



Students and Social Networking

BY LYNN ROSSI SCOTT

You may be one of the 750 million people currently using Facebook.¹ If not, know that social networking on sites such as Facebook, MySpace, and LinkedIn allows individuals to be creators of their own Internet-based pages, link their pages to multitudes of “friends,” post and share comments and photos, browse others’ pages, link to other website content, and share personal information such as relationship status, location, family members, political views, personal interests, and activities.² Today’s students embrace all social networking; a recent study found that 96 percent of students aged 9 to 17 who have Internet access use social networking sites.³

Because of social networking, school and college administrators must now manage students on campus who, in many respects, are living in an unseen environment where they can harass and bully fellow students, be harassed and bullied, engage in romantic relationships with fellow students or educators, cheat on tests, organize a flash mob, or post inappropriate photos and comments to hundreds of people, all while sitting in a classroom listening to a lecture on the midnight ride of Paul Revere, a form of mass communication in 1775.

Inappropriate Communications

President Barack Obama, in his Sept. 8, 2009, nationwide address to students, said, “Be careful what you post on Facebook. Whatever you do, it will be pulled up again later somewhere in your life.”⁴ Social networking has become such a phenomenon that colleges, honorary societies, and potential employers are using these sites to recruit and weed out candidates.⁵ A CareerBuilder 2009 survey found that 45 percent of employers now check potential employees’ social networking sites.⁶ However, 53 percent of employers who checked social networking sites report that they then rejected candidates due to provocative or inappropriate photos or information, evidence of alcohol or drug use, negative comments about employers, poor communication skills, false statements about qualifications, discriminatory comments, or disclosure of confidential employer information.⁷

For students, sharing inappropriate content can have serious consequences. A photograph of a nude minor, typically called “sexting,” can result in felony or misdemeanor child pornography charges.⁸ Children can also be targeted by sexual predators. In May 2011, the FBI estimated that 500,000 sexual predators are online every day, using social networking sites to learn personal information about children, make contact, and then arrange for meetings.⁹

School district employees may also fall into the trap of using electronic media to develop personal relationships with students. The Texas Educator Code of Ethics was recently revised to prohibit inappropriate electronic communications with students or minors, taking into account the nature, purpose, timing, amount, subject matter, openness, and sexual or romantic nature of the communications.¹⁰

Public school districts that receive universal service discount rates are tasked with the responsibility to adopt Internet safety policies, to educate students about Internet dangers, and to operate technology filters.¹¹ The Texas Education Agency provides school districts with Internet safety resources.¹²

Cyberbullying and Harassment

In the wake of a number of student suicides alleged to have resulted from bullying and harassment on social networking websites, so-called “bullycidies,” there is a nationwide focus on the effects of bullying and harassment. A 2010 Olweus study found that 17 percent of public school students report being physically bullied two to three times per month.¹³ Compare this with a 2004 I-SAFE America study in which 42 percent of students report being cyberbullied, while 57 percent of students report reading hurtful or angry things said about them on the web. The study also found that 53 percent of students admit saying hurtful or mean things about others on social networking sites.¹⁴

Cyberbullying differs from traditional bullying in a number of ways. A cyberbully can be anonymous or can hide his or her identity, whereas a traditional bully faces his or her victim. Cyberbullies tend to be less inhibited and may be more aggressive because they do not see the reactions of their victims and do not say their hurtful comments to the victim’s face. Cyber-

bullying can be done 24 hours a day, seven days a week, regardless of the location of the victim or the bully; therefore, it can be constant rather than sporadic. A cyberbully’s audience can be vast, and bystanders are less likely to intervene. Finally, cyberbullying is less often reported because victims do not want to lose their cell phones or computer access.¹⁵

Recent state law changes also make it clear that cyberbullying is a form of bullying that can be prohibited and punished through student codes of conduct.¹⁶ New Texas Education Code Section 37.0832 says that “bullying” includes “expression through electronic means.”¹⁷ Beginning in the 2012–13 school year, school districts will be required to have bullying prevention programs in place that contain a cyberbullying component.¹⁸

In October 2010, the U.S. Department of Education sent a letter to school and college administrators, reminding them that bullying, including cyberbullying, may also trigger an institution’s responsibilities under federal anti-discrimination laws enforced by the Department’s Office for Civil Rights.¹⁹ The letter ignores students’ First Amendment free speech rights, except as a footnote reference to its 2003 Dear Colleague letter about First Amendment Issues.²⁰

First Amendment Issues

While the issue of inappropriate, harassing, or controversial student speech on public school or college campuses is not new, online speech and social networking broadens the problem due to its full-time access to off-campus speech.

While students do not shed their First Amendment rights when they are at school, they do not have the same rights as adults. School administrators can proscribe and control the content of student communications and discipline students for conduct infractions within certain constitutional parameters. While an administrator cannot discipline a student solely for his or her point of view, if the student’s communication causes a material and substantial disruption of the educational environment or causes a material interference with the rights of others, then the student can be disciplined.²¹ Vulgar, lewd, obscene, or offensive speech may also be prohibited on campus.²² “Fighting words” and “true threats” that inflict injury, threaten violence, or breach the peace are not entitled to First Amendment protection.²³ Speech that a reasonable observer would view as the school’s own speech may be regulated on the basis of a pedagogical concern.²⁴ Speech that is directed to or produces lawless action is not constitutionally protected.²⁵ Defamatory speech is not entitled to First Amendment protection.²⁶ The on-campus promotion of illegal drug use is also not constitutionally protected.²⁷ Students, however, do have the First Amendment right to say “deeply offensive” things.²⁸

Discipline for Online Speech

School administrators, therefore, are caught between the rock of the First Amendment and the hard place of the duty to stop and prevent bullying and harassment when addressing complaints about students’ communications via social networking.

On-campus harassing, vulgar and plainly offensive communications, or communications that disrupt the educational envi-

ronment or interfere with the rights of others, using institutional computers, can unquestionably be subject to discipline.²⁹

But, what happens when the offensive speech originates off campus on a student's private computer? There is a split in the circuits, with most courts holding that off-campus communications may only be disciplined when they create a material and substantial disruption in the educational environment. However, courts tend to disagree about what constitutes sufficient disruption. Disruption sufficient to meet the *Tinker* standard in prior social networking cases included a threatened teacher taking medical leave,³⁰ the words "kill [the named teacher]" posing a reasonably foreseeable risk of material and substantial disruption,³¹ and the student encouraging others to call the superintendent to disrupt her work.³²

Two recent 3rd Circuit cases overruled discipline of students because the court failed to find sufficient disruption. Both Pennsylvania cases involved the off-campus creation of fake MySpace pages for school administrators, both of which used profanity and personal attacks aimed at the administrators and their families. Word of the pages spread among students; some classes and administrators' work were disrupted. The disciplined students sued, claiming First Amendment protection. In one case, the district court held for the school district, based on the *Fraser* and *Morse* standards related to vulgar, lewd, and potentially illegal speech, and because there was some degree of disruption under *Tinker*.³³ In the other case, the district court held against the school district, failing to find substantial disruption.³⁴ The 4th Circuit recently ruled in both cases, assuming without deciding, that the *Tinker* disruption test applied to the student's webpage created off campus. The 3rd Circuit failed to find on-campus substantial disruption in both cases, and so ruled that the punitive action taken by the school district violated the students' free speech rights. The court also held that the *Fraser* prohibition on lewd, vulgar, and offensive speech does not apply to off-campus speech.³⁵

A recent 4th Circuit case, however, upheld discipline when there was little disruption. A female student created off campus a MySpace page targeting another female student, calling her a whore and insinuating she had a sexually transmitted disease. The 4th Circuit found interference and disruption sufficient to meet the *Tinker* test because the victim missed a day of school, and, had the school not intervened, there was potential for further harassment. The court noted that the webpage invited other students to join and targeted a student and that the prevention of bullying is now a federal government initiative. Therefore, the 4th Circuit concluded that the school was authorized to discipline the creator of the webpage because her webpage "interfered with the work and discipline of the school."³⁶

Other courts have found other bases to support discipline of off-campus student social networking speech. The 8th Circuit Court of Appeals recently ruled for the school district in a case involving a student's instant message from his home computer to a classmate that he would get a gun and shoot students and himself at school. The 8th Circuit upheld the discipline, finding that the speech was a "true threat," due to his stated targets

and his hate-filled comments, which substantially disrupted the educational environment because of rumors of a "hit list."³⁷

Federal and state law-making bodies' and the courts' abilities to address students' use of social networking has lagged far behind the technological advances students enjoy. Currently, best practices include training students about Internet dangers and cyberbullying intervention, but disciplining students for off-campus cyberbullying only when campus administration can show a substantial disruption of the educational environment or a true threat.

Notes

1. www.facebook.com/press/info.php?timeline
2. Individuals may also create their own web logs or "blogs;" "microblog" via Twitter or WordPress; post video online using YouTube, Picasa, or Shutterfly; and access an unlimited number of chat rooms, list serves, or bulletin boards.
3. www.wewisekids.org/index.asp?page=statistics
4. <http://www2.ed.gov/admins/lead/academic/bts.html>; www.whitehouse.gov; <http://www.youtube.com/watch?v=3iqsxCWjCVI>
5. "Recruiters Troll Facebook For Candidates They Like," *Wall Street Journal*, Aug. 8, 2011.
6. CareerBuilder Survey 2009, www.careerbuilder.com
7. *Id.*
8. 18 USC §2251 et seq; Tex. Penal Code Sections 43.25, 43.26, 43.261.
9. http://www.fbi.gov/news/stories/2011/may/predators_051711/predators_051711
10. 19 Texas Administrative Code §247.2(3)(1).
11. 47 USC §254(h)(5)(B).
12. Tex. Educ. Code §38.023.
13. Olweus Bullying Prevention Program 2010 Study at www.olweus.org
14. I-SAFE 2004 survey at www.dbprescott.com/internetbullying6.04.pdf
15. The School Bully in Cyberspace. Office of Safe and Drug-Free Schools, Vol. 16, No. 1, at http://www.thechallenge.org/16_1_index.html
16. H.B. 1942, 82nd Reg. Sess. 2011.
17. Tex. Educ. Code Section 37.0832.
18. Tex. Educ. Code Section H.B. 1942, *Id.*
19. U.S. Department of Education "Dear Colleague" Letter regarding Bullying (October 26, 2010) at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>
20. U.S. Department of Education "Dear Colleague" Letter regarding Student First Amendment issues (July 28, 2003) at <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>
21. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
22. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).
23. *Chaplinski v. New Hampshire*, 315 U.S. 568 (1942); *Watts v. United States*, 394 U.S. 705 (1969); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004).
24. *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).
25. *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Ponce v. Socorro*, 508 F.3d 765 (5th Cir. 2007).
26. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch*, 418 U.S. 323 (1974); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).
27. *Morse v. Frederick*, 551 U.S. 393 (2007).
28. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001).
29. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).
30. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).
31. *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2nd Cir. 2007).
32. *Doniger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008).
33. *J.S. v. Blue Mountain Sch. Dist.*, 2008 WL 4279517 (M.D. Pa. 2008).
34. *Layschock v. Hermitage Sch. Dist.*, 496 F. Supp. 587 (W.D. Pa. 2007).
35. *J.S. v. Blue Mountain Sch. Dist.* No. 08-4138 (3rd Cir. June 13, 2011); also *Layschock v. Hermitage Sch. Dist.*, No. 07-4465 (3rd Cir. June 13, 2011).
36. *Kowalski v. Berkley Cnty Schs.*, No. 10-1098 (4th Cir. July 27, 2011); see also *Ponce v. Socorro*, 508 F.3d 765 (5th Cir. 2007).
37. *D.J.M. v. Hannibal Public Sch. Dist.*, No. 10-1428 (8th Cir. Aug. 1, 2011).

LYNN ROSSI SCOTT

is a shareholder in Brackett & Ellis, where her practice consists of school law and public law, involving general representation of public school districts, independent and private schools, charter schools, junior colleges, universities, education foundations, and other education-related entities.