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Safe and Responsible Use of the Internet: A Guide for Educators

Nancy E. Willard, M.S., J.D.

Responsible Netizen Institute
474 W 29th Avenue
Eugene, Oregon 97405
541-344-9125
541-344-1481 (fax)
Web Site: <http://responsiblenetizen.org>
E-mail: info@responsiblenetizen.org

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Part III. Legal Issues – Internet Use in School

7. Student Speech

It must be recognized that students do not shed their constitutional rights on the school district’s onramp to the Information Superhighway¹.

Overview of Issues

The issue of students' rights to free speech in the material transmitted through the Internet will arise in a number of ways:

¹ *Tinker v. Des Moines*, 393 U.S. 503 (1969) (Slightly restated)
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- Student speech in public, discussion group messages.
- Student speech in private e-mail messages.
- Student speech posted on a district web site, including material posted in classroom sections, the school newspaper, and, if allowed by the district, material posted on an individual student web page or on an extracurricular organization web page.
- Student speech posted on another web site that has been accessed through the district system.
- Student speech that pertains to the school, teachers, or other students and that appears on a personal web site or is transmitted through personal e-mail account.

Pre-Internet Legal Decisions

There have been a number of Supreme Court cases addressing student's First Amendment speech rights. Three of these cases provide the greatest guidance for educators in addressing issues of student speech on the Internet. The cases are: *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*², *Bethel Sch. Dist. v. Fraser*³, and *Hazelwood School District v. Kuhlmeier*⁴.

In *Tinker*, school officials had disciplined students for wearing black arm bands to protest the war in Vietnam. The standard established in *Tinker* was:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition can not be sustained⁵.

Subsequent court cases that addressed student underground publications, for example, *Thomas v. Board of Education*⁶, have applied the *Tinker* standard to such publications. In *Thomas*, students created a newspaper that contained sexually related articles and parodied several school officials. The newspaper was sold off-campus. The students were punished. The court ruled that such punishment was inappropriate. The court's ruling was based on the "supposition that the arm of authority does not reach beyond the schoolhouse gate."⁷ The court indicated that it was not appropriate for school officials to attempt to restrict free speech in the general community "where freedom accorded expression is at its zenith."⁸ The court did indicate that school officials

² 393 U.S. 503 (1969)

³ 478 U.S. 675 (1986)

⁴ 484 U.S. 260 (1988)

⁵ *Id.* at 509

⁶ 607 F.2d 1043 (2nd Cir. 1979)

⁷ *Id.* at 1044.

⁸ *Id.* at 1050.

were entitled discipline students if the off-campus speech "incites substantial disruption within the school from some remote locale."⁹

In *Fraser*, the Supreme Court found in favor of school officials who disciplined a student whose speech before a school assembly included sexual references. The Court distinguished between the purely political speech in *Tinker* with the student's vulgarity, and held that it was within the ambit of school officials' authority "to prohibit the use of vulgar and offensive terms in public discourse."¹⁰ Justice Brennan's statement in his concurrence in *Fraser* is particularly relevant to the present discussion. Brennan noted, "(I)f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."¹¹

The issue involved in *Hazelwood* was a principal's decision to remove several articles from publication in the school newspaper. Here, the Court stated:

School facilities may be deemed to be public forums only if school authorities have 'by policy or practice' opened those facilities 'for indiscriminate use by the general public, or by some segment of the public, such as student organizations.' If the facilities have instead been reserved for other intended purposes, 'communication or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions of the speech of students, teachers, and other members of the school community¹².

Since the district's Internet system has been established for an educational purpose, it should be considered a limited forum, similar to a school publication where the school has maintained editorial control. This conclusion is strengthened by the fact that every user of the district system will be identified by the district domain name that appears in their address and, therefore, all speech that originates from the district system, even private messages, will bear the imprimatur of the district.

Thus speech that occurs on or through the district's Internet system would be governed by the standards set forth in *Hazelwood*. However, districts that provide a significant amount of open access -- allowing their students to indiscriminately use the system in a manner similar to general public Internet access -- may find that they have established a public forum for their students. In such cases the ability of the district to govern student speech may be more limited. Such districts may need to establish requirements that relate specifically to school-use of the Internet, and other requirements that govern when the internet system is used for open access.

Student speech that occurs on personal web sites clearly would be considered speech that occurs in a public forum, thus the ability of the district to intervene or discipline a student appearing on a persona web site or transmitted through a personal e-mail account is extremely limited. The standards set forth in *Tinker* are the standards that would apply to such speech.

⁹ *Id.* at 1052. n. 17.

¹⁰ *Id.* at 683.

¹¹ *Id.* at 688.

¹² *Id.* at 267 (citations omitted)

Student Speech involving the District System

Legal Standards

In *Hazelwood*, Court ought to craft a standard for the application of the First Amendment in "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonable perceive to bear the imprimatur of the school."¹³ The standard expressed by the Court was:

Educators are entitled to exercise greater control over [activities that may be characterized as part of the school curriculum] to assure that the participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speakers are not erroneously attributed to the school. Hence a school may ... 'disassociate itself' ... not only from speech that 'would substantially interfere with its work ... or impinge upon the rights of other students but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for student speech that is disseminated under its auspices¹⁴.

Reasonable Education-based Restrictions

The educational-based restrictions that would appear to be appropriate for a district to impose related to the use of the Internet by students could include:

- Criminal speech and speech in the course of committing a crime. Threats to the president; instructions on breaking into computer systems; child pornography; drug dealing; purchase of alcohol; gang activities; etc.
- Speech that can cause harm to another. Online harassment; personal attacks, including prejudicial or discriminatory attacks; or false or defamatory material about a person or organization.
- Speech that is inappropriate in an educational setting or violates district rules necessary to maintain a quality educational environment. Restrictions would include:
 - Inappropriate language. Obscene, profane, lewd, vulgar, rude, disrespectful, threatening, or inflammatory language.
 - Dangerous information . Information that if acted upon could cause damage or present a danger of disruption.
 - Violations of privacy. Revealing personal information about others.

¹³ *Id.* at 271.

¹⁴ *Id.* at 271-272 (citations omitted)

- Abuse of resources. Inappropriate use of district group distribution lists through "spamming," chair letters, etc.
- Copyright infringement or plagiarism. Transmission of material in violation of copyright or for the purposes of plagiarism.
- Violations of personal safety. Revealing personal contact information or engaging in communication that could place the student in personal danger.
- Educationally- relevant restrictions. The district may also require that student publications meet a variety of standards related to adequacy of research, spelling and grammar, and appropriateness of material for placement on a school web site.

It is important to understand that public officials cannot limit speech based on viewpoint discrimination. *Hazelwood* did not address this issue directly, but the restriction against viewpoint discrimination is a long-standing First Amendment standard. One of the core functions of free speech is to invite dispute. For example in *Terminiello V. City of Chicago*¹⁵, the Court states: "It may indeed serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.¹⁶" There is no suggestion in *Hazelwood* that the Court was opening the door for school officials to exercise control of student speech based on their disagreement with the opinions being expressed. Indeed this has been the holding of several Circuit Court opinions interpreting *Hazelwood*, e.g. *Searcy v Harris*¹⁷.

As discussed in "District Liability Related to Copyright and Harmful Speech," the district can potentially be held liable for material posted by a teacher or student that harms another. For this reason the district web site management approach outlined in that chapter is recommended.

An educational approach is also recommended both to address concerns of speech occurring on or through the district's Internet system, as well as for speech occurring off-campus, as will be discussed below. If the Internet is providing the vehicle for all people to be publishers, then it becomes necessary for all people to recognize the boundaries between responsible speech and harmful speech. These issues simply must be incorporated into school curriculum. The Student Press Law Center has some excellent materials for student journalists that specifically address the issues related to underground publications and online publications¹⁸. However, consideration of these issues should not be limited to students with an interest in journalism.

It is also advisable to teach students how to engage in effective online advocacy without crossing the line to harmful speech. There are responsible and effective ways to challenge authority or challenge the actions of others on the Internet. Students can be challenged to consider how

¹⁵ 337 U.S. 1, (1949)

¹⁶ *Id.* at 4

¹⁷ 888 F2d 1314 (1989)

¹⁸ URL: <http://www.splc.org>

Mahatma Gandhi or Martin Luther King would have approached the creation of an online protest web site.

Off Campus Speech

Legal Standards

The *Tinker* case provides the legal standard that has been applied to incidents involving student speech that is not made using school technology facilities, but involves comments made about the school, teachers, or other students. The speech may occur on student personal web sites or through personal e-mail accounts. The standard established in *Tinker* was:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition can not be sustained¹⁹.

Cases Involving Off-Campus Student Speech

There have been six reported cases where the issue of school discipline of students for material posted on the Internet that related to the school but was not posted using district Internet facilities. In all but one case, the district lost. In some cases the damages were significant. Each of these cases will be presented so that readers can gain a better understanding of the dynamics of this issue.

O'Brien v. Westlake City Schools of Education²⁰

A high school student created a web site, entitled "raymondsucks.org," which insulted his band teacher. The school administrator imposed a 10-day suspension that resulted in a failing grade in band and lowered grades in other classes. The student brought a lawsuit and was granted a temporary restraining order. The School District ultimately settled the case by agreeing to pay the student \$30,000, expunging the suspension from his record, and providing a letter of apology.

Beussink v. Woodland R-IV Sch. Dist.²¹

A web site was created by a high school student that was extremely critical of the school administration and used vulgar language. The school suspended the student for 10 days. The principal testified that the discipline was a result of his dislike of the site's content, as opposed to any substantial disruption at the school. The Court noted the tensions between the freedom of speech and the ability of schools to determine discipline necessary for an orderly learning environment. In this case, at least, the "public interest is not only served by allowing [the student's] message to be free from censure, but also by giving the students ... this opportunity to see the protections of the United States Constitution and the Bill of Rights at work."²² Applying

¹⁹ *Id.* at 509

²⁰ No. 1:98CV 647 (E.D. Ohio 1998).

²¹ 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

²² *Id.* at 1182.

the *Tinker* standard, the court concluded that "while speech may be limited based on a fear of disruption, that fear must be reasonable and not an undifferentiated fear of disturbance" and that "(d)islike or being upset by the content of a student's speech is not an acceptable justification for limiting student speech."²³

*Emmett v. Kent Sch. Dist. No. 415*²⁴

An honor student created a web site entitled the "Unofficial Kentlake High Home Page." This web site contained a statement disclaiming school sponsorship and noted it was for entertainment purposes only. The site had two mock obituaries of the student's friends. The news media picked up on the story and reported that the student's site contained a "hit list." The student immediately removed the page in response to the story. The school responded with fast-tracking expulsion, and then backtracking to a 5-day suspension, and a lawsuit was filed by the student. The Court found the school officials had failed to show that the web site was "intended to threaten anyone, ... or manifested any violent tendencies whatsoever."²⁵ Utilizing the *Tinker* analysis, no substantial disruption was found. The School district later settled with the student.

*Beidler v. North Thurston Schl. Dist. No. 3*²⁶

In this case, the student's web site targeted a school administrator, showing the individual at a Nazi book burning, drinking beer and spraying graffiti. Emergency expulsion was initiated. The student transferred for the balance of his junior year. The student won a temporary restraining order. The Court held that even if the speech were defamatory, that would not justify imposing discipline here, as this was a case based on a violation of the First Amendment, not on defamation. The School District agreed to pay the student \$62,000.

*J.S. v. Bethlehem Area Sch. Dist.*²⁷

An 8th grader's web site included derogatory comments about his math teacher, including: "Why Should She Die?" and "Take a look at the diagram and the reasons I gave, then give me \$20.00 to help pay for the hitman." The student voluntarily removed the web site a week after the principal learned of it. The school officials contacted the FBI, but took no action against the student during the remainder of the school year. During the summer, officials decided to impose a 5, then a 10-day suspension, which was transformed into expulsion proceedings. The student then brought a lawsuit, appealing the expulsion. The court based its decision on the *Tinker* standard and determined that off-premises behavior could be punished, if the school could establish that "the conduct materially and substantially interfere[d] with the educational process."²⁸ The majority thought this was so, given that students discussed the web site while at school and school-sponsored activities. The statements on the web site were also considered by the majority to be a threat. They noted that the teacher who was the subject of the web site was unable to finish the school year and took a medical leave the following year. The dissent argued

²³ *Id.* at 1183.

²⁴ 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

²⁵ *Id.* at 1090.

²⁶ No. 99-2-00236-6 (Wash. Supr. Ct. July 18, 2000).

²⁷ 757 A.2d 412 (Pa. Commw. 2000).

²⁸ *Id.* at 421.

that the school officials did not believe the statements were a threat and that only true threats should not receive First Amendment protection²⁹.

Important additional information about this case is that the teacher also filed a lawsuit against the student and his parents. The suit was based on libel and invasion of privacy. The court dismissed the libel suit, but the teacher prevailed on the invasion of privacy claim and was awarded \$500,000.

*Killion v. Franklin Reg. Sch. Dist.*³⁰

A high school student was suspended for writing an e-mail that derided the school's athletic director. The e-mail addressed the teacher's weight and sex life. Another student reformatted the e-mail and distributed it at the school. The court examined the case in the context of *Tinker*, *Fraser*, and *Hazelwood* as well as the recent student web site cases of *Emmett*, *Beussink*, and *Bethlehem*. The court determined that the school district would need to establish that there was a "substantial disruption" before it could take action against someone for off-premises speech

The Court noted that the school district could not identify any actual disruption at the school that resulted from the e-mail. There was "no evidence that teachers were incapable of teaching or controlling their classes ... [the e-mail] was on school grounds for several days before the administration became aware of its existence, and at least one week passed before [it] took any action."³¹

The school district argued that the speech could still be punishable, under the *Fraser* analysis, as "lewd speech." The Court agreed with the school district that some of the speech in the student's e-mail was lewd, but because the student was not responsible for bringing the speech to school, the school district could not discipline him for it. The court relied on the statement in Justice Brennan's concurrence in *Fraser*, noted above, that "if respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."³²

Killion will likely become the leading case in this area. The court provided an excellent analysis of the issue in light of *Tinker*, *Fraser*, and *Hazelwood*, as well as the more recent student web site cases. The court further addressed the specific evidence that school officials would need to demonstrate to establish that off-campus speech had created a substantial disruption in school.

In light of these decisions, unless there is actual substantial disruption caused by off-campus, online student speech, school officials do not have the authority to respond to such speech by disciplining the student in the traditional manner. However, such speech may cause harm to members of the school community. It is therefore necessary to consider other strategies to prevent such harmful speech from occurring and to intervene or respond in a manner that is legally sustainable if such speech occurs.

²⁹ *Id.* at 426-29.

³⁰ 136 F. Supp. 2d 446 (W.D. Pa. 2001).

³¹ *Id.* at 455.

³² *Id.* at 456 (quoting *Fraser*, 478 U.S. at 688).

Education and Intervention Strategies

Education

The legal standards related to civil liability related to harmful speech, defamation and invasion of privacy, are addressed in "District Liability Related to Copyright and Harmful Speech" Additionally, there is the potential for criminal liability for the dissemination of speech that meets the standards of harassment, creation or dissemination of obscene material, creation/dissemination of child pornography, and provision of sexually explicit material to a minor.

As noted above, providing students with education about responsible speech, harmful speech, and criminal speech is highly recommended. The more students understand the consequences of harmful speech and criminal speech, the less likely they may be to engage in such speech.

Providing parent education can probably be an even more helpful strategy to address off-campus harmful speech and criminal speech. Parents should be more fully aware of the potential of personal liability or criminal actions that may stem from the harmful or criminal speech posted on the Internet by their child. Also, parents need to understand how they might respond if their child is the victim on harmful online speech.

Intervention

The fact that free speech standards may place restrictions on the use of the traditional school disciplinary response should not prevent a school official from responding in a variety of other effective ways.

- Remember that the perpetrator of online harmful speech may be the victim of on-campus bullying or harassment by other students or may be feeling abused by school staff. In some cases, the online harmful speech may be a disguised cry for help. Seek to see through the harm to the pain that is being experienced by the student.
- Distinguish between legitimate, yet discomfort-provoking, protest speech that is challenging authority and truly harmful speech. Protest speech can provide an excellent "teachable moment" for school administration. Such speech provides the ability to see the school through the eyes of a student or students and can provide valuable insight into the quality of the school environment. If a school is experiencing significant difficulties with harmful online speech by students, this should be viewed as a clear indicator to the school that the quality of the school environment is not of optimal quality.
- Take prompt actions to seek to have truly harmful speech removed from the Internet. Most Internet Information Service Providers have policies for web sites that restrict the publication of harmful speech. The Service Providers have strong incentives to not be associated with harmful speech and most will promptly remove a web site that contains such speech. However, prior to having the speech removed, it would be prudent to retain a copy of the web pages as evidence.

- Contact the parents of the student and request their assistance in resolving the matter. Many parents are not fully aware of the actions of their children on the Internet. Approach parents with the assumption that they are unaware, will be disturbed by the speech, and will be your ally in addressing the matter proactively with their child. If the parents are resistant, it may be appropriate to suggest to the parents that they contact an attorney to determine their potential liability to the victim for the harm caused by their child's online speech.
- Support the victims of such speech to seek appropriate resolution. This may include advising the victim and his/her parents or a staff member about possible legal resources. Additionally, the school can be a conduit of communication between the perpetrator, victim, and parents. For example, the school could be the vehicle of a heart-felt communication by the victim regarding the hurt and harm caused by the online materials and could also be a vehicle for a letter of apology from the perpetrator to the victim.