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

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could have anticipated
the effect of the Internet on
education, or of social net-
working sites such as Face-
book 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 behav-
or 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 pro-
vides 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 de-
ied a student the opportunity to run for offi-
cer on the student council because she posted
a vulgar blog about them on a Website inde-
pendent of the school. She also wore a home-
made 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 mis-
takenly thought that their actions were justi-
ﬁed 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 ac-
tion with which she disagreed (A.B. v. State
2008). The court decided there was insuf-
cient 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 mate-
rial 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 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

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

**References**


Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008), 642 F.3d 334 (2d Cir. 2011).


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