Boundaries of School Responsibility

Introduction

Schools have an extremely important preventative role to play in cyberbullying because they are the main arena for student relationships and interactions. However, the boundaries of their role are not always clear. For example, bullying incidents that begin within schools may spill over to the internet after school hours. In some cases, school-owned computers and technological equipment may be involved in incidents of cyberbullying. As a result, lines of responsibility between schools and parents are blurred. When is it the schools' responsibility to intervene in cyberbullying, and when is it out of their jurisdiction?

This article will examine the following issues:

- **When should schools intervene?**
- **How can schools judge whether a threat is real?**
- **New challenges to student privacy: can schools search cell phones?**
- **Solutions: fostering digital citizenship**

The determination of legal boundaries to school responsibility may depend on the legal tradition and jurisdiction, as well as whether the case involves criminal law or civil (tort) law. In the criminal law context, determining legal boundaries involves two jurisdictions, United States and Canada. Further, Canadian tort law (as opposed to criminal law) is governed by two different approaches; the civilian approach in Quebec and the common law in the rest of Canada.

When Should Schools Intervene?

The debate about student expression in schools revolves around what students can express in the school context and when teachers and administrators can intervene when it occurs off-campus. This boundary is difficult to negotiate, especially because today's school environment has grown to encompass the Internet and all forms of online communication, including social media.

- Are teachers simply responsible for intervening to address offensive student expressions on campus?

- What if students are cyberbullying, maligning, harassing, threatening, excluding, and demeaning one of their classmates on-line and if that student becomes suicidal?

- What if students are joking, gossiping, spreading rumors, posting modified videos and photographs about their teachers on-line - how should teachers respond?

The previous cases have established that the following situations allow schools to intervene in off-campus student speech:

- If it materially or substantially interferes with learning (US:Tinker v. Demoines 1969)[1]
- If it interferes with the educational mission (US: Bethel School District 403 v. Fraser 1986)[2]
- If it involves a school sponsored activity such as school newspaper, school computers or school websites (US: Hazelwood v. Kuhlmeier 1988, Garrity v John Hancock Mut. Life Ins. 2002)[3]
- If there is a nexus to the school - involving teachers, students, staff, administration (Canada: RT v Durham Catholic District School Board 2008)[4]

How Can Schools Judge Whether a Threat is Real?

One of the practical challenges posed by cyberbullying is differentiating between jokes, true threats and perceived threats. It is often difficult for parents and school staff to determine whether a student is simply venting his or her anger and irritation at a peer or teacher or whether it crosses the line to become a serious threat. Consider the following cases:

Perceived threat of harm against Teachers: In JS v Bethlehem Area School District[5], J.S., a minor, was upset with his teacher and set up a website entitled "Teacher Sux". There, he posted several insults against his teacher, Ms. Fulmer, stated she should die, offered $20 for a hitman to cut off her head, and even posted an accompanying diagram. The court ruled that this constituted a definite threat and even though it was online, any "perceived harm" by the teacher constituted "real harm" because it invoked anxiety and fear. J.S. had challenged his school suspension on the basis of his right to free expression. The court ruled that free expression has its limits and even though J.S. was angry with his teacher, online threats took his actions into the realm of criminal threats.

Perceived threat of harm sufficient: In DC v RR et al[6], fourteen-year-old D.C, an aspiring singer, set up a website in which he informed his fans that he had "golden brown eyes." A group of boys from his school decided that he was being arrogant and began a competition to see who could post the worst insults and threats on D.C.'s website. R.R. was the worst, threatening to "rip [D.C.]'s heart out" among other lewd threats and homophobic insults. R.R. described his comments as "hyperbole and mere jokes" not "true threats" and claimed that his comments were protected under the First Amendment. D.C. had to leave his school, suffered depression and a drop in grades and his reputation suffered as a result of the cyberbullying on his website.

The California Court of Appeal ruled it is not necessary for a threat to be "true" – if it is perceived as potentially harmful by the person victimized it has the same impact as a true threat. In this case the student perpetrators stressed that their online expressions were less about D.C. and more about a competition between them as to who could post the worst insults. The court also talked about the expressions being libelous because of their homophobic content, affecting D.C.'s reputation.

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[1] *Tinker v Des Moines Independent Community School District, 3930 U.S. 503 (1969).*
[2] *Bethel School District No. 403 et al. vs. Fraser, a minor, et al. 478 U.S. 675 (1986).*
[3] *Hazelwood v Kuhlmeier et al., 484 US 260 (1988); Garrity v. John Hancock Mutual Life Ins. Co., No. 00-12143-RWZ, 2002 U.S. Dist.*
[4] *RT v. Durham Catholic District School Board (EA s.311.7), 2008 CFSRB 94.*
[5] *JS v Bethlehem Area School District, 807 A.2d 803 (Pa. 2002).*
[6] *DC et al v RR et al, B207869 (CA. Ct. App. 2010).*

New Challenges to Student Privacy: Can Schools Search Cell phones?

The legality of school staff searching a student's belongings and person continues to be a contentious issue. Courts have had to weigh the degree of authority that school officials should be allowed to exercise alongside the students' expectation of privacy.

More and more students now own cell phones (77% of 12 to 17 year-olds)[7] and this adds an extra layer to the issue, since cell phones are increasingly likely to provide evidence related to cyberbullying and other school safety concerns, and therefore school staff have an interest in searching them. The following cases show how American and Canadian courts have grappled with the issue of school staff searching students' cell phones.

US Developments

The Supreme Court's 1985 ruling in New Jersey v TLO[8] set out requirements for searches by school staff. The court allowed schools flexibility in conducting searches; schools were not subject to a "probably cause" standard. Rather, the search had to be reasonable under all circumstances. The case involved the search of high school student's purse who was suspected of possessing and selling drugs. The student argued that the search violated her 4th amendment right against unreasonable search and seizure. The Court ruled that "the school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search", but that a search needed to be justified in its inception and be reasonably related in scope to the circumstances. Hence, in balancing students' privacy interests with school safety, school safety was given precedence.

In Klump v Nazareth Area School District[9], a Pennsylvania district court asserted limitations to the flexibility allowed to schools in conducting searched by ruling that school staff had conducted an unreasonable search when its scope was not reasonably related to the circumstances. The case involved a high school student whose phone was confiscated after it fell out of his pocket in class. School rules restricted cell phone use during class. School staff looked through the phone, read text messages, listened to voicemails, texted the student's contacts and also called other students at the school to see if they would break the rules. The court followed the requirements under TLO and ruled that the teacher's seizure of the phone was justified as it was related to the violation of the school's rules. However, the broad scope of the search, especially calling other students, was unreasonable since its purpose was to find evidence of other students' misconduct and not the Klump's misconduct.

In the recent case of JW v Desoto County School District[10], the Mississippi deemed a school search reasonable based on a student's diminished expectation of privacy when violating a rule. JW's son, RW, was caught retrieving a text message from his father on his cell phone at school. The school had a policy against possessing phones on school grounds. The phone was confiscated and the principal found pictures of RW posing with a BB gun. He considered them to be "gang pictures", gave them to police and RW was expelled. Based on TLO, the Mississippi district court ruled that the search was justified in its inception, since it was reasonable for the teacher to try to determine what the student was doing. The court differentiated from the Klump v Nazareth ruling, since Klump only inadvertently violated school rules, whereas, RW knowingly violated the school rules and therefore, had a diminished expectation of privacy.

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[7] *"Teen Gadget Ownership," Pew Research Center's Internet & American Life Project 2011 Teen/Parent Survey, http://pewinternet.org/Static-Pages/Trend-Data-(Teens)/Teen-Gadget-Ownership.aspx.*
[8] *New Jersey v TLO, 469 US 325 (1985).*
[9] *Klump v Nazareth Area School Dist., 425 F.Supp.2d 622 (ED. Pa, 2006).*
[10] *JW v Desoto County School District, F.Supp. 2d, 2010 WL 4394059 N.D.Miss.,2010.*

All three cases show that courts rely on the wording of a school's rules in order to deem whether a search is justified in its inception. For example, if Klump had attended JW's school, his would have had a reduced expectation of privacy. In a 2010 advisory opinion by Virginia's Attorney General Ken Cuccinelli stated that school staff may search and seize the content of students' cellphones "when there is a reasonable suspicion that the student is violating the law or the rules of the school."[11] This approach is problematic since students at schools with more stringent cell phone bans could have their fourth amendment rights more easily violated. Further, this approach may encourage schools to adopt absolute bans on cell phones since this may allow them to search students more easily. This is potentially problematic since it affects a large number of students: 65% of students who own cell phones and attend schools with a cell phone ban, still bring their phones to school.[12] In a comment prior to the JW ruling, the American Civil Liberties Union wrote that the case "reveal[ed] a systemic pattern of arbitrary and unlawful conduct by school and police officials and highlight the disturbing national trend known as the school-to-prison-pipeline, wherein children are pushed out of public schools and into the juvenile and criminal justice systems."[13]

Canadian Developments

Similarly, in Canada, students also have an expectation of privacy at schools and are protected from unreasonable search and seizure under section 8 of the Canadian Charter of Rights and Freedoms. Like in the US, schools have been held to a lesser standard then police but searches are nevertheless required to be justified in their inception.

The Supreme Court case of R v M echoed the TLO decision and allowed schools flexibility in conducting searches.[14] The case involved a vice-principal who searched a student in front of a plain-clothed police officer, after being informed that the student would be selling marijuana at the school. The court ruled that the search was not unreasonable under section 8 of the Charter, since students have a lowered expectation of privacy in schools. Citing TLO, the court affirmed that Canadian schools should also be allowed flexibility in maintaining a safe environment. Adopting an approach similar to the American one, they ruled that searches can be undertaken if it is reasonable to believe that a school rule has been broken and that evidence of the violation will be retrieved through the search.

In the recent case of R v AM[15], the Supreme Court of Canada affirmed that reasonable school searches need to be based on evidence of a possible violation. The case involved police officers who conducted a random search of the school with sniffer dog and discovered marijuana in AM's backpack.

In Saskatchewan, the on-going case of Tournier v Ratt[16] raises questions of whether unreasonable searches can give rise to civil responsibility for schools. A family has filed suit against the Saskatchewan Rivers School Division and a vice-principal for negligence and breach of privacy. Their 12-year-old grandson was caught texting in class, had his phone confiscated and his text

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[11] *"Opinions of the Attorney General and Report to the Governor of Virginia 2010," http://www.oag.state.va.us/opinions%20and%20legal%20resources/annual_reports/2010%20annual%20report.pdf.*
[12] *"Teens and Mobile Phones: Summary of Findings", Pew Research Center. http://pewinternet.org/Reports/2010/Teens-and-Mobile-Phones.aspx.*
[13] *"JW v Desoto County School District: Mississippi Cell Phone Case," American Civil Liberties Union, Last updated on Sept 1, 2009. http://www.aclu.org/racial-justice/jw-v-desoto-county-school-district.*
[14] *R v M (MR), [1998] 3 SCR 393.*
[15] *R v AM, [2008] 1 SCR 569.*
[16] *Tournier v Ratt, 2011 SKCA 103.*

messages read by the vice-principal. The vice-principal discovered texts related to the theft of a car and contacted police, who spoke with the student and eventually located the vehicle. The boy suffered retaliation because of this incident and had to move from his home. The student's family claims that the vice-principal and school board are liable for the harm suffered by the student as a result of the search. The Court of Appeal ruled that the suit against the vice-principal can proceed and ruled that in conducing the search, the vice-principal was not undertaking an "activity" which qualifies for immunity under the Education Act. Therefore, the future outcome of this case will have important implications for school administrators conducting searches of students' property.

Solutions: Fostering Digital Citizenship

A proactive, preventative approach and an emphasis on fostering digital citizenship can be embedded in every aspect of school life and learning. There are many ways that teachers and schools can do this.

Engage with your students about what forms of expression they consider as materially or substantially interrupting learning or the educational mission of the school. Raise student awareness of the educational mission and find ways to implement that through digital citizenship. See our video, The Cellphone that illustrates how sexting by a female student who sent an intimate photograph to a trusted male, who then posted it online, created a lot of gossip and disruption at school – in the hallways and classroom. This video can be a great springboard for discussion with your class.

Present the cases above to your students, such as the one of aspiring singer DC and the horrible comments posted on his website. Discuss why and how friends and reputation become so important to them that they forget about a person's feelings as they compete to post the worst insults. Remind them that online threats are "true threats" because even though they are made in jest, they have "real" consequences – they impact people's lives. Engage students in activities that study stand-up comics and those who are funny without insulting others, and those whose content relies on putting others down. Get students to analyze why, as a human race, we need to put others down to feel better. Get students to develop forms of online entertainment that engages friends without having to put others down. The likelihood is that they will find it difficult – but out of this process may come some creative and constructive ways of having fun through on-line communication. Get students to think about how they might have stood up for D.C. on-line. For an excellent discussion of threatening speech, see Diane Heckman, Just Kidding: K-12 Students, Threats and First Amendment Freedom of Speech Protection. 259 Ed. Law Rep. 381 (2010).

Similarly, jokes about teachers on Facebook can undermine teacher authority and affect the learning of each and every student as well as impact the confidence and reputation of the teacher. Address these issues through dialogue and have students find examples of online communications that enhance the mission of the school and enhance learning. Listen to and act on reports of cyberbullying immediately and continue to follow up. Bringing in experts on cyberbullying can be helpful; however, if teachers do not model respect, trust and confidence in their students' abilities to identify the lines when their online jokes and teasing go too far, then you might be fostering an environment of suspicion and zero-tolerance. Zero-tolerance policies do not work because they do not help students understand how and why their on-and-off-line discourses and conversations can hurt others and hurt the entire school environment. Have suspensions as a last resort, only after you have worked through preventative and proactive approaches. This might require evaluating each and every school program – but it will be worth it.