Internet Use Policies and Student Expression: What Should Administrators Know?

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Presentation Outline

This session will explore recent developments in First Amendment law relative to personal student web sites. It will also explore student created school web sites, effective Internet use policy construction, and guidelines for student web masters.

The Problem.

There is a gap in the knowledge between how much law administrators are exposed to and how much they are expected to know to be able to do their jobs effectively. Although the landmark cases on student expression are still the same relative to student's first amendment rights in schools, there are new situations to which to apply these cases and judges appear to be sending out a clear message to administrators on how to proceed in matters involving student rights and the Internet.

An Overview of Free Speech Rights in Schools

Pure Speech

The Bill of Rights was seldom referenced in pre-1969 constitutionality cases of student-contested school rules. The courts applied a *reasonableness* test to judge school polices. Judges upheld a school rule if they determined a reasonable relationship existed between the rule and some educational purpose (Fischer, Schimmel, & Kelly, 1999). This followed even if judges believed a rule was unwise, unnecessary, or unfairly restrictive of the rights of students or teachers. Since judges regarded school officials as the experts on education, they held that wide discretion should be tolerated in the creation of school policies (Fischer et al., 1999). The courts appeared reluctant to substitute their judgment for that of the school officials.

This hands-off trend by the courts changed with the decision handed down in the *Tinker v. Des Moines Independent School District* (1969) case. In *Tinker*, three students planned to wear black armbands as a symbol of protest against the Vietnam War. On the day before they were to wear the armbands in a silent protest, administrators, as a result of finding out about the plan, met and adopted a policy forbidding the wearing of such armbands. Although the students knew of the consequences, they wore the bands in protest anyway and were suspended. The Supreme Court held that the prohibition of wearing of the armbands violated the students' First Amendment rights.

In this landmark case the Supreme Court moved beyond the reasonableness test by ruling that students do not lose their constitutional rights to freedom of expression when they enter the schoolhouse. The *Tinker* ruling did not license students to say or write anything they wish but it did broaden the boundaries of student expression and clarify the need write good school policies, including Internet use policies. In considering the First Amendment rights of students, the courts will balance a school's need to maintain discipline against a student's right to free expression (Sperry, Daniel, Huefner, & Gee, 1998).

Lewd, Vulgar, and Indecent Student Speech

Fraser, a student at Bethel High School, delivered a speech nominating a fellow classmate for student-elected office. Approximately 600 high school students, many of whom were 14-year-olds, attended the school-sponsored assembly, which was part of an educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred to his candidate in terms of "an elaborate, graphic, and explicit sexual metaphor"(*Bethel v. Fraser,* 1986).

Despite suggestions from teachers not to give the "lewd" speech, Fraser delivered it anyway and was suspended and removed as a candidate for commencement speaker. The school had an extant policy clearly prohibiting the use of obscene language that materially and substantially interfered with the educational process. The Supreme Court upheld the disciplinary actions stating that officials have the authority to regulate vulgar, indecent, or obscene speech.

School-Sponsored Speech

In *Hazelwood School District v. Kuhlmeier* (1988), the U.S. Supreme Court upheld a principal's decision to remove two articles from a school-sponsored student newspaper. The Court held that where the school sponsors an activity in such a way that the speech bears the imprimatur of the school, the official has the right to restrict student speech (*Hazelwood v Kuhlmeier*, 1988).

In analyzing First Amendment rights of public school students, Sperry et al. (1998) connect the three landmark cases of *Tinker, Bethel*, and *Hazelwood* in this way:

> First, "vulgar or plainly offensive speech (*Fraser*-type speech) may be prohibited without a showing of disruption or substantial interference with the school's work. Second, school-sponsored speech (*Hazelwood*-type speech) may be restricted when the limitations reasonably related to legitimate educational concerns. Third, speech that is neither vulgar nor

> school-sponsored (*Tinker*-type speech) may only be prohibited if it causes a material disruption of the school's operation (p. 521).

The three landmark cases above clearly illustrate that school administrators are agents of the state and as a result are required to grant students their First Amendment rights to freedom of speech. On the other hand, they are also responsible for maintaining order in schools. The conflict between these competing responsibilities has been more pronounced in recent years (Goldstein, Gee, & Daniel, 1995).

These important Supreme Court cases present a framework for dealing with First Amendment free speech cases involving the rights of students and it extends to usage on the Internet. Any new cases involving free speech issues of students in schools will likely guide courts through an analysis that involves at least one of these important cases. This trend has been seen so far in cases that involve student's Internet speech. Although there are only a few cases that have been decided at this juncture, it appears that administrators can benefit more from employing this simple framework when considering punishment of students in school than being reactive to issues involving the Internet, free speech and school violence. This framework will be called the TBH framework throughout this paper.

Free Speech and the Internet

Although the *Tinker* speech took place on campus, it opened the door for students to express unpopular speech as long as that speech did not upset the smooth operation of school. The Supreme Court described the speech in *Tinker* as "pure speech" because it was " a silent, passive, expression of opinion, unaccompanied by any disorder or disturbance"(*Tinker*, p. 508).

This type of analysis becomes clearer in the case of *Beussink v. Woodland R-IV School District* (1998). In this case, Brandon Beussink, a high school student, was suspended for ten days because he posted his homepage on the Internet. On his web page he criticized the high school and its Web page. Beussink used vulgar language throughout his Web page. The Web page was created at his home on his computer. Beussink's friend viewed the page at his home and, after becoming angry with him on another matter, decided to show the page to school officials. As a result, the principal suspended Beussink for ten days, even though he did not show the page to anyone at school. The suspension caused Beussink, who had already missed 8 days of school, to be "dropped" a letter grade in each class pursuant the school's absenteeism policy and he, consequently, failed the semester. He filed suit.

Citing *Tinker*, the court found that Beussink's page did not materially and substantially interfere with the operation of the school (*Beussink*, 1998). The page was not created at school and it was not created using school resources. In fact, Beussink did not intend for his Web site to be viewed at school and he did not access it at school until asked by school officials. *Tinker* applies here in the sense that the speech was silent and passive prior to being accessed by another student.

The principal testified at the preliminary hearing that he was upset by the homepage and that he decided to discipline *Beussink* immediately after seeing the page and before investigating whether the page had interfered with the smooth operation of the

school (*Beussink*, 1998). Beussink was disciplined because of the content of his speech, not because that speech interfered with the smooth operation of the school.

Applying the TBH framework above, a principal may decide if a Web page is visited an inordinate amount of times and created on campus (perhaps due to obscene material on the page, such as in a *Fraser*-type speech situation), then the student can be punished. If it is not created on campus and it causes a material disruption in school, then the student may also be punished. From a school official's perspective, the punishment must not be meted out simply because of the content of the speech or expression.

In *Dustin Mitchell v. Rolla High School District No. 31*(Missouri) (1999), a junior honor student participated in a teens-only chat room five days after the Littleton, Colorado shooting. He responded "Yes" to the question of whether such a tragedy could happen at his school. Mitchell used the name of another student known for wearing a black trench coat. Mitchell was suspended for 10 days. The court found that his speech was protected and the suspension violated his First and Fourteenth Amendment rights. The court also found the school handbook to be constitutionally vague and overbroad. This confirmed a need in this case and others to write specific policies clearly defining the parameters of student conduct. School officials failed to provide adequate notice that the student's behavior was punishable. The court noted that school officials were allowed unfettered discretion of "off-campus misconduct" in disciplining the student. This court limited the authority of school officials to on campus expression. Administrators were clearly reacting to what they may have understood to be a potential Columbine situation. However, the decision to punish cannot go beyond the bounds of student free speech rights.

High school student Nick Emmett created a Web site at his home and posted it to the Internet (*Emmett v. Kent*, 2000). The page was entitled the unofficial home page of his high school and on it he posted at least two mock obituaries of friends and allowed visitors to vote on who would "die" next in this mock obituary list. Emmett was suspended for five days as a result of the content on his web site. The principal claimed that he was placed on emergency expulsion for intimidation, harassment, and disruption to the educational process, and violation of Kent School District copyright policy. Emmett sued for a restraining order enjoining the school district from enforcing the suspension. The court granted this injunction because it found that the school presented no evidence "that the mock obituaries or voting on this web site were intended to threaten anyone, did actually threaten anyone or manifested any violent tendencies whatsoever"(*Emmett v. Kent*, p. 1090). Hence, the school district was enjoined from enforcing the short-term suspension.

Beussink, Mitchell, and *Kent* all have several commonalities in addition to being free speech cases involving student rights, Internet and a perceived relationship to school violence. They all involved situations where the students participated in off-campus conduct that was protected speech and they were all punished for this behavior by an administrator who may have reacted differently if s/he had more knowledge about the relationship between student First Amendment rights and the Internet. Other cases that deal with Internet and speech include the following:

Mahaffey v. Aldrich, 236 F.Supp.2d 779 (E.D.Mich.2002)

Parents, on behalf of high school student, sued board of education and school director, after student was suspended for contributing objectionable material, including list of people he wished would die, to an Internet web site. A district court held that student's suspension violated his First Amendment rights because there was no proof of disruption to school by web site or that it was created on school property. Furthermore, the student's statements on the web site did not constitute threats, and thus speech was protected by the First Amendment.

Coy v. Board of Educ. of the North Canton City Schs., 205 F.Supp.2d 791 (N.D. Ohio 2002)

Student and parents brought action against school officials, school district, and board of education, alleging that the district violated his First Amendment rights when he was disciplined for accessing an unauthorized web site with the school computers. A U.S. district court held that the *Tinker* standard was the proper standard for the court to analyze student's claims and that there was no disruption in the student's viewing of the site. The conduct code catch-all section was constitutionally invalid on its face but sections of conduct code were not unconstitutionally vague. Like the *Mahaffey* court, this court concluded that the school officials were not entitled to qualified immunity.

Killion v. Franklin Regional School Dist., 136 F.Supp.2d 446 (W.D.Pa.2001)

A high school student brought § 1983 action alleging violations of First Amendment and due process rights by school district and administrators who tried to suspend him after he wrote a "top ten list" ridiculing a teacher. A U.S. district court held that the school district's failure to provide written notification of suspension of student, and reasons for it, was violation of his due process rights. The court also found that the student's list which was created off campus did not disrupt school environment or interfere with anyone's substantial rights, and the district's policy against abuse of teachers and administrators was unconstitutionally vague and overbroad.

Threats

In *Mahaffey*, the school district characterized the student's Internet speech as a threat. In crafting their arguments the district cited the *Lovell v. Poway* and the *Doe v. Pulaski* cases. These are from the 9th and 8th circuit decisions, respectively, and both courts have reached, not surprisingly, the same conclusion: threats are not protected speech. However, the *Mahaffey* court found that the speech was not intended to threaten anyone. A summary of these cases is provided below.

Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996)
Sarah Lovell, a high school student brought action against school asserting free speech

and due process violations resulting from three-day suspension for allegedly threatening to shoot counselor in connection with proposed schedule change. A United States district court held that student's speech was entitled to First Amendment protection. The Ninth Circuit Court of Appeals held that statement made by Lovell to school guidance counselor constituted a threat and as such was not protected by First Amendment.

Doe v. Pulaski, 306 F.3d. 616 (8th Cir. 2002)

An eighth grade student brought action against school district, claiming his expulsion based on writings he composed which described the rape and murder of a former girlfriend violated his First Amendment rights. The school district claimed the composition threatened the female student. A U.S. district court concluded that the composition was not a true threat, and voided the expulsion finding no proof that student communicated or intended to communicate a threat. The Eighth Circuit Court of Appeals affirmed. However, upon rehearing, the Court of Appeals held that student intended to communicate the content of the letter and that a reasonable recipient would have perceived the letter as a threat. Hence, the expulsion of student did not violate the First Amendment.

In J.S. v Bethlehem Area Sch. Dist., 807 A. 2d 847 (Pa. Sup. Ct. 2002)

In *J.S. v Bethlehem*, a middle school student and his parents sought review of school district's decision to permanently expel the student based on his off campus creation of an Internet web site containing threatening and derogatory comments about a teacher and the principal. The decision was affirmed and student and parents appealed. Eventually, the state Supreme Court held that the student's Internet web site did not constitute a "true threat," even though web site asked why teacher should die, showed picture of teacher's head severed from her body, and solicited funds for a hit man. The court found that the web site was crude and highly offensive attempt at humor or parody but did not reflect a serious expression of intent to inflict harm, despite offense taken by teacher and fear she experienced after viewing web site. However, speech expressed by student on web site, was "on-campus" speech with respect to the school environment and given web site's disruption of entire school community, expelling student did not violate his First Amendment rights. The web site caused the teacher to take time off from work because she was so distressed about its contents.

Mahaffey and J.S. v. Bethlehem tells us that threats delivered by students, including those delivered over the Internet, will likely be not protected. Each court made a special note in the analysis that the expression was found not to constitute a threat. .

In Florida, a threatening web site created by a high school freshman in Duval County caused a school district to examine its policies more closely. The web site targeted threats at a fellow female student. Other parts of the web site refer to violent acts without specific targets like, "I will kill you" and "I will peel off their skin with a dull, rigid

knife." The school district officials were unsure if they could discipline the student because the web site was created off campus. Some parents were angry after hearing the 13-year-old boy who created the web site was not suspended right away. The student was eventually suspended for two days and board members were left realizing the need for policy changes.

Mahaffey was initially expelled for the Internet speech he created off campus. The school recommended expulsion based on admitted and alleged violation of three categories of misconduct. He may have used the computers to create part of the speech in question. The categories were Behavior Dangerous to others, Internet Violations, and Intimidation and Threats. After a breakdown in communication at the hearing between the school director and the Mahaffey's attorney, the director re-classified the violation of in the category dealing exclusively with intimidation and threats.

The school district did not investigate the student's statement admitting that parts of the web site may have been created on campus, which possibly could have been a violation of the Internet use policy. Instead, the school officials attempted to classify the violation as threat. As stated earlier, the court disagreed that the expression constituted a threat. Even though the speech was not a threat the school could have prevailed if they could have proved that it was disruptive. However, the court found no evidence that site "substantially interfered with school's work." Hence, it concluded that school district violated the student's First Amendment rights. A well constructed set of Internet use policies may have provided the school director with more guidance on whether Mahaffey could be punished and if so, to what extent.

Internet Use Policies

Internet use policies are written rules and regulations that are often used in school settings to inform students and their parents about their rights and privileges associated with school computers use. They are clear rules and regulations and are often written for the school district by school board members. This is a general policy that often applies to all computer use by students in the districts. Internet use policies are usually written for students, but it is becoming necessary and wise to create such policies for teachers and administrators in schools. These polices usually provide some information about the consequences of violating the rules. This is usually at a minimum a suspension of computer privileges for some period of time.

Parents, and sometimes the students, are required to sign Internet use policy forms before students are permitted to use the school's computers. Policies often include what has come to be known as "netiquette", or etiquette when surfing the Internet. Guidance for construction of such policies can be found on the Internet. However, school officials should be sure they have some understanding of the Internet before adopting such policies.

Several school districts have implemented some form of Internet use policies.

Although there may be some school districts that have not gotten on board with this important policy implementation, they are clearly decreasing in number. As one might imagine, school district Internet use policies, like general policies, vary widely among school districts. Naturally some are better than others because they are constructed based on clearer guidelines and an enhanced understanding of what should be a part of these policies. Even though these policies vary in quality, there is some background knowledge necessary in the construction of Internet use policies and there are some elements that should be common in all policies. These are often in the form of do's and don'ts. [1] Of course, many Internet use policies that have been developed for schools do not contain information on monitoring email and Internet activities of school personnel. It is recommended that teachers and administrators, in addition to students, be required to sign such policies. Examples of Internet use policies will be shown as part of the presentation.

What Should Administrators Know

Creation of Policies for Students

Vague and Overbroad

In *Flaherty v. Keystone Oaks Sch. Dist.,* 247 F.Supp.2d 698 (W.D. Pa. 2003), parents brought action against school district on behalf of their son, alleging that certain policies in school's student handbook were unconstitutionally vague and overbroad in violation of First and Fourteenth Amendments and the state constitution. The district court held that the breadth of handbook policies relating to discipline, student responsibility, and technology were overreaching in violation of students' free speech rights and were unconstitutionally vague in definition and as applied; the court also found that the overbroad and vague handbook policies did not geographically limit school official's authority to discipline expressions that occurred on school premises or at school-related activities, thus violating students' First Amendment free speech rights. Policies should not be vague and overbroad.

Relevant Policies

In *Coy*, the court noted that while the district had initially disciplined the student for the Web site's content, it now argued that the discipline was for accessing the site at school. While the site's content was crude and juvenile, the court found that it contained no obscene material and that there was evidence that the student was viewing the Web site in a way that drew almost no attention himself. As a result, school officials were attempting to discipline him for the content of the site. The court made a note that if the district could show that it actually expelled the student for viewing the site in violation of the school Internet policy, it might still prevail in later court proceedings before a jury. Relevant policies can make a difference.

[1] Philip T.K. Daniel, *The Electronic Media and Student Rights to the Information Highway*, 121 Ed. Law. Rep. 1 (1997).

Qualified Immunity

The *Coy* court denied a motion for qualified immunity by the superintendent and principal, who argued that the law was not clearly established on the issue of student Web sites, since it has never been ruled upon by the U.S. Court of Appeals for the Sixth Circuit. The court disagreed, holding that it is not necessary that there be an existing case law precedent to establish a constitutional right. The court found that *Tinker had* been applied by the Sixth Circuit in numerous cases and applied to this case. The student's speech rights were clearly established, so it was appropriate to deny immunity to the administrators.

The *Mahaffey* court also held that defense of qualified immunity was not available to school director, who was sued in her official capacity. The court also held that the student's due process rights under the Fourteenth Amendment were violated when he was suspended for one semester without being afforded due process rights provided for in school district's code of conduct. Recall that this student had contributed objectionable material to a web site off campus. Immunity may not be available to administrators because this is a relative new area First Amendment law. Courts are stating that *Tinker* applies and that administrator should be aware.

Administrators should create general Internet Use Policies. Students have started to create web sites as part of web page development classes. Sometimes students are given small amounts of space on web servers to create their own web pages. Policies should encompass this activity also. Administrators should be mindful that the Internet use policies they create are not vague and overbroad. The construction of any school web page must remain an educational endeavor. Much like the case of *Hazelwood*, school officials should approve all content that goes on sites before it is posted to the web. If the language in polices is worded such that school maintains ownership, there will likely be less confusion about who controls the content of the web page.