



## **Case Study I: Online Student Speech**

### **The Facts:**

Once again, Main Street High School has found itself in the local – and national – newspapers after it suspended a student for comments he made about the school on MySpace.com.

“I just wrote the stuff to make people laugh,” said Jake Edelstein, a sophomore and an honors student. “They were stereotypes about the school, what people say about the school. But it was just my opinion, not facts.”

About a dozen students held a rally the day after the suspension was announced as a public show of support for Edelstein, who was suspended for 15 days.

Although no names were used, it was possible to identify people from their descriptions.

Asked to comment on the case, ACLU attorney Stephen Vick said: “It’s definitely a First Amendment issue. Young people have the right to express themselves. When students speak out on campus, the school has some ability to regulate what students write, but this is off campus.”

A concerned parent brought a printout of the postings to school a week ago, and Edelstein was suspended the same day.

Public School spokeswoman Angela Abramian confirmed that the suspension was for Internet postings. “A writing that disrupted the educational process at school occurred in this venue,” she said. “Just like with any other student behavior that disrupts the educational process, it is the school’s responsibility to respond accordingly,” she said.

Sarah Margon, a friend of Edelstein’s, said the school took the comments too seriously. “When you’re at home and you’re on your computer, you know,

people say things every day,” the 18-year-old said. “I don’t know why they’re taking it out on Jake. It’s just so blown out of proportion.”

**The Legal Questions:**

1. What are the primary considerations to make when determining issues of student speech that occur in cyberspace?
  
2. What limits, if any, can be placed on the private Web sites of students?

**Other key issues to consider:**

**Who will win the case?**

## **Answers to legal questions<sup>\*</sup>:**

1. Student speech and the Internet raise some important and complex issues for educators, students, and parents.

Until recently, there was little law governing what was and wasn't acceptable speech on the Internet. In fact, the U.S. Supreme Court didn't issue a ruling on Internet speech until 1997. In that year, the Court returned a verdict in the case of *Reno v. ACLU* that helped clarify how Internet speech should be treated in the future.

The Court had been asked to resolve a challenge to the constitutionality of the Communications Decency Act (CDA) of 1996. In particular, the American Civil Liberties Union (ACLU) took issue with two provisions of the CDA that prohibited the online communication of "patently offensive" and "indecent" speech.

The Court agreed that the disputed provisions of CDA were unconstitutional under the First Amendment because "the general undefined terms 'indecent' and 'patently offensive' cover large amounts of non-pornographic material with serious educational or other value." The Court then stressed that speech on the Internet should be entitled to the highest possible degree of protection, just as it would in print.

In light of this ruling, schools should consider the following factors before regulating student speech on the Internet:

- Was the content created as part of the school curriculum, such as a class project or the official school newspaper? If so, then the speech in question is considered school sponsored, and the *Hazelwood* standard of expression would apply. In that case, schools are granted greater leeway in regulating speech that "students, parents, and members of the public might reasonably perceive to bear the imprimatur [endorsement] of the school."
- Was the content created on school computers during the student's free time? If it was, the student will likely contend the *Tinker* standard governs. Under that standard, the speech in question is entitled to protection under the First Amendment as long as it does not (a) cause a material or substantial disruption to the school community, or (b) infringe on the rights of others. An attorney for the school, however, would likely argue

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<sup>\*</sup> The answers to these legal questions are taken from *The First Amendment in Schools* (ASCD, 2003). For more information, visit <http://shop.ascd.org/productdisplay.cfm?productid=103054>

that the speech should be held to the *Hazelwood* standard of expression because school computers were being used.

- Was the content created during a structured class or lab time? If so, the *Hazelwood* standard should apply, because the content could be linked to the curriculum.

These factors, of course, relate to student speech on the Internet that occurs on the school grounds. If the speech in question occurs on a private Web site, a different set of issues is at stake.

2. Case law in this area is still developing, so a clear legal standard has yet to be defined.

School officials, however, should exercise caution before attempting to limit student expression on a private Web site maintained off school grounds.

On one hand, schools have a vital interest in keeping all members of their community safe; if a student produces speech that constitutes a "true threat," schools have a responsibility to act. However, in the majority of lawsuits between students and administrators so far, judges have been more likely to defend the free expression rights of the students, whose speech they usually determined did not constitute a "true threat."

As one judge put it, in a case where students had been punished for publishing an underground newspaper that was produced and sold off campus, "our willingness to defer to the schoolmaster's expertise in administering school discipline rests . . . upon the supposition that the arm of authority does not reach beyond the schoolhouse gate."<sup>1</sup>

To help understand the distinctions that educators should make when considering off-campus Internet speech, Edwin Darden, senior staff attorney for the National School Boards Association (NSBA), suggests that student Web sites be divided into three categories:

- Sites that are offensive, obnoxious, and insulting.
- Sites that are offensive, obnoxious, and insulting, and also contain some sort of veiled threat of violence or of destruction of property.
- Sites that contain an outright blatant threat.

Darden suggests that for the first category, under which most student sites fall, "my advice to schools is, you just need to develop a thick skin." For the second category, because the nature of the threat is unclear, educators should be sure to get further information on the subject before passing judgment too quickly.<sup>2</sup>

For the third category, however, if the speech in question represents an actual threat, the student could be punished, as long as schools can demonstrate that the speech could disrupt the school or that it seriously threatens harm to a member of the school community.

For example, in the case of *J.S. v. Bethlehem Area School District*, an 8th grader asked visitors of his Web site for \$20 to "help pay for the hit man" to kill his math teacher. The student was expelled as a result, prompting the parents to sue the

school district. Then the teacher followed by filing a defamation suit against the family. The family countersued.

When the Pennsylvania Commonwealth Court issued their ruling in July 2000, they ruled that the child's threat materially disrupted the educational process.<sup>3</sup> Then, a jury awarded the teacher \$500,000 in damages.

Several other state and federal courts have determined that school officials exceeded their authority in regulating students' online speech created wholly off campus. For example, one federal judge rejected school officials' actions in suspending a student for lampooning school officials on his private Web site. The judge wrote: "Disliking or being upset by the content of a student's speech is not an accepted justification for limiting student speech under Tinker."<sup>4</sup>

So what does this all mean?

Because the Supreme Court has granted cyberspeech the highest degree of protection under the First Amendment, school officials need to be aware that student speech that occurs off school grounds is private and not subject to the authority of school officials unless it causes a substantial disruption. If, however, a student's speech crosses the line and suggests actual physical harm -- such as Eric Harris's Internet "hit list" prior to the Columbine massacre -- then schools should immediately consult an attorney.

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#### **Notes**

<sup>1</sup> See *Thomas v. Bd. of Education Granville Central Sch. Dist.*, 607 F.2d 1043 (2nd Cir. 1979), cert. denied, 444 U.S. 1081 (1980).

<sup>2</sup> Welch, Matt, "Off-Campus Speech v. School Safety," available online at [USC Annenberg Online Journalism Review](#).

<sup>3</sup> *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Cmwlth. 2000).

<sup>4</sup> *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).