Student Speech 2.0

How much authority do school officials have over online student speech?

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An eighth-grade student creates a fake profile for his science teacher from his home computer. The profile includes a picture of the teacher with the caption "Ms. Campbell is a fugly biatch." Seven other students "like" this Instagram post from their home computers. Campbell asks her principal to discipline the student who authored the post, but the principal's hands are tied: She remembers learning in a law course that she can only intervene if the post creates a substantial disruption at school. The principal is correct.

Unfortunately, the U.S. Supreme Court has avoided answering how much authority school officials have over student off-campus online speech, making it difficult for administrators to know when to intervene in such cases. Although federal court decisions provide some guidance to school leaders, outcomes are mixed. What we do know is that student online speech generally needs to create a substantial disruption in the school before school officials can act. This legal standard is derived from the U.S. Supreme Court's seminal decision about student speech on campus (*Tinker v. Des Moines*, 1969).

This article highlights several cases that have addressed student off-campus Internet speech and examines how much authority school officials have in monitoring this type of expression. We discuss cases involving speech that targets school personnel and students. We also address online speech that involves dangerous threats and situations where administrators conduct illegal Web searches of student online activity.

Off-Campus Speech That Targets School Personnel

A high school student in Connecticut blogged on her home computer that the superintendent and other school officials were "douchebags" for interfering with the students' plans to hold a jamfest in the school auditorium (*Doninger v. Niehoff*, 2008). When school employees learned of the online post, the student was prohibited from running for student council. In response, students protested by wearing "vote for Avery" T-shirts to school. Also, the student and her mother appeared on a local news station to discuss the matter. Upholding the district court's decision granting summary judgment to the school district, the 2nd Circuit Court of Appeals found that it was foreseeable that the student's speech could create risk of substantial disruption.

Unlike the 2nd Circuit, the 3rd Circuit Court of Appeals held in favor of students in two cases involving online speech that focused on school personnel. In Pennsylvania, two different students created parodies of their principals from their home computers and were disciplined. The 3rd Circuit ruled in an en banc decision (i.e., a decision heard before all judges of this court) that these students could not be disciplined because school officials could not have reasonably forecast that the Internet profile would have caused a substantial disruption in school (*J.S. v. Blue Mountain Sch. Dist.*, 2011; *Layshock v. Hermitage Sch. Dist.*, 2011). In *J.S.*, a student created an Internet profile of her principal that included sexually explicit content. The post contained the principal's picture but not his name or the school's name. The student had limited the access of the profile to her friends. Even though it was undisputed that there was no evidence of disruption, the student was suspended. But the 3rd Circuit reversed the district court's decision granting summary judgment in favor of the school district; the 3rd Circuit reasoned that the fear of a disturbance was insufficient to overcome the student's right to free speech. Similarly, in *Layshock*, a student created a fake Internet profile of his principal from his grandmother's computer. The profile contained fake answers to several questions. For example, the principal's profile included the following:

Birthday: too drunk to remember

Are you a health freak: big steroid freak

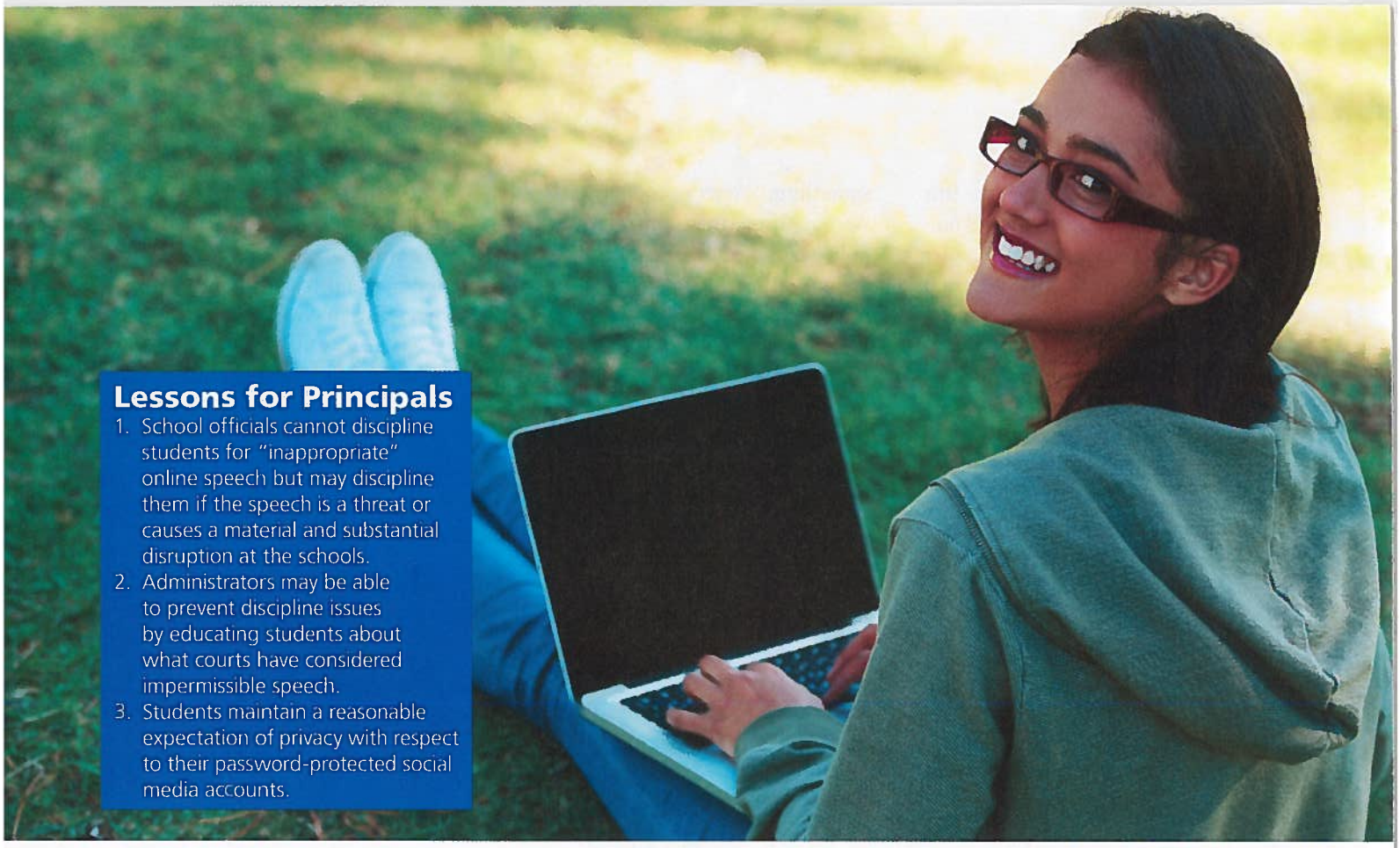
In the past month have you smoked: big blunt

In the past month have you been on pills: big pills

In the past month have you gone skinny dipping: big lake, not big dick

In the past month have you stolen anything: big keg

Ever been drunk: big number of times



Lessons for Principals

1. School officials cannot discipline students for "inappropriate" online speech but may discipline them if the speech is a threat or causes a material and substantial disruption at the schools.
2. Administrators may be able to prevent discipline issues by educating students about what courts have considered impermissible speech.
3. Students maintain a reasonable expectation of privacy with respect to their password-protected social media accounts.

Ever been called a tease: big whore

Ever been beaten up: big fag (*Layshock v. Hermitage Sch. Dist.*, 2011)

After administrators learned about the fake profile, the student was suspended, placed in an alternative education program for the remainder of the year, banned from extra-curricular activities, and prohibited from attending graduation. The 3rd Circuit found no evidence of disruption and affirmed the district court's decision granting summary judgment in favor of the student.

Interestingly, the 2nd Circuit permitted school officials to discipline a student for making derogatory comments online, but the 3rd Circuit sided with the students in two cases. What these cases seem to turn on is whether school officials can point to evidence that a substantial disruption will—or will likely—occur at the school.

Off-Campus Speech That Targets Other Students

In West Virginia, a high school student created a web page from home and wrote that a classmate had herpes and was a slut (*Kowalski v. Berkeley County Schools*, 2011). She invited others to comment on the web page, where she also included photos of the student. The 4th Circuit Court of Appeals upheld the district court's decision granting summary judgment in favor of the school district. Relying on *Tinker*, the court found that the off-campus speech was related to the school's pedagogical interests, which allowed school officials to intervene. Additionally, the speech created a substantial disorder and collided with the rights of others in the school. It was foreseeable that the student's speech would reach the school. Other circuits have permitted administrators to discipline students for online speech that targeted classmates if the speech caused a substantial disruption at the school (see, e.g., *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 2012).

Online Speech That Involves Threats

Justifiably, administrators are concerned about preventing school shootings and other violence, but it is not always clear when they can regulate violence-related online posts. If a student posts a true threat, it is not protected under the First Amendment. Yet, school leaders may be confused about what constitutes a true threat. To illustrate, a Nevada high school student wrote from his home computer that he would commit a school shooting. The student specifically named two classmates, identified his school, and noted the date of the proposed killings. He also explained that he had access to weapons and ammunition (*Wynar v. Douglas Cnty. Sch. Dist.*, 2013). The student was eventually expelled for 90 days. Upholding the district court's decision to grant the school

district summary judgment, the 9th Circuit Court of Appeals found no First Amendment violation because the student's threat related to serious school violence. Also, relying on *Tinker*, the court reasoned that school officials could reasonably forecast that a substantial disruption would occur. Plus, the speech interfered with the rights of others to be left alone. The 9th Circuit carefully noted that this decision was limited to the facts in this particular case. Specifically, this case did not address what actions could have been taken had the student harassed other students or mocked school officials.

In a New York case, a middle school student sent an instant message to a friend that included an icon with a pistol firing bullets at a person's head with the words "kill Mr. VanderMolen"—the student's English teacher (*Wisniewski v. Bd. of Educ. of the Weedsport Central Sch.*, 2008). The student was given a one-semester suspension that his parents challenged on First Amendment grounds. They argued that their son's speech was not a true threat. Upholding the federal district court's decision granting summary judgment to the school district, the 2nd Circuit agreed that the icon crossed the boundary of protected speech and that it posed a reasonably foreseeable risk of substantial disruption. The 2nd Circuit did not decide whether this speech constituted a true threat but instead applied *Tinker* as the appropriate analysis.

In a Minnesota case, a student sent an instant message from his home to a classmate outside of school (*D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist.*, 2011). In it, he spoke of getting a gun and shooting students at school. This student also expressed access to weapons, and wrote that he wanted his school "to be known for something." After school officials were notified, they contacted the police and the student was placed in a juvenile detention center. The district later expelled the student for the rest of the school year. Upholding the district court's decision, the 8th Circuit Court of Appeals found that his speech could be reasonably understood as a true threat and was therefore not protected under the First Amendment. The court also noted that the First Amendment did not require that school officials wait for the shootings to be carried out before disciplining this student. Even under a substantial analysis, the school was found to have been substantially disrupted because of the student's threats.

Administrators can usually discipline student speech that advocates violence. It may either be considered a true threat that has no First Amendment protection or may be considered unprotected using the *Tinker* analysis. Either way, it appears that administrators are given more leeway to curtail speech in these types of cases.

Privacy Protection

School officials might wonder if they can actively search and review posts made by students on the Web and then discipline them for what was found. These searches are likely unprotected activity. As such, school officials must not force students to disclose social media passwords, which could raise First Amendment as well as Fourth Amendment concerns. For example, when an eighth-grade student posted on Facebook that she "hated" the school monitor, she received a detention. Subsequently, she was disciplined after posting a message including profanity. After school officials learned that she had a sexually explicit conversation with a fellow student, the administrators made the student give them her password. They read both her public and private posts on Facebook. The federal district court concluded that if the facts set out in the complaint were true, school officials had likely violated her constitutional rights (*R.S. v. Minnewaska Area Sch. Dist.*, 2012). Thus, the court denied the school district's motion to dismiss the First and Fourth Amendment claims. **PL**

REFERENCES

- J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2012).
- D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754 (8th Cir. 2011).
- Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2008), *cert. denied*, 132 S. Ct. 499 (2011).
- Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2012).
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- Wisniewski v. Bd. of Educ. of the Weedsport Central Sch. Dist., 494 F.3d 34 (2d 2007), *cert. denied*, 552 U.S. 1292 (2008).
- Wynar v. Douglas Cnty Sch. Dist., 728 F.3d 1062 (9th Cir. 2013).

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