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School lawyers on dealing with questionable actions in the blogosphere by school staff and students

One Monday morning Superintendent John Brown arrives at school district headquarters to find 15 voice-mail messages from angry parents insisting that 4th-grade teacher Jane Smith be fired immediately. It seems that Smith has been posting scantily clad photos of herself on her personal website, which also contains graphic sexual language.

In another community, the tension at the middle school is palpable as the weekly Wednesday afternoon faculty meeting gets under way. Angry teachers are passing around printouts from an anonymous teacher's website. The writer uses thinly veiled pseudonyms to demean fellow teachers, as well as some students. The principal has a strong suspicion about who the author is, and the faculty members are demanding swift action.

At Memorial High School in a third school district, a student reports to his guidance counselor that he fears for his safety. The previous night, he accessed a classmates myspace.com website, looking to catch up on the day's gossip. To his horror, he saw his name on the site's newly featured "Hit List," which contains the names and photographs of students and teachers the author would like to see "eliminated."

Blurring Lines

With the continued explosive growth of personalized websites, more and more public school administrators can expect to face situations in which inappropriate materials have been posted by a teacher, staff member or student. 'While failing to recognize employees' rights of free speech can result in legal liability, administrators also must be prepared to identify unprotected speech and determine when Internet postings are causing material disruptions or resulting in a flow of inappropriate materials into the school.

We see a growing problem. Based on our legal representation of school districts, we suggest some approaches for dealing with such issues when they arise.

Advances in computer technology and its increasing use are blurring the line between work and home. Employees now use e-mail and Internet postings to broadcast information and opinions worldwide. Inevitably, some of those employees will post negative, harassing, hostile, false or confidential information and opinions about the schools where they work and their co-workers and students.

In determining how to deal with such matters, you will first need to consider when you can legally monitor websites and blogs; when you will actually monitor; how you will notify your employees of your intent to monitor; and whether any objectionable postings are legally protected or instead form a basis for discipline or discharge.

Navigating these treacherous waters is a daunting task, but if you fail to protect your school's reputation in appropriate cases, you will likely open the door to even more harm.

Blogs and Chatrooms

Some teachers now use Internet blogs and chatrooms to criticize or harass their administrators, students or faculty members. A blog is, in essence, an electronic Internet diary. Some are open to the public, while others require a password. Chatrooms are similar to blogs and function as interactive electronic bulletin boards. An example of a chatroom/bulletin board website, the widely popular myspace.com, has been the subject of several recent student discipline cases.

Many bloggers and chatroom participants speak impulsively, with little consideration for the

consequences to themselves or their employers. Others use blogs to pursue anti-social agendas or simply to gain attention, in some cases by posting sexually suggestive pictures of themselves.

Recent examples suggest increasing abuse. These include the elementary school teacher near Houston, Texas, who was forced to resign because she had, in her blog, chronicled her sexual exploits and made disparaging remarks about students. Also, a high school music teacher in Pennsylvania maintained a personal website containing jokes about genitalia and scatological references. This teacher was placed on unpaid suspension pending formal dismissal proceedings and eventually resigned. The school districts in both cases had sought termination of the teachers' employment under immorality, intemperance and incompetence clauses in their contracts.

The first step when you hear of an inappropriate posting by an employee is to determine whether you can pin down just what was posted without violating any laws. If you can properly get a copy of the posted material, you then will need to determine whether the posting itself was legally protected or instead warrants action, such as remedial counseling, discipline or discharge.

Various federal and state laws limit the circumstances under which you can enter websites, monitor them and respond to postings. That is especially true where the postings are made on personal computers during employees' personal time, away from the workplace.

Proper Responses

While proper responses will vary with the situation, the following issues need to be considered as part of the broader framework of laws and the rules governing employees of your school:

No. 1: Seek lawful access to suspect postings.

Federal laws limit access to electronic information in various ways but also provide some guidance as to when access is permitted. You certainly are entitled to review a website that is open to the public. However, if the site is password-protected, consider the following options:

- * Someone with access might give you a copy of the materials or a password to the site. (The latter option is not without risk but has been upheld by one federal court of appeals.)
- * If your school owns the computer the blogger is using, you may be able to review the communications in your school's server.
- * Where an anonymous source posts libelous or otherwise harmful materials attacking your school, you may want to file a "John Doe" lawsuit to smoke out the wrongdoer.
- * If you can't get lawful access but suspect who the source is, you can confront that employee and ask whether he or she made the improper posting. (You should only do this where the employee has no protected right to post the material.)

No. 2: Determine whether postings are legally protected.

The First Amendment entitles public employees to voice their concerns about matters of public interest. Public employers, however, may regulate employees' communications about more personal matters.

Where a public-sector employee raises both public and private interests, the administration must show that any right to speak of public concerns is offset by other considerations, such as undermining a legitimate goal of the school, creating disharmony among colleagues or impairing discipline. Some courts find such communications are unprotected even where only a potential for disruptiveness has been shown.

Subjects likely to be protected include corruption, wastefulness or inefficiency, educational standards, layoffs, student enrollment, grade inflation and general political expression. Subjects not likely to receive legal protection include bickering with department heads, individual classroom assignments, responses to parents' complaints or poor teaching evaluations.

One recent example of a non-Internet case involved the Cherry Creek, Colo., district. A high school geography teacher was placed on paid leave pending investigation because, in a lecture, he had compared

President Bush's State of the Union address to speeches of Adolf Hitler. Although the district superintendent and principal questioned the teacher's judgment, the school district reinstated the teacher without formal punishment because his lecture related to matters of public concern.

No. 3: Reduce your risks of harm from Internet abuses.

School administrators can control the negative effects of employee Internet abuse by maintaining an action plan. Taking the following preventative steps will go a long way towards minimizing potential abuses and mitigating harm if an incident occurs:

- * Put employees on notice that certain forms of off-duty misconduct, including Internet misconduct, will subject them to discipline, up to and including discharge.

- * Expect your administrators to help enforce your rules consistently, in part by notifying the superintendent immediately of possible violations.

- * When you receive a report of a possible violation, investigate it promptly.

- * Considering the number of federal and state laws that restrict employers' freedom of action in this sensitive area, consult your labor attorney before disciplining an employee for inappropriate Internet postings.

No. 4: Differentiate between employees' rights and students' rights.

In addition to school employees, students are also using blogs with great frequency to comment on their schools, teachers and peers. Because they are not employees, however, students have stronger First Amendment protections than teachers.

Student blogs are protected by the First Amendment as long as their content does not constitute a material disruption to classwork or involve substantial disorder or invasion of the rights of others. First Amendment cases generally provide such expansive protections of students' off-campus blogs that only threats and references to violence remain unprotected.

In the case of *J.S. ex rel H.S. v. Bethlehem Area School District*, the Pennsylvania Supreme Court held that a student's online depictions of a decapitated teacher and solicitation of donations to have the teacher killed amounted to a material disruption and warranted expulsion. The recent decision of the Newport-Mesa Unified School District in Southern California to punish a student for a myspace.com posting in which he threatened to kill a classmate is likely to stand on similar grounds. What remains to be determined in the latter case is whether the school district was justified in suspending students who merely viewed the website and did not contribute to its content.

Discipline for student blogs that merely consist of criticism of their schools or their teachers usually does not withstand First Amendment scrutiny. In *Beussink v. Woodland School District*, a federal judge in Missouri found that a student's blog containing vulgar criticism of his school was not a material disruption and could not be the basis for discipline.

In *Dwyer v. Oceanport School District*, a school district in Central New Jersey paid a student \$117,500 to settle a case after a judge ruled that the school district had acted illegally in disciplining the student. The middle school student had been removed from his school's baseball team and was kept from going on a field trip because he had maintained a website on which he criticized his teachers, expressed hate for his school and encouraged other students to post similar non-profane opinions on his website. In addition to money damages, the settlement of the case required that the school district provide training to teachers students and administrators on First Amendment rights.

Other courts have rejected students' First Amendment claims where their blogs, even of non-vulgar criticism, have caused material disruptions in the school. In the case of *Layshock v. Hermitage School District*, the U.S. District Court for the Western District of Pennsylvania recently refused to stop a school district from suspending a student, placing him in an alternative school and barring him from graduation ceremonies. The student's website had included a non-vulgar parody of his school's principal. The court

found it likely that, at trial, the website would be considered a material disruption. Students had entered that website from school computers so frequently that the school had to shut down its computer network.

A Balancing Act

In deciding how you will approach school employees' postings of offensive materials on external websites, you will need to balance the potential harm to your school district against the potential harm to your relationships with teachers and staff if you are perceived as intruding unduly into their private out-of-work communications.

Because it is neither advisable nor possible for you to monitor all such Internet communications, a better approach is to investigate only when you have received a report that an employee has broken laws or your school's rules or expectations of behavior.

In some cases; you may have a legal duty to investigate, as where the posting raises issues of employee safety or of unlawful harassment or discrimination. Beyond that, if you receive reports that postings are likely to hurt your school or its employees, you should discuss with your legal counsel whether you may legally enter the website to review the materials. You also should discuss what response, if any, would be both legal and appropriate.

Meanwhile, putting teachers and other employees on clear notice of your intentions and consistently enforcing your policies should reduce the number of Internet abuses that might require you to take responsive action.

ADDED MATERIAL

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