

CYBER MISCONDUCT, discipline and the law

When does a school district have jurisdiction to discipline a student or employee for cyber speech?

Less than a decade ago, school district technology use policies essentially focused on school computer labs and the prohibition of cell phones on campus. Today, as schools integrate technology into classroom instruction and school operations, districts are moving quickly to implement policies to encourage digital citizenship throughout the school community. One particular challenge school administrators face is determining whether a school district has jurisdiction to discipline a student or employee for cyber misconduct.

Typically, it is not difficult for a school district to establish jurisdiction to discipline students and employees for cyber misconduct that occurs on campus or from school-based technology. Conversely, the issue of when a school district can discipline a student or employee for off-campus cyber speech poses a significant challenge to school administrators.

Interestingly, courts have seemingly pro-

vided greater speech protections to students for cyber speech than school teachers and employees. Two recent decisions found that a school district overstepped its bounds in disciplining students for cyber speech. In those cases, the courts found that the school district violated student First Amendment rights by disciplining the students, as the cyber speech did not cause a substantial disruption at school and it was not reasonably foreseeable that substantial disruption would occur. Whereas, a recent employee dismissal was upheld by a court where the cyber speech – which was not viewed by students – caused the principal to lose confidence in the employee as a role model.

What the court said

In *J.C. v. Beverly Hills Unified School District*, students made a four-and-a-half minute video after school that bullied a

By Gretchen Shipley

middle school student, calling her a “slut,” “spoiled” and “ugly.” They later posted the video to YouTube – J.C. v. Beverly Hills Unified School District (2010) 711 F.Supp.2d 1094. The video clip was viewed 90 times on the night it was posted on YouTube. After the parents of the victim complained, the student who created and posted the video was suspended from school for two days.

The court found that the suspension violated the student’s First Amendment rights because the video, in the court’s opinion, did not cause a substantial disruption and it was not reasonably foreseeable that it would cause a substantial disruption at school. The court held that addressing concerns of an upset parent, having five students miss a portion of their classes, and a fear that students would gossip was not substantial enough to warrant school district jurisdiction to suspend the student.

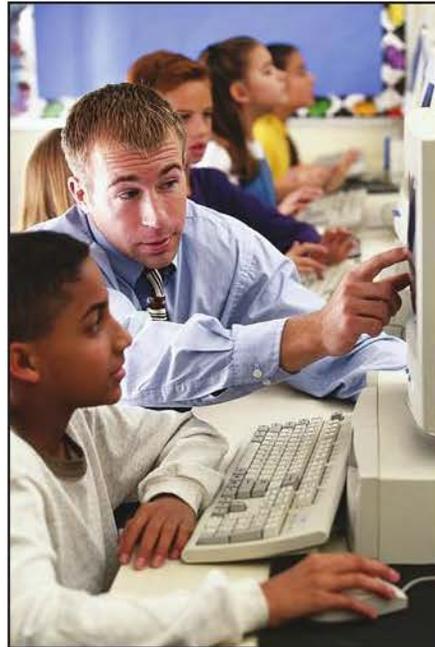
“Substantial disruption” vs. “rumblings”

Similarly, in J.S. v. Blue Mountain School District, a middle school girl created a Myspace parody profile of her principal from her home computer – J.S. v. Blue Mountain School District, No. 08-4138 (3d Cir. June 13, 2011). The profile included the principal’s official school photo and descriptions of him such as “being a tight ass, spending time with my child (who looks like a gorilla), hitting on students and their parents, sex addict, pervert, I love children, sex (any kind), and my darling wife (who looks like a man).”

The school district suspended the student for creating the profile. The profile was the source of “general rumblings” at school, including six or seven students talking in class, resulting in a teacher telling them to stop three times; two other students reporting the profile to another teacher; and the school counselor having to reschedule several appointments.

Despite the “general rumblings” at school about the profile, the 3rd Circuit Court of Appeals found that it was not reasonably foreseeable that the MySpace profile would cause a substantial disruption at school and thus, the discipline was not warranted. The court held that the school district violated the student’s First Amendment rights by disciplining her for creating the profile.

Following the J.C. v. Beverly Hills Unified School District and J.S. v. Blue Mountain School District decisions, school districts should carefully evaluate whether off-campus cyber misconduct causes a substantial disruption at school, or whether it is reasonably foreseeable that such substantial disruption will occur. School districts should also



consider whether other means of intervention may be appropriate, such as counseling, meeting with parents, cease and desist orders, injunctive relief, and/or referral to law enforcement.

Nexus between the conduct and the school

While the legality of a teacher dismissal for immoral conduct is evaluated under a different test than student discipline, the issue of nexus between the conduct and the school is also one of the factors courts consider in employee discipline cases. While the J.C. v. Beverly Hills Unified School District and J.S. v. Blue Mountain School District cases, discussed above, appear to require a strong nexus between the cyber misconduct and school, a recent employee dismissal case concerning cyber activity had a very tenuous connection between the cyber conduct and the school.

In San Diego Unified School District v. Commission of Professional Competence, a middle school teacher and dean of students

posted a graphic, vulgar ad soliciting sex on Craigslist – San Diego Unified School District v. Commission of Professional Competence (2011) ___ Cal.Rptr.3d ___ [2011 WL1234686]. The ad contained photos of the employee’s nude body and his face. The ad did not identify the employee by name, nor did it state that he was an employee or identify the school where he worked. The Craigslist ad was on a page that prohibits viewing by persons under the age of 18 and therefore, it is presumed that no students viewed the site.

The school received an anonymous call reporting the ad. The school district dismissed the employee for evident unfitness to serve and immoral conduct, and the court upheld the dismissal on these grounds. In evaluating the “nexus between conduct and ability to teach” factor of the eight Morrison factors, the court held that his conduct was, “detrimental to the mission and functions of [his] employer.” The posting was vulgar, inappropriate and demonstrated “a serious lapse in good judgment.”

A cautionary tale

The ad caused the school principal to lose confidence in the teacher’s ability to serve as a role model. “The conduct itself, together with [the teacher’s] failure to accept responsibility or recognize the seriousness of his misconduct given his position as a teacher and role model, demonstrates evident unfitness to teach.”

The case serves as a cautionary tale to public school teachers that online conduct is often a public communication and school teachers may be held to a high standard for their speech because of their position as a teacher and a role model. On the other hand, a school district’s ability to lose confidence in a teacher based on their cyber speech is a subjective standard and a difficult one to measure. Therefore, school districts should be mindful that discipline of a teacher solely based on the content of their cyber speech may be an insufficient basis to dismiss a teacher for evident unfitness to teach and immoral conduct.

Each cyber misconduct case, whether student or employee, should be evaluated on its own set of facts and may require advice

of legal counsel to determine whether the school district has jurisdiction to move forward with discipline.

General advice, “Not necessarily legal advice”

As co-chair of Fagen Friedman & Fulfrost’s eMatters Practice Group, I work closely with numerous organizations and associations on the wide range of policy is-

ssues and contract matters that arise from the integration of technology into public school settings. From this experience, I offer some practical tips for your consideration:

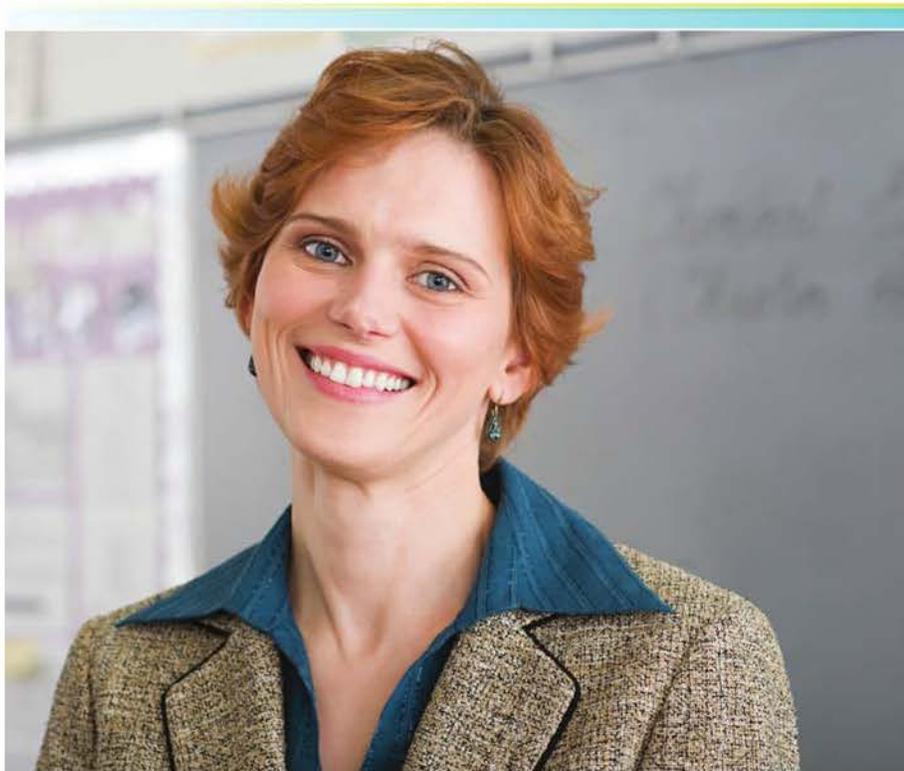
■ **Integrate acceptable technology use into existing policy.** Now that technology use is intertwined into all aspects of classroom and school operations, acceptable use of technology principles may be integrated into

many existing district policies, including but not limited to document retention, code of conduct, publishing, cheating, plagiarism and homework policies.

■ **Shift from building policies around devices.** With the rapid advancement of technology, it can be challenging for school districts to continually update policies created around specific devices. For example, most cell phone policies prohibit students from making phone calls during class time; whereas, smartphones now offer video, photo, audio recording, texting, video game and Internet access capabilities to students during class time.

Rather than a specific cell phone policy, acceptable use of technology policies should be broadened to govern all forms of technology on campus, including smartphones. Similarly, if a school district adds electronic textbooks to its instructional toolbox, the district should integrate expectations for proper use and handling into policy that currently addresses expectations for how textbooks and other supplies are to be treated.

■ **Promote digital citizenship in the school community.** Today’s challenge is to teach everyone – students and employees – the appropriate use of technology and consequences for abusing technology. Many school districts are embarking on campaigns to promote digital citizenship, including responsible use of campus Facebook pages, cyberbullying reporting protocols, and potential consequences of social networking, Twitter, and online speech. These are 21st century life lessons that public schools are now called upon to address. ■



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Gretchen M. Shipley is a partner in Fagen Friedman & Fulfrost’s San Diego area office and co-chair of the firm’s eMatters Practice Group. In this leadership role, she keeps the firm and its clients in front of the legal issues that stem from technology in today’s education environment.

More information is available at Fagenfriedman.com.