PERRY A. ZIRKEL

High-Tech High Jinks: An Update

Technology continues to change at a rapid rate, constantly creating new legal issues in the school context as students test the boundaries of adult supervision and savvy. Although this column has previously explored this topic both specifically (Zirkel, 1999 & 2006) and under the overlapping topic of student threats (Zirkel, 2003), it is necessary and appropriate to examine the latest variations of the legal issues. The following case and the accompanying question-and-answer discussion illustrate the most recent court decisions concerning controversial uses of technology by public school students.

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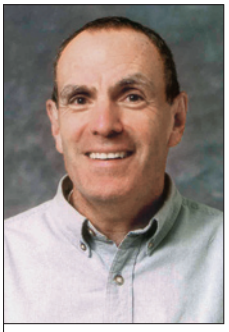
The Case[1]

In April 2001, Aaron, a middle school student in Weedsport, New York, was using AOL's instant messaging (IM) software on his parents' home computer. His icon, which remains on the screen during IM exchanges to identify him as the sender, was a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood. Beneath the drawing were the words "Kill Mr. VanderMolen"—one of his teachers.

Aaron created the icon a couple of weeks after administrators warned students that threats would not be tolerated by the school and would be treated as acts of violence. Aaron sent IM messages displaying the icon to approximately 15 members of his IM "buddy list," which included some of his classmates, but not to any school official. The icon appeared



for three weeks, during which time it came to the attention of a classmate who informed VanderMolen and later supplied him with a copy of the icon.

Distressed by this information, the teacher forwarded it to the principal, who brought the matter to the attention of the superintendent, the local police, and Aaron's parents. In response to the principal's questioning, Aaron acknowledged and expressed regret that he had created and posted the icon. The principal suspended him for five days and thereafter allowed him to return to school, pending an expulsion hearing. Meantime, the principal granted VanderMolen's request to stop teaching Aaron's class.

The police closed their case after their investigator interviewed Aaron and concluded that the icon was meant as a joke, that Aaron fully understood the severity of what he had done, and that he posed no real threat to VanderMolen or any other school official. A psychologist who interviewed Aaron came to the same conclusions.

After a hearing required by New York state law, the hearing examiner recommended a one-semester expulsion for Aaron, concluding that the controlling criterion for a threat was what a reasonable person would perceive, not what Aaron intended, and that his IM icon constituted a disruption of the school environment in violation of the student code of conduct. The school board approved the recommendation and Aaron served the expulsion in the fall of 2001, whereupon his family moved from the district due to perceived school and community hostility.

In November 2002, the parents filed suit on Aaron's behalf for money damages, claiming that his expression was not a "true threat" and, therefore, was protected by the First Amendment. The federal trial court granted the defendants' motion for summary judgment, and Aaron's parents appealed.

Questions and Answers

What do you think was the appellate court's decision in this case?

The 2nd Circuit Court of Appeals upheld the trial court's summary judgment for the defendants (Wisniewski v. Weedsport Central School District, 2007). Notably, the court decided the case on broader grounds than the precedents concerning "true threats," concluding that even if Aaron's IM icon was not such a threat, it crossed the boundary of protected speech demarcated by the Supreme Court's landmark decision in *Tinker v. Des Moines Independent Community School District* (1969).

Specifically, the court found "a reasonably foreseeable risk" that the icon would come to the attention of school

authorities and that it would "materially and substantially disrupt the work and discipline of the school." The court dismissed the home transmission of the icon as not insulating Aaron, citing various precedents that the controlling criterion was its impact on school environment.

Have other recent court decisions concerning student uses of technology to express what school administrators perceived as threats had similar outcomes?

The prevailing judicial view agrees with the 2nd Circuit's decision that the effect of the expression is the key in technology-related cases. For example, Pennsylvania's highest court upheld the expulsion of a middle school student who had sent a similar message from his home computer, concluding that although the message did not constitute a true threat, it nevertheless resulted in a substantial disruption of the school environment (J.S. v. Bethlehem Area School District, 2002).

Other cases show that the *Tinker* precedent does not necessarily mean that school officials always win (Emmett v. Kent School District, 2000; Killion v. Franklin Regional School District, 2001; Mahaffey v. Aldrich, 2002). In *Emmett*, for example, a federal court issued a preliminary injunction in favor of the First Amendment claim of a high school senior who—inspired by a creative writing class the previous year that had students write their own obituaries—created a Web site at home that posted tongue-in-cheek obituaries of two of his friends. Based on the resulting lively discussions at school, he invited site visitors to vote on who would be the subject of the next mock obituary.

The key in this case was that neither the mock obituaries nor the voting constituted a true threat or a substantial disruption at school.

The broader array of student expression cases that extend beyond technology are split, with some relying on *Tinker* (e.g., Boim v. Fulton County School District, 2007; Ponce v. Socorro Independent School District, 2007) and others using the narrower "true threat" analysis (e.g., D.F. v. Board of Education, 2005; In re C.C.H., 2002).

If school officials censured or censored student off-campus Internet expression based on perceived offensiveness but not perceived threat, would the judicial outcome have been the same as in Aaron's case?

The answer would have to be "it depends." The factors include the specific facts of the case and the judicial choice of the appropriate legal framework, which includes but is not limited to *Tinker*. For example, a federal district court denied a student's motion for a preliminary injunction after school officials barred her campaign for senior class office as a result of her vulgar blog critical of them (Doninger v. Niehoff, 2007). Although acknowledging that it was "troubled by the school's conduct," and not sure whether *Tinker* or other Supreme Court decisions provided the fitting framework to this off-campus expression, the court cited Aaron's case in support of its preliminary decision.

Similarly, a federal district court in another jurisdiction denied a student's request for a preliminary injunction after school officials disciplined him for secretly taping a female teacher in class and posting the video on YouTube with vulgar graphics (Requa v. Kent School District, 2007). In reaching its decision, the court relied on general disruptive-free language in *Tinker* and the more specific limitation on lewd and vulgar student speech in *Bethel School District v. Fraser* (1986). Yet, in another case a student obtained at least a partial judicial victory after he challenged his suspension for creating a disparaging parody of the principal on MySpace (Layshock v. Hermitage School District, 2007). Having difficulty finding a clear-cut standard in the pertinent case law, the court ruled that the district was liable but that the defendant officials, including the principal, were insulated by qualified immunity. However, the court warned: "The mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web."

If, instead, the student's Internet expression that school officials found offensive was connected to school facilities or equipment, would the judicial outcome likely have been different?

Here, again, the outcome will depend on various factors. For example, in a recent case a group of students organized a Conservative Club in a high school that prided itself in being one of only 11 pilot schools selected to participate in the national First Amendment Schools program. As one of their activities, the club members distributed posters at school that contained the Web address of their affiliated national organization. The site featured links, with expressed warnings, to graphically violent anti-terrorism videos. School officials banned the posters and the students filed suit. The court concluded that the administrators lacked evidence of disruptive effect under *Tinker* and that, even if the linked content was plainly offensive, access was sufficiently removed from school (Bowler v. Town of Hudson, 2007).

In another case, a federal district court preserved for trial the case of a middle school student whom the district expelled after he used the school's computer lab to access his own Web site, which contained vulgar vilification of three students he identified as "losers" and other, more general juvenile expressions of profanity. The purpose of the trial would be to determine whether school officials disciplined the student for unauthorized use of its computer facilities or for the vulgar, but not obscene, content of his private Web site. If the ultimately determined reason for disciplining the student is the Web site's content, given the lack of any evidence that the student promoted its access or caused any disruptive effect at school, he would win under the First Amendment (Coy v. Board of Education, 2002).

"Although courts tend to defer to school officials in clearly safety-related situations, other recent cases demonstrate the varying limits to such deference."

Conclusion

The ever-changing capacity and accessibility of technology, ranging from cell phones that include cameras to popular social Internet sites, such as MySpace and YouTube, pose inviting opportunities for students and daunting challenges for school administrators charged with providing a safe and proper educational environment. The recent court decisions illustrate the variety of not only technological devices and student uses but also judicial approaches and outcomes. While most cases have involved high school and middle school students, elementary school cases are inevitably on the horizon.

Principals need to avoid knee-jerk reactions in such cases, using due diligence to keep current with technological and legal developments. As Aaron's case illustrates, although courts tend to defer to school officials in clearly safety-related situations, other recent cases demonstrate the varying limits to such deference, based on the particular circumstances and the evolving legal framework. For the intersection of technology and law, either for student expression or other school issues, there is no easy answer for school principals beyond the sage principles of prudent procedures, careful consultation, and due deliberation. P

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Note

[1] Because this case arose at the pretrial stage of the district defendant's summary judgment motion, the "facts" herein are allegations, with any doubts resolved in favor of the plaintiff-student.

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