



Electronic Dispatch

School District Law Information Memo

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STUDENT INTERNET MISUSE— WHAT ARE THE LIMITS OF SCHOOL DISCIPLINE?

The educational potential of the Internet has made on-line access a common feature in many classrooms. In addition, the Internet has proven to be popular among students who use email, chatrooms and instant messaging to communicate with classmates and friends outside of school. Some students also use the Internet to display personal web pages, operate Internet-based businesses or to maintain on-line journals (known as weblogs or “blogs”).

For all the benefits of student Internet use, there have been some students whose use of the Internet has caused disruption in schools or resulted in discipline to the students. The novelty of the Internet, however, and the fact that it transcends traditional, physical boundaries, has made it difficult for some school officials to determine whether students’ off-campus Internet activity is subject to school discipline. This information memo will discuss the scope of schools’ ability to discipline students for off-campus Internet use.

Discussion

Traditionally, school officials have been permitted wide latitude to regulate or punish student conduct, especially conduct taking place when a student is at school, or conduct that could reasonably have an adverse or disrupting effect on the school. School officials have somewhat less latitude to regulate or punish student speech. See *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). School officials can punish student speech only when the officials reasonably predict, or the speech actually causes, a substantial disruption of appropriate discipline in the school. See *Board of Educ. of Monticello Sch. Dist. v. Comm’r of Educ.*, 91 N.Y. 2d 133 (1997); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

Students’ use of the Internet, however, can blur the distinction between speech and conduct. For example, if a student uses a non-school computer to replace a school district’s Internet homepage with a denunciation of the district’s proposed dress code, is this speech or conduct? More significantly, students’ use of the Internet can obscure the boundary between off-campus activity and on-campus activity. For example, a student email transmitted from an off-campus computer is read at school by a fellow student or a school official; is the email on-campus speech or off-campus speech? Following is a summary of the restrictions faced by school officials seeking to regulate or punish student Internet use.

School officials are permitted to punish students for Internet-related off-campus conduct that has a negative effect on the school. See *Matter of Coghlan*, 262 A.D.2d 949 (4th Dep’t, 1999). The off-campus conduct must, of course, have some nexus with the school. For example, a student who “hacks” into a school district computer system may be punished by the school district. See *Appeal of J.C. and P.C.*, 41 Ed. Dept. Rep. 14,723 (2002). Such off-campus conduct has an adverse effect on the school district’s equipment and is punishable by the school in much the same way a student’s on-campus vandalism or burglary would be punishable.

Public school districts’ ability to regulate or punish student *speech* is less expansive. (Officials of private schools, however, have more latitude to restrict student speech, because private schools are not state actors to which the First Amendment



applies.) The Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District* is generally cited for the proposition that "students [do not] shed their constitutional rights to freedom of speech or expression at the school house gate." Clearly, therefore, in developing student regulations and determining appropriate punishment for violations of such regulations officials must respect students' First Amendment rights.

While student speech generally is protected, courts recognize that there are limits to broad First Amendment protection. For example, student speech that communicates a "true threat" is subject to regulation and punishment by school districts. *Thomas v. Bd. of Educ. of Granville Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979). When a student left a computer message for another student who perceived the message as a threat, the student's punishment—based in part on the computer threat—was found to be appropriate. *Appeal of P.K.*, 41 Ed. Dept. Rep. 14,733 (2002).

School districts' legitimate regulation of "true threats" extends both on campus and off campus, including off-campus speech communicated over the Internet, provided there is a nexus between the threat and the school. The New York State Commissioner of Education has addressed school discipline for Internet-based threats in several cases. In two of the cases, students used off-campus, non-school computers to send bomb threats to school officials via email. The Commissioner of Education concluded that punishment of the students' threats was appropriate. *Appeal of Leahy*, 39 Ed. Dept. Rep. 14,264 (1999); *Appeal of B.B.*, 38 Ed. Dept. Rep. 14,113 (1999).

In another case, students used a non-school computer to send anti-Semitic email to several other students. The email did not contain an overt threat, but it directed readers to view a "profile" the sender had written in which the sender stated "Trench Coat [Mafia] is [coming] to your school Monday morning..." As with the directly emailed bomb threats, the Commissioner of Education determined that the email, in conjunction with the threatening profile, constituted a "true threat" which could be punished by the school district notwithstanding the student's First Amendment rights. *Appeal of Ravick*, 40 Ed. Dept. Rep. 14,477 (2000).

Courts in other states generally have reached similar conclusions with respect to students' threatening Internet communications. The consensus is that student communication transmitted from an off-campus computer is off-campus speech, but that it can be punished or regulated by school officials if it communicates a "true threat" and there is a nexus with the school. See, e.g., *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088 (W.D. Wash. 2001).

A school's right to regulate and punish student speech is less certain when the speech does not involve a "true threat" but instead consists of non-threatening speech, such as on-line gossip or other offensive speech. The issue to be resolved in such cases is whether the student speech "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509.

Frequently the target of school discipline is Internet gossip or speech that affects school activities, perhaps because it consumes the school-day attention of students or faculty or because it untruly tarnishes the character of a student or faculty member. Common sources of such speech are websites on which students (and others) can post comments about other students or faculty members. While it is possible for such sites to provide constructive criticism or encouragement of fellow students and faculty members, the anonymous (or pseudonymous) nature of the commentary makes it equally possible that they will be used to traffic in gossip and character assassination.

Whether non-threatening comments on such a site pose a material and substantial interference with school discipline is a fact-intensive inquiry. Most courts that have considered whether schools may impose discipline for non-threatening off-campus Internet speech (none of which are in New York) have been reluctant to find that such communication creates a substantial disruption of school discipline. See *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698

(W.D. Pa. 2002); *Kilion v. Franklin Regional Sch. Dist.*, 136 F. Supp .2d 446 (W.D. Pa. 2001); *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich, 2002); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp .2d 1175 (E.D. Mo., 1998). In these cases, the courts have recognized the disruption that can be caused by gossip and character assassination, but have not found facts showing disruption sufficient to restrict students' rights under the First Amendment. In a comparable (non-Internet) administrative decision, the N.Y. Commissioner of Education determined that essays that a student brought to school were "insulting, demeaning, and in extremely poor taste," but were not actionable by the school because they were not threatening. *Appeal of Michele M. Roemer*, 38 Ed. Dept. Rep. 14,037 (1998).

In at least one case there were facts that allowed the court to find that a student's website depicting violent and crude depictions of the student's teacher and principal did not pose a "true threat," but upheld punishment of the student because the website so disturbed the teacher that she could not return to school. *J.S. v. Bethlehem Sch. Dist.*, 807 A. 2d 847 (Pa. 2002).

When discipline is appropriate, it is important that school officials correctly identify the party subject to discipline. In New York, the Commissioner of Education has upheld punishment of a student who repeated (but apparently did not initiate) a rumor of a bomb threat and who failed to report the rumored threat to school officials. *Appeal of T.N.*, 42 Ed. Dept. Rep. 14,836 (2003). This appears to be the exception, however. In other states, even where there is a "true threat," a school district's reach is generally limited to the actual source of the threatening message. Students in a suburb of Seattle, Washington, created an Internet site outside of school and with non-school computers. The site included editorials published by the creators (who identified themselves only by a collective pseudonym) and also included forums allowing others to anonymously discuss matters of interest to the school's students. The site's creators offered to remove offensive comments if brought to their attention, but they did not screen each comment for offensive content. When school officials learned of a threatening message on the site, they cancelled classes and called the bomb squad to search the school. Before the anonymous message was determined to be a hoax, one of the site's student creators offered to assist authorities in determining the identity of the person who made the threat. In response, the school sought to suspend the student and require him to pay restitution for the costs of the cancelled school day. (The threatening message was later determined to have come from a non-student.) The student appealed his punishment to the school board, which ruled that it was improper to discipline the student for another person's speech. The board concluded that the student merely operated an unmoderated, off-campus discussion forum, and was not the party responsible for communicating what officials justifiably believed was a true threat. The First Amendment rights of the website's student creators were among the rights not left "at the schoolhouse gate."

School District Courses of Action

What can a school do when confronted with an Internet site used by students to post threatening or disruptive communications related to the school? Very likely the school will be unsuccessful if it seeks to force the site to stop operation. School districts and school officials lack any legal basis or authority to act against publishers of Internet sites that provide a discussion forum for students. Much like print publishers, the operators of such sites are protected by the First Amendment, provided they do not facilitate copyright infringement, advocate violence or engage in other criminal activity.

Schools may have more success in having offensive speech removed from a site or restricting access by the source of the offensive speech. Most Internet Service Providers (ISPs) have an acceptable use policy that limits subscribers' use of the ISP's network. Even speech that is not threatening and does not present a material and substantial disruption of school discipline may still be a violation of an ISP's acceptable use policy. If the speech is a violation of the ISP's policy,

a school district may convince the ISP that violation of the policy is sufficient basis to remove the offensive material or terminate the ISP account used to create the offensive speech, even if the ISP will not divulge the identity of the person behind the speech.

If the speech is threatening or disruptive and has a nexus with the school, schools can take disciplinary action against the source of offending speech, provided the source is a student. Disciplinary action requires identifying the source, which may be difficult given the anonymous or pseudonymous nature of most Internet communication. It may be possible to obtain identifying information from the ISP used to initiate or transmit the speech. This is likely to be successful only when the speech violates a criminal statute or gives rise to a civil claim (e.g., copyright infringement), because many ISPs have privacy policies that prevent release of their subscribers' identities unless there has been some violation of the law or the ISP has been served with a subpoena.

Where a student has engaged in threatening or disruptive speech that has a nexus with the school and the school succeeds in identifying the student, the school can administer discipline in accordance to its policies. The appropriate discipline in each case will of course depend on the facts of the offense.

Conclusion

Schools may take action against students for Internet-related speech only if the student communication constitutes a "true threat" and there is some nexus between the Internet-related speech and the school or if the facts clearly show a material and substantial disruption of school discipline. This will require identifying the student who is the source of the threatening or disruptive speech, which typically will require the cooperation of the student's ISP.

If you have questions about off-campus Internet activity that is affecting your school, contact one of our School Law or Internet Law attorneys to discuss the options for identifying and disciplining the source of the activity.

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