kuhlmeier*, 484 U.S. 260 (1988).

3 *Morse v. Frederick*, 551 U.S. 393 (2007).

4 Also called the "Tinker Substantial Disruption Test."

5 *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015)

6 The lyrics of the rap song involved threats against the teachers and referenced the use of firearms such as "I'm going to hit you with my reuger [a brand of firearm]" or "[I am] going to get a pistol down your mouth." *Id.* at 384.

transferred to an alternative school. The question posed before the court was whether the school could constitutionally discipline Bell under *Tinker* for a recording as off-campus speech. The Fifth Circuit held that *Tinker* does apply to certain situations relating to off-campus speech. The court reasoned that discipline for speech at hand could be permitted under *Tinker*, even when off-campus, because of "the paramount need for school officials to be able to react quickly and effectively to protect students and faculty from threats, intimidation, and harassment intentionally directed at the school community."[7] Furthermore, the court found that Bell's comments "reasonably could have been forecast to cause a substantial disruption."[8]

In another recent case, *Longoria v. San Benito Consolidated Independent School District*,[9] a Texas court determined whether a student's termination from extracurricular activities as a form of discipline for off-campus online lewd speech constituted a violation of the student's First Amendment Rights. The First Amendment claim was brought after student-cheerleader was terminated from the cheer squad because of her social media postings. The social media posts in question were made off-campus and involved: (i) the student-cheerleader's own social media posts; (ii) "likes" of social media posts made by third parties; and (iii) social media posts tabbed "like" by the student-cheerleader. Because the speech in question was "lewd speech"[10] involving profanity and inappropriate subjects, the court applied the *Fraser* standard under which public school officials may punish students for using lewd, vulgar, or indecent speech in the school setting. However, the Supreme Court has recognized that lewd speech under *Fraser* is not subject to the "substantial disturbance" test in *Tinker*. Further, the Supreme Court in *Morse* held that off-campus lewd speech is protected by the First Amendment. Because the Fifth Circuit in *Bell* did not address whether *Fraser* extends to online, off-campus speech, the Texas court looked to persuasive authority.[11] After applying these authorities to the facts at hand relating to the student-cheerleader, the court determined that "online, off-campus lewd speech 'does not mutate into on-campus speech' and remains protected under the First Amendment."[12] Therefore, "social media posts, even if designated as 'lewd.' which originate online, off-campus, and outside of the school context — are not subject to individual defendant's authority under Fraser."[13]

The above cases illustrate that when dealing with online, off-campus speech, schools must carefully consider what type of speech is involved before implementing discipline. Certain speech like in *Bell* can potentially be restricted, whereas other types like in *Longoria* may not be easily disciplined. Ultimately, because of the uncertainty present in the case law, the numerous legal tests, and the fact-intensive inquiry involving these issues, Texas charter schools should

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7 *Id.* at 393.

8 *Id.* at 398-399. Not only did Bell's recording pertain directly to events at school, but it also identified two teachers by name.

9 *Longoria as Next Friend of M.L. v. San Benito Consol. Indep. Sch. Dist.*, No. 1:17-CV-00160, 2018 WL 5629941, (S.D. Tex. Oct. 31, 2018) (appeal filed).

10 Examples of the "likes," comments, or posts attributed to the student-cheerleader include: "I [sic] don't f*** with people who lowkey try to compete with/out do me."; "I f***ing love you so much and you don't even know it like b**** I hope you do great sh** in life I believe in you."; "So let's set this sh** straight I got zero hoes zero guys zero ppl [sic] entertaining me:-) k bye". *Id*. at *2.

11 Such authority provided that *Fraser* does not extend to online, off-campus lewd speech. *See J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 930-32 (3rd Cir. 2011).

12 *Longoria*, at *4.

13 *Id.*

work closely with their legal counsel before administering discipline for off-campus social media speech.

What To Do, What To Do With That Facility Funding?
By Ramón Medina

In accordance with House Bill 21, as enacted by the 85th Texas Legislature (1st Called Session), Texas Education Code §12.106 was amended to add subsections (d), (e), (f), and (g) to provide facility funding to open-enrollment charter schools. After taking into account the variables that must be considered to determine the amount of funding to be made available, the Texas Education Agency (TEA) concluded, preliminarily, that the statutory limitation of $60 million dollars will apply. Using the estimated 2018-2019 average daily attendance (ADA) for charter schools of 294,895.954, the average amount of facility funding per student is estimated at $203.45 for the 2018-2019 school year.[14] For each charter school, the estimated Charter Facilities Entitlement is published on the 2018-2019 Charter School Facilities Funding Detail Report available through the Summary of Finances (under the 2018-2019 Other Programs Detail Report accessible via line 45 on the 2018-2019 Summary of Finances).

However, before you proceed to buying a brand new bus, it may interest you to know that, pursuant to Tex. Ed. Code §12.106(f), "Funds received by a charter holder [under the Charter Facilities Entitlement] may only be used:

(1) to lease an instructional facility;

(2) to pay property taxes imposed on an instructional facility;

(3) to pay debt service on bonds issued to finance an instructional facility; or

(4) for any other purpose related to the purchase, lease, sale, acquisition, or maintenance of an instructional facility."

Moreover, under §12.106 (g), "instructional facility" "means real property, an improvement to real property, or a necessary fixture of an improvement to real property that is used predominantly for teaching the [foundation and enrichment] curriculum required under [Tex. Ed. Code] Section 28.002."

Thus, charter schools may only use their Charter Facilities Entitlement for an instructional facility and not for any other purpose.

Regarding the accounting for these funds, charter schools are required to account for the revenues associated with these funds under net asset (fund) code 420 and object code 5812. To demonstrate compliance with the above legal requirement, charter schools may want to use a subject code to uniquely identify the receipt and use of these funds.

For further TEA guidance, go to https://tea.texas.gov/About_TEA/News_and_Multimedia/Correspondence/TAA_Letters/Charter_School_Facility_Funding/.

[14] Using the Existing Debt Allotment Guaranteed Yield and State Average Interest and Sinking Fund Tax Rate published by TEA, the estimated amount of facility funding per student in ADA is $209.27.

A Friendly Reminder Concerning Federal Report Cards

From TEA's Department of Contracts, Grants and Financial Administration

"Federal Report Cards for the state, district, and campuses are now available on the Texas Education Agency's (TEA) website.

Each LEA that receives Title I, Part A funding is responsible for disseminating the State, LEA and campus-level report cards to 1) all LEA campuses, 2) to parents of all enrolled students, and 3) to make the information widely available through public means such as posting on the Internet, distribution to the media, or distribution through public agencies.

At a minimum, the LEA must—[Section 1111(h)(2)]

- post direct links to the State, LEA, and campus report cards on its web site, make hard copies available to parents upon request, make hard copies available for viewing in public locations, and [sic]

- notify parents of all students about the availability of the report cards and the options for obtaining them.

- [sic] provide appropriate translation (either oral or written) upon request.

LEAs must make the federal report card information readily accessible to the public, and parents must be notified of the availability of the federal report card information no later than the Monday, March 4, 2019."

Have Questions? We'll Answer.

If you have any questions concerning the content in this e-newsletter or any other school law matter, please contact Joe Hoffer's Assistant Lori Madla at lmadla@slh-law.com or at (210) 538-5385.