TARGETSOLUTIONS

10805 Rancho Bernardo Roac
Suite 200
San Diego, CA 92127

The Internet and School Discipline: Old Rules Applied to New Technology

By Carl Fessenden

The way we communicate has changed. When I was in high school, if I had a problem with a teacher or a school administrator, I would typically discuss it with a friend or group of people. But it never went beyond a relatively small group of individuals. It was a rare occasion that a student would come onto campus and express themselves in a way that would wind up leading to discipline.

In today's world, if a kid has an issue with a teacher or school administrator, they can post it on their Facebook account for everyone to see. The question for school administrators is this: Can, or should, a school be able to discipline a student for something posted on the Internet? It's a difficult legal question.

We must recognize we are in the midst of unprecedented change in technology and the way we communicate. Dissemination of information is increasing at an exponential rate. Think about this for a moment: It took 38 years for radio to reach 50 million users. For TV, it took 13 years. For Internet use, it took only four years. Currently, Facebook has 600 million users. In December of 2009, Twitter processed more than one billion tweets (almost 40 million a day).

Technology is changing at a pace too fast for our legal system to adequately address. Courts are applying First Amendment principles that were developed long before the advent of the Internet. There are legitimate questions whether those old rules are adequate – or even appropriate – to address the way we currently communicate.

So, can a school discipline a student for something posted on the Internet? Imagine you're a principal at a school, and you found that a student created a "parody" using your name and had your character give the bogus answers on their MySpace page. It went something like this:

Question: What's your Birthday?
Answer: "Too drunk to remember."

Question: Are you a health freak?
Answer: "Big steroid freak."

Question: In the past month, have you smoked?
Answer: "Big blunt."

There was more, but you get the idea. What would you do if you were in this position? (It should be noted that in California, a law has been passed that makes impersonating another person online a criminal offense).

10805 Rancho Bernardo Roac
Suite 200
San Diego, CA 92127

To further the legitimate interest of the school in educating its students, can the school undertake action to restrict such speech? Is it enough that there is only a threatened or possible effect on the school environment? Does it matter that the fake MySpace profile was created at home? Should the school consider, or does it matter, whether the profile is an attempt at humor? If it is offensive to a "reasonable person," is it a basis to discipline? These are all legitimate, but very difficult, questions with which the courts are currently struggling.

The ability to restrict a student's First Amendment rights is very well established. In 1969, the Supreme Court very clearly stated that students (and teachers) do not shed their First Amendment rights at the school house gates.

The Supreme Court also recognized that the school has a legitimate interest and obligation to educate its students and to maintain an appropriate learning environment. Balancing those interests, the Supreme Court found that schools may not restrict students' speech unless the speech "materially and substantially" interferes with the operation of the school.

Since 1969, courts have struggled with the application of the "materially and substantially" interference test. Recently, the Supreme Court has concluded this test is not the only basis to restrict students' speech. A school may also limit speech that may reasonably be regarded as encouraging illegal drug use, even if there is no evidence that that speech disrupted the school.

Other courts have reached similar conclusions, and found that schools, whether or not there is evidence of "substantial disruption," may limit speech that is sexually inappropriate (vulgar, lewd and offensive) or advocates violence.

The best example of the difficulty courts are having with this issue is found in the United States Third District Court of Appeals. There, the same court, looking at relatively similar facts, reached two very different conclusions. In both cases, a student created a profile on a social media website concerning a school administrator that contained unflattering – and some would say vulgar – statements about the principal.

In both cases, there was very little evidence the posting created any level of disruption at the school. In both cases, the fake profile was created off-campus. In one case, the court concluded that off-campus speech that reasonably threatens to cause a substantial disruption does not need to meet any geographic limitations, and the school is well within its rights to discipline such lewd, vulgar and offensive speech, especially when it undermines the authority of a principal. In the other, the court found the school did not have the right to restrict the student's speech. As stated in that case: "It would be an unseemingly and dangerous precedent to allow the state in the guise of school authority to reach into a child's home and control his/her actions there to the same extent that they could control that child when he/she participates in school-sponsored events."

So, what are school administrators to do?

Disciplining a student could create a long legal battle over First Amendment rights. Failing to act, could lead to a legal action over the school's failure to address harassment between students.

10805 Rancho Bernardo Roac
Suite 200
San Diego, CA 92127

Understanding the contours of the law and recognizing the issues created by communication over the Internet will help the school make good decisions.

In the end, the school cannot forget that its obligation is to educate its students. That obligation is clearly recognized by the courts as extremely important, and a legitimate basis for which to restrict students' speech.

Ultimately, our Supreme Court will have to confront an important social question about electronic communication and its effect on the school's ability to educate its students. Stay tuned, or more aptly, stay connected.

About the Author

Carl Fessenden represents clients throughout the state of California in a variety of forums, including the Superior Court, the Court of Appeals, the U.S. District Court for the Northern and Eastern Districts, and the Ninth Circuit Court of Appeal. He represents all types of public entity clients in a variety of cases including harassment, discrimination, and retaliation claims; civil rights; constitutional issues; labor issues; whistle blower claims; contract actions; and dangerous condition of public property. Carl handles cases from pre-litigation, trial and through appeal. Fessenden graduated with majors in Political Science and Communications from the University of California, San Diego, in 1988. He graduated from University of the Pacific, McGeorge School of Law in 1992. Mr. Fessenden joined Porter Scott in 1994 and has been a shareholder since 2000.