



Technology – The Good, The Bad and The Ugly

By Michele V. Handzel, General Counsel

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Several middle school students were buying, selling and trading inappropriate photos and videos of fellow students, including some images of naked girls. Teachers discovered the images on a student's iPod Touch. School officials in Montgomery, Maryland are currently working through these very facts. No district is immune from issues of inappropriate technology use by today's tech-savvy students who have also been referred to as "digital natives." (A previous newsletter) described the no boundaries approach of modern day bullying – relentless harassment and taunting through texts and online posts.

There is no one right response – cases are fact-specific. School officials, prosecutors, courts and state policymakers are grappling with this new frontier of cases arising from students' online postings and text messages which directly affect other students and/or school personnel.

"Sexting" Nightmares

Over 20 percent of teenagers engage in "sexting" -- a growing phenomenon among teenagers. See "Sex and Tech" survey, <http://www.thenationalcampaign.org/sextech/>. Sexting is the transmission of sexually explicit text messages and/or photographs sent via the cell phone.

"Sexting" made national headlines in 2008 when high school senior Jessica Logan committed suicide after months of relentless taunting after peers disseminated semi-nude photos of her. Her parents have since commenced a lawsuit against the school district and the school resource officer for negligence in the handling of the matter. See "Lawsuit Filed Over 'Sexting' Suicide", Cincinnati.Com, May 12, 2009.

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What can School Districts do to Address Sexting?

School districts are increasingly either adopting a specific policy prohibiting sexting or including the prohibition in its general policy governing use of electronic devices during the school day.

The American Association of School Administrators (AASA) recommends raising student awareness of the dangers of sexting, training of staff and school board members, and distributing information on school policies through newsletters and other correspondence.

Superintendents are advised *never* to transmit or download any digital images as part of a sexting investigation. In 2009, an assistant principal was charged with possession of child pornography and related crimes after he transferred an explicit photo to his office computer to preserve evidence as part of a student “sexting” investigation. See “My Students. My Cell Phone. My Ordeal.” *The Washington Post*, April 19, 2009.

Social Media: Student Discipline for Inappropriate Online Postings – A Recent Decision

What happens when a student posts angry comments about a teacher on a Facebook page? Can a school district require a student to remove comments posted online?

In *Evans v. Bayer*, 2010 U.S. Dist. Lexis 12560, a federal district court in Florida cleared the way for a former student to pursue a lawsuit asserting her high school principal violated her First Amendment rights by suspending her for complaining about a teacher on Facebook.

The court denied the principal’s motion to dismiss, allowing the former student to proceed with her challenge to the discipline imposed by the principal. Katherine Evans, a high school senior created a group on Facebook entitled “Ms. Sarah Phelps is the worst teacher I’ve ever met.” The group’s purpose was to provide a platform for students to express their dislike for Ms. Phelps.

Katherine posted the following: “*Ms. Sarah Phelps is the worst teacher I’ve ever met! To those select students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her insane antics: Here is the place to express your feelings of hatred.*”

Katherine posted a photograph of Ms. Phelps. At no time did she post a threat of violence. Katherine created the group and posted the comments on her home computer after school hours. She removed the page two days later.

Ms. Phelps never saw the page, and school activities were never disrupted by the page. The principal became aware of the posting after it had been removed. As a disciplinary measure, the principal suspended Katherine for three days and forced her to move from her advanced placement classes into lesser-weighted honors courses.

On-Campus Speech Not Subject to Full First Amendment Protection

It is well-established that while a student’s constitutional right to freedom of expression is not extinguished within the halls of a school building, the rights are curtailed and not as extensive as in other settings.

In *Tinker v. Des Moines Independent Community School District*, the seminal case pertaining to student speech, the Supreme Court held that to justify suppression of student expression, the student’s activity must “materially and substantially disrupt the work and discipline of the school.”

More recently, in *Morse v. Frederick*, 551 U.S. 393 (2007), the Supreme Court recognized that off-campus student speech could still be subject to the *Tinker* standard, which means that depending on the circumstances, off-campus speech may be subject to suppression.

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Are Online Posts Considered On-campus or Off-campus Speech?

When are student internet postings entitled to full First Amendment protections and when do they receive limited protection under the *Tinker* standard? The answer is not clear. Courts, as in *Evans*, have weighed factors such as:

- Did the student access the on-line content on a school computer?
- Did the student show, inform or encourage other students to view the site or postings?
- Was the online content aimed at a random audience or at those directly connected with the school district (i.e. students, personnel)?
- Did this behavior disrupt the work and discipline of the school?

In *Evans*, the court weighed that Katherine's postings were made off-campus on her home computer, she did not access the Facebook site on-campus, her postings were no longer accessible when the principal and teacher learned of it, and they did not cause any disruption on campus. As a result, the court held that her speech was off-campus and entitled to full First Amendment protections.

Is the Online Posting Protected Speech?

Even if speech is considered to be made off-campus, it is not always entitled to full First Amendment protection. Words uttered to incite violence and obscenities may be considered unprotected speech in certain cases. However, in *Evans*, the court found that Katherine's speech was constitutionally protected – "was an opinion of a student about a teacher that was published off-campus, did not cause any disruption on-campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior."

The Good News

NYSED is working with the field, to address these emerging issues. See generally:
http://www.emsc.nysed.gov/technology/internet_safety/In_SafeUsage.html

The case law on social networking and student use of technology is just evolving. Superintendents must continue to work with their respective boards of education and with school district counsel to develop and implement policies that will address these emerging issues, and to provide training for school administrators and staff, including immediate notification of parents and law enforcement.

Check with your state's education department to determine what resources and guidance they are providing.

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