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Can the Law Keep Pace with Technology? Regulating Student Use of the Internet and Cyberspace

By Charles J. Russo, J.D., Ed.D., and Allan G. Osborne, Jr., Ed.D.

The courts are reaching markedly different outcomes on disciplining students who violate school rules using technology.

Who could have anticipated the effect of the Internet on education, or of social networking sites such as Facebook or MySpace? Yet given the relatively new state of the law, as the legal system struggles to keep pace with technological advances, the courts are reaching markedly different outcomes on the extent to which education officials can punish students who violate school rules, especially if their behavior originated out of school or involved First Amendment free speech claims.

In light of the legal and technological challenges facing school business officials (SBOs), school boards, and other education leaders, the first part of this column provides a comprehensive review of reported litigation involving student use and misuse of technology in schools. The second part offers recommendations for SBOs, boards, and other education leaders who face the daunting task of complying with the law by keeping their technology policies up-to-date.

Recent Litigation

In Connecticut, a case arose after officials denied a student the opportunity to run for office on the student council because she posted a vulgar blog about them on a Website independent of the school. She also wore a homemade T-shirt to a school assembly protesting their actions. In its first of two trips to the Second Circuit, the court rejected claims that officials violated the student's free speech or equal protection rights (*Doninger v. Niehoff* 2008). The court later held that officials were entitled to qualified immunity because they had not selectively disciplined the student (*Doninger v. Niehoff* 2011).

The court found that even if officials mistakenly thought that their actions were justified by the potential disruption that might

have ensued if they allowed the student to wear the T-shirt, since it was a reasonable error, they could not be liable. The court indicated that it would have forgiven such an error since the student's supporters were upset by her being denied the chance to run for office and her most recent post on her blog demonstrated her willingness to incite confrontations with educators.

The Indiana Supreme Court invalidated a student's being adjudicated delinquent for posting vulgar remarks about her school's policy of prohibiting body piercings on MySpace since she engaged in protected free speech by criticizing a government action with which she disagreed (*A.B. v. State* 2008). The court decided there was insufficient evidence proving that the delinquent had the requisite intent to harass, annoy, or alarm her former middle school principal.

Lower courts remain split over whether students can be disciplined for posting comments on social networking sites that threaten or are critical of educators. This divide is reflected by the fact that a federal trial court in Tennessee allowed educators to punish students for posting critical material on MySpace (*Barnett v. Tipton County Bd. of Educ.* 2009), whereas a federal trial court in Florida prevented officials from doing so with regard to student postings on Facebook (*Evans v. Bayer* 2010).

In a case from West Virginia, the Fourth Circuit affirmed that officials did not violate a student's First Amendment rights when he was suspended for postings on MySpace mocking a classmate. The court reasoned that once the student's words reached school, they would have been disruptive (*Kowalski v. Berkeley County Schs.* 2011).

Similarly, the Eighth Circuit upheld the suspension of a high school student in Missouri who used instant messaging to



communicate with a friend about his desire to bring weapons to school to harm others (*D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60* 2011). The court affirmed that insofar as the messages constituted “true threats,” they were not entitled to First Amendment protection.

In a state case, the New Hampshire Supreme Court affirmed that school officials could suspend a student for sending emails containing sexually explicit language to a principal and teacher under the name of a peer (*In re Keelin B.* 2011). Even so, the court determined that the student’s 34-day suspension was excessive.

Earlier, the Second Circuit reached a similar outcome in upholding a grant of summary judgment in favor of officials in New York who suspended a student for creating an instant-messaging icon depicting the

shooting of his teacher (*Wisniewski v. Bd. of Educ. Weedsport Cent. Sch. Dist.* 2007, 2008). The court chose not to address whether the

It is important to mandate that administrators thoroughly investigate reports within set time frames.

image was a true threat but concluded that insofar as the conduct occurred off campus, officials could discipline the student because his behavior could have materially and substantially interfered with school activities.

On the other hand, in two cases from Pennsylvania that it resolved on the same day, the Third Circuit reached the opposite result. The court affirmed that school officials violated the First Amendment rights of a student who was suspended for using his grandmother’s computer

to create a fake Internet profile of his principal on MySpace (*Layshock ex rel. Layshock v. Hermitage Sch. Dist.* 2011). The court observed that

officials lacked the authority to punish students for expressive conduct occurring outside of school that they considered to be lewd and offensive.

In the second case, the court agreed that officials violated the rights of an eighth grader who used her home computer to create a fake profile of her principal on MySpace, insinuating, among other things, that he was a sex addict and a pedophile (*J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.* 2011). The court explained that insofar as the student tried to keep the profile “private” so only her

friends could access it and it was so outrageous as not to be taken seriously, educators violated her rights because they could not reasonably have forecast the substantial disruption of, or material interference with, school activities due to the posting.

Recommendations

SBOs, their boards, and other administrators face significant challenges posed by evolving technology. Accordingly, it is imperative that they develop, implement, and revise policies aimed at setting parameters for acceptable student Internet use. In developing policies, education leaders should

- Work with their attorneys to ensure that policies are consistent with federal and state case law and statutes.
- Require students and their parents to sign receipts acknowledging that they have received copies of appropriate use policies at the beginning of each school year.
- Establish policies that specify that violations are punishable, and identify possible sanctions, including loss of privileges and suspensions for more serious offenses.
- Establish policies distinguishing in-school and out-of-school violations so they cannot be struck down as vague and overbroad (based on mixed results to date, disputes over the extent to which educators can discipline students for out-of-school use of the Internet that affects schools are likely to receive increased judicial scrutiny).
- Review policies annually, typically between school years rather than during or immediately after controversies, since this timing affords educators better perspectives (this approach also provides evidence that educators are doing their best to maintain safe, orderly schools while safeguarding the rights of all in school communities in the face of rapid legal, social, and technological changes).

Acceptable Use Policies for Students

Carefully written acceptable use policies

- Limit computer access for students to legitimate academic and instructional purposes.
- Specify that students and parents who refuse to sign acknowledgment of acceptable use policies or comply with their provisions will be denied access to district-owned technology.
- Clarify the educational missions of schools and delineate how accessing the Internet supports that mission (educators should use acceptable use policies as instructional tools to teach students about the positive uses of the Internet and technology while warning about hazards, such as contacting strangers or losing respect for others by accessing pornography).
- Are differentiated based on student age, meaning that they consider the ages and maturity levels of students who will be accessing technology.
- Include clear and unequivocal language indicating that use of technology can be restricted as long as computers, hardware, and software are purchased and maintained with board funds (by

clarifying ownership issues, school boards can maintain greater latitude in regulating access to and use of equipment).

- Address privacy and use limitations, such as preventing students from using school computers for non-school-related purposes while clarifying reasonable expectations of privacy, especially as it relates to sending and receiving messages.
- Make it clear that computers—or more properly, their hard drives—are subject to random checks for compliance whether accessed in school or from home computers linked to school servers.
- Indicate that filtering software is in use but that it is not foolproof (although such software has improved, it has still not reached the same level of sophistication as the sites schools seek to monitor, such as pornographic sites).

Policies on Harassment, Bullying, and Intimidation

Policies regulating harassment, bullying, and intimidation should

- Include clear definitions of harassment, bullying, and intimidation, as they put students on notice as to the types of intolerable behavior (the definitions should encompass verbal, written, and electronic communications that could lead to physical acts and

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gestures that cause physical or emotional harm, damage victims' property, place victims in fear of harm, create hostile environments, infringe on the rights of others, or create material and substantial disruptions to school environments).

- Prohibit all forms of harassment, bullying, and intimidation on the basis of race, ethnicity, national origin, religion, gender, sexual orientation, or disability.
- Make it clear that policies apply to activities that occur on school grounds, on property adjacent to schools grounds, at school-sponsored and school-related events and activities (whether on or off school grounds), at school bus stops, and on school busses.
- Include statements covering harassment, bullying, or intimidation of school personnel or students via the Internet, technology, or electronic devices, whether the devices used are owned or leased.
- Specify that off-campus behavior is punishable if it creates a hostile environment, infringes on the rights of victims, or creates material and substantial disruptions to the education process or school operations (policies should be carefully written so as not to be overly broad and are limited to areas in which educators have legitimate interests).
- Include provisions for age-appropriate instruction about preventing online bullying.
- Include mandates that all staff immediately report instances of harassment, bullying, or intimidation to designated administrators.

Courts consistently agree that educators are liable for deliberate indifference by failing to conduct proper investigations into incidents of harassment and bullying. It is important to mandate that administrators thoroughly investigate reports within

set time frames and to make it clear that incidents will be reported to law enforcement authorities when there is evidence that a crime has been committed.

Being Vigilant

The intersection of the First Amendment and the Internet has created a new world. Yet because technology continues to develop at a faster rate than the law, it may be years before the judiciary provides concrete guidance about how they can regulate off-campus cyberspeech.

In the meantime, SBOs, their boards, and others will have to remain vigilant as they seek to provide some clarity to the complex issue of student use of the Internet.

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