Understanding the role of social media in the education world is critical. If businesses can utilize social media platforms to increase sales, why can’t teachers use social media platforms to increase student grades? Teachers and students are using both school-issued and personal technology in the classroom, including social media in all its various forms. They may also be using such technology as an extension of the classroom outside of normal class and even school times. And use of technology, including social media, by staff and students even for personal reasons may sometimes impact the school community. In this session, we will review common legal pitfalls and issues involving the use of social media and other technology in the school house, with a specific focus on the special education realm.

I. LEARNING TARGETS

- I will know what social media is and why it is a concern for schools and, specifically, those who work in the realm of special education.
- I will learn strategies for handling common social media mishaps with special education parents.
- I will understand how schools are using social media with special education students, both in the classroom and as an extension of the classroom, and recognize common legal issues related to that use.
- I will be able to identify the risks relating to appropriate teacher/student boundaries that are exacerbated by use of social media and how to allay those risks.
- I will discover the heightened responsibilities that school districts may have with respect to policing student conduct on social media.
- I will understand how and when students and employees can be disciplined for use of social media, both inside and outside the classroom.
II. IN GENERAL

1. What is social media?

   a. Social media refers to the means of interactions among people in which they create, share, and exchange information and ideas in virtual communities and networks. (http://en.wikipedia.org/wiki/Social_media). Examples of popular social media websites include Facebook, Twitter, Pinterest, MySpace, Google+, Instagram, Skype, FaceTime, etc. Some newer social media platforms that are gaining popularity among students include Snapchat, through which users can send photographs for a set amount of time, and Vine, which is like Instagram with videos. Although we mostly think of social media as including social networking websites, they also can include multimedia sharing websites such as YouTube, Flickr, and blogs. Source: SpecialEd Connection, “Guard Against Staffers’ Social Media Missteps.”

   b. Social media is revolutionizing how information is shared around the world. Without question, social media issues will increasingly involve special education students and the delivery of service.

2. Why is social media a topic at this conference?

   Technology in general and social media specifically are hot topics in the school world, especially in the realm of special education, because technology is invading the school house and raising a number of tricky legal questions. The following are a few key examples and questions from the special education world:

   a. Recording/Sharing IEP Meetings: Parents increasingly audio/video record IEP meetings, with or without permission, and may broadcast them online, such as on YouTube. For example, a Texas school district gained intensive media attention involving a dispute over whether a 5-year-old student with cerebral palsy should use a walker or a wheelchair at school. The child's mother secretly audio recorded her meeting with the special education director and posted a portion of the recording to YouTube. Hearing officers are recognizing the problem: In District of Columbia Public Schools, 113 LRP 29932 (SEA D.C. May 28, 2013), a footnote in the decision states that: “[school] staff has become increasingly uncomfortable communicating with the student’s parents because of the social media posting and public campaign that the parents have engaged in threatening to ruin the staff’s reputations because of the parent’s perception about the services the student has received at [the school] and in DCPS.”

   b. Recording/Sharing from the Classroom: The use of recording devices in special education classrooms has risen over the years. For instance, Texas is considering installing cameras in all self-contained special education classrooms. A bill introduced by state Sen. Dan Patrick, R-Houston, calls for the placement of video monitoring cameras in all self-contained classrooms that provide special education services. The proposed legislation (S.B. 1380), passed the Texas Senate April 4, 2013, and has been referred to the House Committee on Public Education.
Similarly, in *Fairfield-Suisun (CA) Unified School District*, 112 LRP 24933 (OCR San Francisco March 30, 2012), the Director of Special Education “expressed concern to OCR that recording devices, such as smart pens, would be used to record other students without their permission, as well as information unrelated to classroom lectures. She added that she thought the District would need to have a release from other students or their parents. She also expressed concern that students with emotional disabilities might exhibit poor judgment and use the recording device inappropriately to record private conversations or post information on social media sites.”

OCR clarified that the use of recording devices: “[M]ay be an appropriate accommodation for a student with a disability; whether a student with a disability will be permitted to use a recording device in the classroom is a decision to be made by the student’s IEP or Section 504 team. The team will make an individualized determination, based on complete and current evaluation information, as to whether the use of such device is needed to meet the student's individual disability-related needs. The use of recording devices in the classroom by students with disabilities may not be conditioned on a release from other students in the classroom or the parents of those students.”

c. **Bullying:** In a joint *Dear Colleague Letter*, OSERS and OSEP indicated that the decision to change a student’s placement under the auspices of protecting him/her from peer bullying may result in an IDEA violation. The letter references social media in relation to peer bullying and can be found at: http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html

d. **Goals/objectives:** Can’t you foresee a day when a student’s IEP goal may focus on social networking and accessing social media? I couldn’t find any cases yet, but it stands to reason that they are coming!

e. **Assistive Technology? Related Service? Accommodation?** Is social media considered an assistive technology? A related service? An accommodation? Might a school district have to buy a student an iPad for use at home to work on social media or other technology skills?

### III. SOCIAL MEDIA AND SPECIAL EDUCATION PARENTS

1. **How does social media and other new technology impact parental disputes in the special education context?**
   
a. Parents may be more inclined to turn to social media for support during disagreements with school administrators and employees over special education issues.

b. For example, on March 19, 2012, a parent published a video on YouTube that has drawn 66,531 “hits” relating to a dispute with a Texas school district, New Caney ISD, over her daughter LaKay’s use of a walker. LaKay has Cerebral Palsy and the parent’s position was that she should be allowed to use a walker. The school administration believed that the walker was unsafe. The parent audio recorded a conversation with a special education administrator about the walker and posted it on YouTube over a video of pictures of happy LaKay using her walker. The video drew national media attention. The school administrator said that LaKay could not use the walker because it was unsafe, because the child fell in the
parking lot with her mother. The mother pointed out that when a general education child falls in the parking lot, the school does not take her shoes away from her, and said that the school district was being “discriminatory.” The special education administrator made a number of comments that drew criticism. He said sarcastically at one point: “We’re gonna not do what the mother wants us to do. Make sure you get that down on tape.” He also said “You’re not concerned about [the student].” The administrator then said “It’s up for a court to decide then.” The video states that a fund was set up to accept donations on behalf of LaKay and asks viewers to “Help LaKay’s voice be heard by contacting New Caney ISD.” The video can be found at http://www.youtube.com/watch?v=3BTvNQRkKfY.

c. In light of this new reality, school employees and administrators must be on guard and assume that every conversation that they have with a parent might end up on YouTube, Facebook, or some other social media platform.

2. **What are some takeaway tips for special education administrators and employees on how to manage what seems like a social media landmine with parents in the special education realm?**

   a. Special education is fraught with emotion and emotional issues do not “translate well” over social media. Anything you do or say can end up in the social media queue – this is simply the day and age we live in. Whether right or wrong, educators are subject to heightened public scrutiny.

   b. Assume your conversations are being recorded and that the e-mail you are about to send will be on the front page of tomorrow’s newspaper (or up on YouTube!).

   c. “People skills” may be considered soft skills, but staff members should be trained on people skills, all the same.

   d. Recognize when and learn how to adjourn a meeting that is out of control. Resort to alternative dispute resolution in difficult situations.

   e. Although not unique to social media, avoid sending messages (including social media messages or email messages) with negative impressions of parents. These almost always must be produced in preparation for due process and may come back to bite you (and your employer!).

   f. If a parent takes steps that appear to violate the law (e.g., recording an IEP meeting without permission) contact legal counsel for help with an appropriate response.

IV. **USE OF SOCIAL MEDIA WITH STUDENTS IN THE CLASSROOM AND BEYOND**

1. **What is the definition of an assistive technology device?**

   An “assistive technology device” is defined in the regulations implementing the *Individuals with Disabilities Education Improvement Act* (IDEA) as any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability, not
including a medical device that is surgically implanted or the replacement of such a device. 34 CFR §300.5.

2. What is the definition of an assistive technology service?

An “assistive technology service” is any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. 34 CFR §300.6. By virtue of these definitions, it is clear that assistive technology devices and services can include social media.

3. Are social media tools and related new technologies considered forms of assistive technology?

Yes. Social media tools and related new technologies can be valuable as assistive technology. As described in a recent report from the Virginia Department of Education:

[S]ocial media tools are accelerating in popularity. Teens increasingly are communicating digitally via text messaging and social networking (Lenhart & Madden, 2007). Access to social media tools is important to all students, regardless of their learning approaches or differences. Digital participation is key to accessing the wealth of information exchanged across this growing online network of social communities. In addition, social media can offer access to students who may be socially isolated by their disabilities; however, their participation thus far has remained relatively low (Gray, Silver-Pacuilla, & Saucer, 2008). According to a 2007 report, only 44 percent of students with disabilities had computers at home—compared with 72 percent without disabilities—and only 38 percent of students with disabilities had Internet access from home (KirkHart & Lau, 2007).

This instant-access appeal of social media tools offers an attractive convenience feature for many users and school divisions looking to engage diverse learners on shoestring budgets. Many portable handheld devices, smartphones, and portable USB keys include useful learning supports and AT program features (Gray, Silver-Pacuilla, & Overton, 2009).

Increasingly, individuals rely upon the quick speed of readily available Wi-Fi hot spots and Internet connections to access and share information. Broadband access typically maximizes the speed of these tools, which helps ensure better access for all. The U.S. Chamber of Commerce (2009, hereafter USCC) notes, “Broadband is quickly becoming an essential AT, both as a medium for the delivery of critical services to persons with a disability and as a vehicle that enables a wide range of services and tools” (p. 8). Apple, Verizon, AT&T, and other major commercial technology firms increasingly are including ubiquitous accessibility features and functionality within their products (USCC, 2009). This ubiquity is raising awareness about AT and the importance of universal designs.

4. Is a school district ever required to use social media or other technology for a special education student?

Required? Probably not (yet). But keep in mind that depending on the unique needs of each student, the use of social media or other technology may be a required component of their IEPs. The IDEA requires schools to ensure that special education students receive “assistive technology devices and services” if required as part of the child’s special education, related services, or supplementary aids and services. 34 CFR §300.105 (a). A school district must, when warranted by a student’s suspected or known disability, evaluate whether the student’s functional capabilities may be increased, maintained, or improved through the use of assistive technology devices or services. Letter to Fisher, 23 IDELR 565 (OSEP 1995). The need for assistive technology is determined on a case-by-case basis, taking into consideration the unique need of each individual child. Letter to Anonymous, 18 IDELR 627 (OSEP 1991).

5. Must assistive technology devices or services be included in a student’s IEP?

Yes, to the extent that the device and/or service is needed to ensure that the child receives a free, appropriate public education, the specific device and/or service must be identified in the IEP. Thus, if the IEP team determines that a child with a disability requires an assistive technology device or service as part of the child’s special education or related services, or if the team determines that such a device is needed to facilitate the student’s participation in the regular education program, it must be included in the IEP. Letter to Anonymous, 24 IDELR 854 (OSEP 1996).

6. Is a school district required to purchase assistive technology devices for home use?

Generally speaking, assistive technology devices are appropriate for home use when the student uses the device to communicate. However, parents are increasingly making requests for assistive technology devices for homework/organization purposes. The bottom line is that if an IEP team determines that a particular assistive technology device is required for home use in order for the student to receive FAPE, it must be provided to implement the IEP. Letter to Anonymous, 18 IDELR 627 (OSEP 1991).

V. LEGAL ISSUES INVOLVING THE USE OF SOCIAL MEDIA WITH STUDENTS

1. What concerns arise relating to staff members who use social media and other new technologies during work with students?

a. Staff members should not use personal social media accounts with students for work purposes. Many school districts prohibit staff members from communicating with students in this way.

b. If the school district becomes aware of speech on a social media account that a teacher is using with special education students that is inappropriate, and the teacher made or accesses the technology in question during school hours, when working with students, or through school technology, the teacher likely can be disciplined pursuant to the school district’s regular discipline policies and acceptable use of technology policy, or AUP.
c. It is important that the school district have access to social media accounts used with
students. Employees should be discouraged, if not outright prohibited, from using their
personal social media accounts to communicate with students. For example, some school
districts prohibit the use of social media with students at any time except through a school-
sponsored account. This can include an account created by the employee with their business
password, and intended for business use. Passwords should be obtained by the administration.
In addition to providing protections for the employee, such rules also mitigate concerns with
the so-called Facebook password law, which in Illinois essentially prohibits an employer
from demanding access to or information from an employee’s personal social media account.
By requiring the employee to use only a professional social media account, employers are
able to avoid violating this law in case they need to gain access to an account used with
students.

d. Care should be taken to ensure that parents consent to the use of social media by students,
especially in the special education realm. Moreover, care should be taken to ensure that
information about special needs students is not published on public websites of any kind
without parental permission, especially when the students are engaging in special education
activities.

e. School employees should understand that there may be limits on when they can delete
content from a public social media page or school district or classroom webpage?

- School districts and employees who use social media for educational or professional
purposes may at some point wish to delete what they deem to be inappropriate comments.
The operators of social media accounts must understand that the First Amendment may
limit their ability to delete information from a social media account that allows public
comment.

This is a very new area of law and there is little relevant case law. However, at least one
lawsuit has been filed on this issue making clear that school districts and employees must
take care not to delete comments from social media platforms arbitrarily. The lawsuit was
filed against the Honolulu Police Department over deleted posts on the department’s
facebook page. As one news article explains, “the key legal question would be whether
the police department created a public forum . . . for private speech or whether the web
page is government speech.” Associated Press, “Lawsuit over HPD Facebook comments
could set legal precedent.”


- Although the question is not settled, there is little doubt that once a governmental entity,
like a school district, opens up a webpage allowing comments, it has created some kind
of forum for public use and cannot discriminate based on viewpoint when deleting
comments from that forum. That means that school districts and employees operating
social media websites should not delete content simply because they disagree with the
viewpoint of the content or believe that others will disagree with it. School districts
should also have a clear social media policy that governs when and for what reasons
content from the public can be deleted, and should have oversight over employee’s pages
to ensure that the policy is being followed.
2. When can an employee be disciplined when using social media and other new technology during work with students?

a. The questions the school district must ask in these situations prior to imposing discipline is whether the conduct can be tied to a specific teacher, whether the conduct violates a school rule or policy, and whether discipline can be imposed under any relevant collective bargaining agreement. In the case of on-campus misconduct, the First Amendment rights of the teacher are minimal, if they even exist at.

3. What if the employee is using social media for personal purposes at work?

Most school districts have (or should have) policies prohibiting use of personal social media accounts for personal purposes, at least through the employer’s computer or Internet, during work times. Use at other times (e.g., break times) may be allowed, but usually must be de minimis and not in a manner that interferes with or disrupts the work or learning environment. Even personal use on a personal device (e.g., through a smartphone on a wireless account) may lead to discipline if it is during work times or when an employee should be supervising students. Employees should limit such use to break times and should use such devices in a non-disruptive manner.

4. How does off-campus misconduct differ?

If a teacher engages in improper speech on a private social media account off campus and on her own time, if she has allowed students to access her social media account, she may nonetheless be subject to discipline if the school district learns of the speech and it either is unprotected speech, is made by the employee as a public employee as opposed to a private citizen, relates to a matter of purely private concern as opposed to a matter of public concern, or infringes on the employer’s operations or on the employer’s ability to provide effective and efficient services. Pickering v. Board of Education, 531 U.S. 563 (U.S. 1968). In these cases, the First Amendment protections against government discipline for speech do not apply.

5. What is unprotected speech under the First Amendment?

Categories of speech not protected by the First Amendment in the school context include fighting words, words that incite others to imminent lawless action, obscenities, defamatory speech, true threats, lewd and indecent speech, and promotion of drug use.

6. When does an employee speak as a public employee and not as a private citizen?

An employee does not “speak as a public citizen” when he makes a statement related to his “official duties.” Speech might be considered part of an employee’s official duties if it relates to “special knowledge” or “experience” acquired through the job. For example, if an employee is using social media as part of a course, even off campus on their own time, and makes a statement in pursuit of those duties, his or her speech is as a public employee, not a private citizen. In those cases, discipline can be imposed for the speech if it can be tied to the employee, violates school rule or policy, and discipline is allowed by any relevant collective bargaining agreement.
7. When does speech relate to a purely private concern?

a. Content is the most important factor when determining whether speech is of a public or private concern. A matter of public concern is typically speech relating to any matter of political, social or other concern to the community. For example, a school employee who, on Facebook, criticized a school about giving students unnecessary time outs, failing to provide safe working and learning conditions, and inadequately supervising patients likely would be a public concern.

b. Personal gripes about the employment context or information about an employee’s private life, including gripes about a supervisor or other business operations, is likely a matter of purely private concern. A public employee may be disciplined for a matter of purely private concern if the speech can be tied to the employee, violates school rule or policy, and discipline is allowed by any relevant collective bargaining agreement. For example, a special education teacher who complained on Facebook about her students, calling them names or criticizing them or their parents personally, likely would be a matter of purely private concern.

8. When does an employee’s speech have a sufficiently negative impact on school operations to warrant discipline?

Even if speech is made by an employee as a private citizen on a matter of public concern, discipline may be imposed if the balance tips in favor of the employer. Factors to consider include whether there has been a threat to management authority, a threat to the ability to maintain student discipline, a breach of confidentiality, or an impact on the need for loyalty and confidence. As one court explained in a case involving an assistant district attorney, “[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.” *Connick v. Myers*, 461 U.S. 138 (U.S. 1983).

9. What are some examples from the school environment of staff member conduct on social media?

a. In a case decided in May of 2013, *Rubino v. City of New York*, 965 N.Y.S.2d 47, 48 (N.Y.A.D. 1 Dept. 2013), fifth-grade teacher Christine Rubino posted a status update, just one day after a 12-year-old girl drowned on a school field trip to the beach, implying that her students may deserve the same fate. “After today, I'm thinking the beach is a good trip for my class. I hate their guts,” Rubino wrote. A friend soon commented, asking, “Wouldn't you throw a life jacket to little Kwami?” But the teacher said she wouldn’t – not even “for a million dollars.” Although a judge found that the posting was “clearly inappropriate,” discipline was not warranted according to a judge because Rubino’s social media profile was available only to her friends, she was not friends with any students or parents, her remarks were not published to the public at large, and she deleted the comments shortly thereafter.

b. In contrast, in another recent case decided in January of 2013, *In re O'Brien*, 2013 WL 132508, 1 (N.J.Super.A.D. 2013), a court upheld the firing of a New Jersey teacher for posting “I'm not a teacher – I'm a warden for future criminals!” and “They had a scared straight program in school - why couldn't (I) bring (first) graders?” Although the teacher said
she was speaking out of frustration and genuine fear for her students, who had well-documented behavioral problems, O’Brien’s post was widely available to her more than 300 “friends” on Facebook, including family members, friends from high school, friends in the school district, and what she called “friends of friends.” The post also led to extreme outrage in the community, with protests and challenges from parents to the school board to fire O’Brien. It did not help that O’Brien was not repentant for what she said. An administrative law judge found that O’Brien’s remarks were not expressing a matter of public concern, but were a “personal expression” of dissatisfaction with her job. The court also found that the school district’s need to operate its schools efficiently outweighed O’Brien’s right to express her views. The ALJ explained:

An internet social-networking site such as Facebook is a questionable place to begin an earnest conversation about an important school issue such as classroom discipline. More to the point, a description of first-grade children as criminals with their teacher as their warden is intemperate and vituperative. It becomes impossible for parents to cooperate with or have faith in a teacher who insults their children and trivializes legitimate educational concerns on the internet.

c. The ALJ also made clear that while First Amendment protections do not generally rise or fall on the public reactions to a person's statements, “in a public school setting thoughtless words can destroy the partnership between home and school that is essential to the mission of the schools.” The ALJ’s decision was affirmed on appeal by the New Jersey Supreme Court.

d. Even more benign conduct by public employees online can cause trouble. For example, Stacy Snyder, a 25-year-old student-teacher at a Pennsylvania high school posted a photograph on her MySpace page that showed her at a party, in a pirate costume, drinking alcohol. The picture had the caption “Drunken Pirate” and was available to the public on the webpage. When a supervisor at the high school saw the photograph, Snyder not only lost her job, but the university she was attending refused to allow her to receive her teaching degree. Administrators claimed that the picture constituted virtual promotion of drinking to her students. Snyder sued in federal court, but lost. The court held that the speech was not protected by the First Amendment’s protections of freedom of speech, because the speech was regarding purely private conduct and was not on any matter of public concern. Snyder v. Millersville University, 2008 WL 5093140, 1 (E.D.Pa. 2008).

10. Why is the risk greater for staff members who allow students access to their personal social media accounts?

As is clear from the court cases described above, courts are more likely to find that a public school employee’s speech on social media is protected, and that the employee cannot be disciplined for that speech, if the employee takes pains to make sure their social media accounts are private. Employees who allow students to communicate with them through personal social media accounts will have a difficult, if not impossible, time showing that their speech was truly private and not disruptive to the school environment.
VI. MAINTAINING APPROPRIATE TEACHER/STUDENT BOUNDARIES

1. What risks relating to appropriate teacher/student boundaries arise with the use of social media and other new technology with students?

   a. The use of social media and other related technology with students can create a risk of inappropriate relationships between public employees and students. Even more commonly, this use can lead to the appearance of an inappropriate relationship between teachers and students, even if the teacher does not intend that result.

   b. The reason for the increased risk when interacting through social media and other new technology is that technology levels the playing field between school employees and students. Whereas in the classroom it is clear that the teacher is the authority and not a friend, that line is blurred in the world of technology. The new, blurred line can be much more difficult for school employees to navigate and for school districts and administrators to police. Consider the following quotations from Spanierman v. Hughes, 576 F.Supp.2d 292 (D. Conn. 2008).

   The conversation occurred between a teacher and a student on a social networking website:

   | Teacher: [student] and [another student] sittin in a tree. K I S S I N G. 1st comes love then comes marriage. HA HA HA HA HA HA HA!!!!!!!!!!!!!!!!!!!!!!! LOL |
   | Student: don’t be jealous cause you cant get any lol:) |
   | Teacher: What makes you think I want any? I'm not jealous. I just like to have fun and goof on you guys. If you don't like it. Kiss my brass! LMAO |

2. How can school employees reduce the risk of impropriety and the appearance of impropriety when using social media with students?

   a. School employees must monitor their own emotional or psychological vulnerabilities, making sure not to use students to boost their own self-esteem, to feel better about their own attractiveness, fulfill their need for validation and affirmation outside of the classroom, etc. This will help mitigate the risk of an improper relationship developing with a student online.

   b. School employees must also take steps to avoid the appearance of impropriety. Steps to take to avoid this risk include not having a larger volume of communications with one student or a group of students, not discussing personal issues with students, etc.

VII. POLICING ONLINE CONDUCT

1. What responsibilities do school districts have to police conduct that occurs online when they allow students to use social networking and other new technologies in school?

   a. School districts may have the responsibility to police interactions between students and school employees on technology, including on social networking and blogging programs used to continue class discussions after school hours, in order to avoid liability for a failure to protect students from known harassment by, or improper relations with, school employees or other students. Parents may argue that once a staff member “leads” a student onto technology, especially online, the school district is responsible for risks associated with that use. For instance, if a staff member creates a Facebook group to communicate with students, and the
student “links” to another inappropriate page on Facebook after accessing the staff member’s page, the parent may believe the school is responsible. Similarly, if a student develops an improper relationship with a staff member, is bullied on social media, or engages in sexting, there may be liability concerns for the school district.

2. What policing is required with respect to employee-student interactions?

   a. A case not involving technology is instructive. In Sandra T.E. v. Sperlik, 639 F. Supp. 2d 912 (N.D. Ill. July 23, 2009), students who were sexually abused by their music teacher filed suit against the school principal and other school officials, alleging, among other things, that the school officials “turned a blind eye” to evidence of sexual abuse. The court allowed the students’ substantive due process and equal protection claims to move forward. The court found that the principal did not take proper steps to protect the students after hearing the students’ complaints about the music teacher. Although this case did not involve an online relationship, the principles therein could be applied to improper relationships online.

3. What responsibilities do school employees who allow students to use social media and other technology to continue class discussions after school have to police those interactions?

   a. Steps should be taken to ensure that parents are aware of their responsibilities to supervise student use of social networking and other technology tools when used by their students outside of school hours and off of school property.

   b. But school employees who allow students to use social media and other technology to continue class discussions after school may have an independent duty to police those interactions. Such interactions are not essentially different from interactions between students and others in the classroom or in other structured environments at school, which school employees unquestionably must police. Care should be taken to understand what, if any, responsibilities exist before students are directed to use social media or other new technology outside of the structured learning environment.

   c. For example, good school district policies and procedures often require that employees who operate social media or other accounts on behalf of or through their position as an employee of a school district check the content of the website frequently. Procedures may also require that comments on a website be approved before being posted or other precautions to prevent inappropriate behavior.

4. What is cyberbullying?

   “Cyberbullying is the use of the Internet and related technologies to harm other people, in a deliberate, repeated, and hostile manner. As it has become more common in society, particularly among young people, legislation and awareness campaigns have arisen to combat it.” (http://en.wikipedia.org/wiki/Cyberbullying).

5. What laws require school districts to address and prevent cyberbullying?

   School districts are required by federal law to address any severe, pervasive or persistent conduct, including bullying and cyberbullying, that creates a hostile environment at school and is based on
a student’s race, color, national origin, sex, disability, or religion. Parents and students are filing federal lawsuits and Department of Education Office for Civil Rights (OCR) complaints against school districts in record numbers for their alleged failure to protect students from bullying at school. Harassment based upon disability is one of the fastest growing “types” of bullying identified by courts. Every state has a law, policy, or both a law and policy prohibiting bullying in schools, as well, including cyberbullying.

6. **What must a school district do to address cyberbullying?**

   a. OCR (Office for Civil Rights) has clarified that although a school district will not be held liable for damages by a court unless the school district had actual knowledge of bullying that constitutes impermissible harassment, OCR will hold school districts responsible for bullying when the school district knows or reasonably should have known of bullying that constitutes harassment. Therefore, school districts must be proactive not only when bullying is a confirmed certainty, but also in those situations where administrators believe bullying is likely to be occurring.

   b. OCR has indicated that it intends to take a strong stance against bullying in public schools. In light of OCR’s indication, school districts should determine if a reported incident of bullying, including cyberbullying, based on race, color, national origin (including religion), sex (including sexual orientation) or disability, including seemingly isolated incidents, warrant further investigation or action, which is required if the bullying is severe or widespread enough to create a hostile environment. The school district must take affirmative steps to end the harassment and to prevent it from recurring. The school district must also revise policies and procedures to ensure they address bullying complaints in a manner that complies with federal law.

7. **What steps should employees take who are using social media or other online technologies if they suspect or are told that cyberbullying is occurring?**

   Employees should immediately report the conduct to a school district administrator, as required by school district policy. If there is no policy on point, the employee should report the conduct in writing to a supervisor and maintain a copy of the report. Depending on the nature of the conduct in question, the teacher may have other reporting requirements or duties, such as reporting to local child welfare services in the case of alleged abuse or neglect by a trusted adult.

8. **What is sexting?**

   Sexting is defined as the sending of sexually explicit photographs or messages via mobile phone or other like technology.

9. **What laws address sexting?**

   There is no federal law that prohibits sexting. However, at least 20 states have laws that prohibit sexting. And although some laws, like Illinois’, do not make it a crime for a minor to possess and image of another minor, some laws do. For example, “under current Washington law, even any minor involved simply in consensual sexting with a person his or her own age faces felony charges, up to five years in prison, and mandatory sex offender registration.” See Brian Alseth,

10. What should a school district do to address sexting?

School districts must take steps to prevent sexting. School districts should adopt a comprehensive anti-sexting policy which should:

- Include a statement that the mere possession of sexually explicit images of minors on any device is prohibited regardless of whether any state laws are violated.
- Indicate that all involved in sexting could be subject to discipline, and should immediately report sexting to school officials.
- Inform students that their parents and the police may be contacted to investigate sexting.
- Put students on notice that cell phones will be searched if there is probable cause that a criminal violation has occurred, and may be searched if reasonable suspicion exists that the phone contains evidence of a violation of school policy.
- Clearly state the potential consequences for violating the policy.

11. What steps should employees take if they learn that sexting between students has occurred?

If made aware of the dissemination of any indecent image of a minor at school, through school issued technology, or among school students, school staff should:

- Immediately notify the school resource officer or other police officer contact and work with the police officer to collect any evidence and investigate the incident to determine its nature. Consider whether any child welfare reporting obligations are triggered.
- NEVER forward, copy, transmit, download, place on a USB thumb drive, or show any non-law enforcement personnel any evidence collected during the investigation. This may lead to felony criminal child pornography charges, even if actions were made in the best interests of the students involved.
- Promptly meet with all the students involved in order to determine the extent of image dissemination.
- Consider encouraging the student who is featured in the pictures to meet with the school counselor or social worker in order to deal with the trauma and stress of the incident.
- Consider whether confiscation or searches of personal electronic devices are warranted.
- Consider whether discipline is warranted. Especially for the student whose photograph was sent, discipline should only be taken when the circumstances of the situation are understood. Care should be taken to respond sensitively and to ensure that if the student is a victim of
bullying in the forwarding of an image, protections are in place to address the bullying and
protect the student as required by law.

VIII. STUDENT DISCIPLINE

1. When can students be disciplined for conduct that occurs on social media websites and
other related technology being used as part of the educational program?

a. When students are using technology as part of the educational program, including as
identified in their IEPs, their misconduct is governed by the school district’s own policies.
Whether misconduct occurs on social media when being used in the classroom, on a student’s
personal device in the classroom using a BYOD program, or in a student’s bedroom after
school hours on a tablet computer issued pursuant to their IEP, a student’s abuse of
technology at school or on school-issued devices largely is a matter regulated by the school’s
discipline code and network/technology policies, including any authorization forms required
to participate in programs like 1:1 and BYOD programs.

b. As the owner of this technology, the school district has the right to monitor, search and
otherwise access material that is created, viewed or otherwise accessed by users on that
technology. This includes the right to access “screen shots” of Internet pages that users
access, including social media and electronic mail pages, such as Facebook, that user access
through school district technology and/or networks. Such access is authorized even if the
website or account accessed is protected by a password.

c. Because school districts are the owners of district-issued technology, courts have held that a
school can properly discipline students for misuse of such technology, such as accessing
unauthorized websites at school, as long as the misconduct is a violation of a properly written
school board policy. The same reasoning also logically can be stretched to include the use of
school-issued technology at home or the use of personal technology in school.

d. Students must be notified that the school district may access district-owned technology or
material accessed using the District’s technology or network. Students and their parents
should be required to sign an acceptable use policy (AUP), which governs activities on
district technology and networks. The AUP should specifically notify users that the school
district retains the right to monitor, search and otherwise access that technology without prior
notification and that users have no expectation of privacy as to the district when using district
technology or networks. Students should also be notified that any misconduct that occurs on
such technology constitutes a violation of school rules and can be the subject of discipline.
Similarly, if students are allowed to use their personal technology at school, whether in the
hallways or in the classroom in a BYOD program, policies and authorization forms signed by
students and parents should make clear that misconduct that occurs on those devices can be
the subject of discipline, as well. Policies and procedures should be drafted carefully to avoid
being unconstitutionally overbroad or vague.

e. In summary, in most cases where allowed by school district policy and an AUP, a school
district may discipline a student for failure to comply with district policy and the AUP on
school-owned technology or personal technology used by students at school, regardless of the
content of the student’s speech. The discipline is for the violation of the school policy, not the
content of the speech, and so constitutional limitations relating to the content of the speech (i.e., the First Amendment) are less likely to be implicated.

2. When can students be disciplined for conduct that occurs on social media websites and other technology off campus and on their own time and/or on their own technology?

When student misconduct occurs off-campus, on a student’s own time and on a student’s own technology, merely showing a violation of school policy is not enough to justify discipline of the student. The First Amendment protection of freedom of speech generally extends to student speech online. In the school setting, students may be disciplined for speech that occurs off campus and online if: (1) there is a sufficient “nexus” (or connection) between the student’s online speech and the school environment and (2) the speech is either unprotected by the First Amendment or the speech caused or could reasonably be foreseen to cause a substantial and material disruption or invasion of the rights of others.

3. What is a sufficient nexus?

A sufficient “nexus” exists where it is reasonably foreseeable that the contents of online material would reach and impact the school community. The determination of whether there is a sufficient nexus between the misconduct and the school environment must be made on an individual basis. However, the following guidelines from past cases are useful to consider:

- Whether the materials, though created off campus, were: (1) accessed by the student on school grounds; (2) showed to fellow students on or off of school grounds; or (3) aimed not at a random audience, but at a specific audience of students and others connected with the school community. See J.S. v. Bethlehem Area Sch. Dist., See J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (finding sufficient nexus regarding student web-site that made derogatory, profane, offensive, and threatening comments about the student’s algebra teacher and principal).

- Whether the material was distributed in a manner known to be freely accessible by recipients on school grounds, especially where actual accessing on school grounds in fact occurs, depending on the totality of the circumstances involved. Id.

- Whether the materials were sent to classmates over an extended period of time. See Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007), cert denied 128 S. Ct. 1741 (2008) (finding sufficient nexus where student created graphic instant-messaging icon depicting shooting of a teacher off-campus, and sent it to 15 recipients electronically, including some classmates, during a three-week circulation period).

- Whether the school district was only alerted to the page by a parent or other third party outside of the school community. If so, there likely is not a sufficient nexus. See Mahaffey v. Aldrich, 236 F. Sup. 2d 779 (E. D. Mich. 2002) (no sufficient nexus where student posted off campus on a website entitled “Satan’s web page,” which included mock obituaries and allowed students to vote on who would “die next” where there was no evidence that any posting or reviewing of the website occurred on school property, and in fact the school was only alerted to the website by a concerned parent).
Whether there is likely to be a serious negative impact on student relationships as a result of the off-campus, online misconduct. Although there is no illustrative case regarding online misconduct, the Glenbrook North High School hazing case provides at least some authority for student discipline under these circumstances. See *Gendelman v. Glenbrook Bd. of Educ. Sch. Dist.* 225, 2003 U.S. Dist. LEXIS 8508 (N.D. Ill. 2003) (a severe hazing incident that occurred off campus was likely to disrupt the school’s educational environment because it necessarily affected the students’ relationships while in school). On the other hand, if the off-campus misconduct is a random and isolated incident, it might be less likely to warrant in-school discipline. See *Robinson v. Oak Park & River Forest High School*, 213 Ill. App. 3d 77, 82 (Ill. App. 1991) (expulsion of students for random, isolated incident in which one student struck another student after school and off school grounds was an abuse of discretion especially when student had no prior record of misconduct).

4. **What is a substantial disruption or invasion of the rights of others?**

This standard is based on the case of *Tinker v. Des Moines Independent Community School District*, in which the U.S. Supreme Court held that a school may limit student speech that reasonably threatens to materially and “substantially interfere” with the work of the school or impinge upon the rights of other students. 393 U.S. 503, 509 (1967). Under this standard, a school need not wait until disruption actually occurs before it may act. The question instead is whether school officials might reasonably portend disruption from the student expression at issue. Some factors that may support the presence of a risk of “substantial disruption”:

a. Do the materials address an ongoing controversy at the school in a manner that might discourage cooperative efforts to resolve the conflict? *See Doninger*, 527 F.3d at 50. If so, it may support a finding of “substantial disruption”.

b. Are the materials misleading or false, creating a need for the school district to correct misinformation? *Id.* If so, it may support a finding of “substantial disruption.”

c. Is there any evidence of past disruption in similar circumstances? *See Boucher v. School District of Greenfield*, 134 F.3d 821 (7th Cir. 1998) (addressing off-campus newsletter and finding that evidence of past disruption would support forecast of future disruption); *Killion v. Franklin Regional School Dist.*, 136 F.Supp.2d 446, 455 (noting that the *Tinker* standard is met where a school can point to a well-founded expectation of disruption, especially one based on past incidents arising out of similar speech). A simple warning in the past is likely not sufficient; instead, a school must show that the student’s past conduct actually led to a disruption of some sort, or at least that there was discipline for the prior misconduct. *Killion*, 136 F. Supp. 2d at 455.

d. Is there any evidence of actual disruption to teachers, such as failure of teachers to be able to teach or control their classes, or need for faculty members to take leaves of absence because of the materials? *See Killion v. Franklin Regional Sch. Dist.*, 136 F. Supp. 2d 446, (W.D. Pa. 2001); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d at 869. However, the risk that student counseling may be required, or the likelihood of unplanned classroom discussions, likely do not rise to the level of “substantial disruption”. *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 171 (D. Mass. 2007).
e. Is there any evidence of actual disruption to other students, such as expressions of anxiety about the materials or about their safety? See J.S. v. Bethlehem Area Sch. Dist., 807 A.2d at 869.

f. Is there any evidence of actual disruption to parents, which may be evidenced by them voicing their concerns for school safety or other issues? Id.

Some factors that may suggest that was not a risk of “substantial disruption”:

a. Did school officials simply dislike the speech. Disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under Tinker? See Beussink, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).

b. Does the school administrator’s reliance on alleged disruption appear to be a mere pretext? See Beussink v. Woodland R-IV School District, 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (finding that where principal testified that he was simply offended by the content of a website, and there was no other evidence of any fear of disruption, there was no justification for limiting the speech); Coy v. Bd. of Educ. of the North Canton City Schools, 205 F. Supp. 2d 791 (N.D. Ohio 2002) (finding that if school disciplined a student for content, as the student alleged, the student would prevail, but if the student was punished for accessing the site at school, the school would prevail).

5. May students be disciplined for off-campus, online speech that is “unprotected”?

a. Like employees, students can be disciplined in the school context for “unprotected speech.” Again, this includes fighting words, words that incite others to imminent lawless action, obscenities, defamatory speech, true threats, lewd and indecent speech, and promotion of drug use. Thus, so long as there is a clear school policy covering the student’s misconduct, schools may regulate a student’s off-campus speech that falls under one of the unprotected speech categories, without running afoul of the First Amendment.

b. Schools often attempt to categorize off-campus, online misconduct as a “true threat” in order to defeat a student’s First Amendment defense. A statement qualifies as a true threat if a reasonable person would understand that the statements, in their context and under all the circumstances, to be a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. United States v. Parr, 545 F.3d 491 (7th Cir. 2008). To constitute a true threat, it is not necessary that the speaker actually intend to carry out the threat, nor that he or she communicate the threat to the potential victim. Id. However, the speech must be more than mere “political hyperbole.” Watts v. United States, 394 U.S. 705, 708 (1969) (“if they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” not a true threat).

c. Courts across the country have enumerated a number of specific factors to consider when addressing whether a statement is a true threat, including: (1) the reaction of those who heard the alleged threat; (2) whether the threat was conditional; (3) whether the person who made the alleged threat communicated it directly to the object of the threat; (4) whether the speaker had a history of making threats against the person purportedly threatened; and (5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence. See,
e.g., *In re A.S.*, 243 Wis.2d 173, 626 N.W.2d 712 (2001); *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 623 (8th Cir. 2002). Courts have recognized that, in light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996).

d. Where a student makes a threat against an individual or a group that is unconditional, unequivocal, specific, and detailed, and especially where the student communicates the threat directly to the object of the threat or in a manner in which the threat would reasonably reach the object of the threat (or some mixture of those facts exists), it may constitute a “true threat.” Where a threat appears to be more like a joke—even a highly distasteful one—it may not be a true threat. Cf. *Emmett v. Kent Sch. Dist. No. 415*, 92 F.Supp.2d 1088 (W.D. Wash. 2000) (not directly applying the true threat analysis, but finding that a student’s tongue-in-cheek mock obituaries on a website did not rise to a level of threat necessary to limit the speech). In any case, a district should make sure to take immediate steps to discipline a student who it believes has made a serious threat and to notify the student’s parents, so as not to appear to believe that the threat is not serious enough to be a “true threat.”

**IX. STUDENT RECORDS ISSUES**

1. **How might student records issues arise in the context of the use of social media and other new technologies with students?**

   a. The Federal Educational Rights and Privacy Act (FERPA) and its counterparts in state laws require: (1) parents to be granted access to student educational records; and (2) school districts not to disclose student educational records without the express, written consent of the student’s parents. The disclosure requirements of the student records laws are even more heightened in the context of special education students, where the IDEA also prohibits the disclosure of sensitive information without parental consent. Parents of special education students may be especially sensitive to information about their students being made public without their permission.

   b. FERPA defines “education records” as records containing information “directly related” to a student that are maintained by an educational institution or a person acting for the institution. FERPA does not define “directly related to a student,” but references “personally identifiable information” contained in records. In turn, federal regulations implementing FERPA define “personally identifiable information” as information that, alone or in combination with other information, “is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.” It is unclear whether the FERPA definition would cover information about students created or posted on a social media account, but the conservative approach is to consider that they would meet the definition and treat them as educational records.

   c. However, it is generally recognized that even if materials such as photographs and videos of students at school may be covered by FERPA, that such information may be “directory information” that can be released as long as a parental consent form is on file. However,
general consent forms collected by school districts may not be specific enough to address the types of student information that is created or posted in a special education atmosphere.

d. Accordingly, educational professionals who use social media with students must take great care to ensure the privacy of any information that is posted on social media, whether it is work created by a student, work created in working with a student on issues arising under their IEP, or photographs or videos of the student participating in special education programs. The best way to do this is to avoid posting information about students on publicly accessible websites at all. Websites, including social media sites, that are only available to students and parents may be a better option, although they should still be considered a public website for purposes of obtaining a parental release. The best practice for any public website on which information is to be posted is to discuss with parents explicitly what types of material may be posted, where it may be posted, and who may access it before any information about students is posed on a social media or other website. Such information should only be posted if the parent signs a release form explicitly addressing the type of information that is to be shared publicly.