

# It Didn't Happen at School, but ...

Educators and the courts are grappling with the boundaries of school jurisdiction and responsibility in the borderless world of the Web.

BY LARRY MAGID

THERE WAS A TIME WHEN TO MISBEHAVE IN SCHOOL, YOU HAD TO BE IN SCHOOL. THESE DAYS, technology makes it possible for youth to reach through both space and time to harass or bully classmates, regardless of physical location. For example, a group of kids could each be sitting in their own homes on a Saturday night, using their computers to contribute to a website or MySpace or Facebook social-networking page that demeans, harasses, defames, or impersonates a fellow student. The activity is taking place off campus, outside of school hours, and no school equipment is being used. Yet come Monday, that online activity could have a very real impact on campus. Not only might fellow students have seen it prior to arriving at school, they might also access that page at school on school computers or their own mobile phones. It could have a negative impact on the victim(s) or even cause a disruption school-wide.

Bullying is not new. It's probably been going on in one form or another since humans started inhabiting the planet. What is new is that it's now possible for kids to use the Internet, their cell phones, social-networking sites, and even game consoles to harm, impersonate, or embarrass others. And because the data is digital, it can be forwarded, archived, and searched pretty much forever.

It is also possible to express oneself in ways that are lewd and offensive and even to appear in or distribute nude or sexually suggestive photos via computer or cell phone that can be viewed from both off and on school grounds. We now have a term for that—sexting—and it too is becoming an issue for educators.

## Is It at School, at Home, or Both?

When we explore the example of kids posting malicious content online on their own time, it's happening outside the reach of school officials. But is it really outside their jurisdiction? Even though the behavior may be taking place away from school, it could be having an impact on campus. Even though students are creating the webpage away from school, others may be reading it at school.

So what are school officials to do? Should they ignore the behavior, discipline the students involved, or look for an alternative way to deal with the problem? The answer isn't obvious.

The problem is that technology has complicated a reasonably clear set of policy directions set down by the United States Supreme Court in two landmark cases. In the 1968 case *Tinker et al. v. Des Moines*, the Supreme Court grappled with a situation in which a group of students was suspended from school for wearing black armbands to protest the Vietnam War. The students took the district to court, and the case eventually reached the Supreme Court, which ruled in their favor.

Speaking for the court, Justice William Brennan wrote, "The record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." He added, "They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression."

## Is Sexting a Sex Offense?

Sexting is a new trend that involves individuals exchanging nude or sexually explicit pictures between cell phones or computers. Although it wasn't a peer-reviewed study, an online survey conducted earlier this year by the National Campaign to Prevent Teen and Unplanned Pregnancy found that 20 percent of teens—22 percent of teenage girls and 18 percent of teenage boys—had engaged in the practice. Of the 20 percent who reportedly sent such pictures, 71 percent of girls and 67 percent of boys say they sent or posted content to a boyfriend or girlfriend, while 21 percent of the girls and 39 percent of the boys say they sent it to someone they wanted to date.

As you might expect, peer pressure plays a role here. Of those who sent their photos, 51 percent of teen girls cited "pressure from a guy," compared with only 18 percent of teen boys who felt pressure from girls. Just over half (52 percent) of the girls said they sent pictures "as a sexy present" for their boyfriend. Sixty-six percent of girls and 60 percent of boys said they sent images "to be fun and flirtatious."

It is not clear whether that data reflects the entire teenage population, but it is safe to say that sexting is occurring among students at schools throughout the country.

Dealing with sexting can be particularly problematic, because a nude or sexually explicit image of a person under 18 can in many cases be classified as child pornography. Felony charges have been brought against teens for sharing their own images with their friends. In January 2009, three teenage girls from Pennsylvania were charged for creating child porn, and the three boys who received the images were charged for possessing it. And a Texas eighth-grader last October spent a night in jail after a coach found a nude picture on his cell phone, sent by another student.

What some teens might think of as a humorous or innocent act could land them in juvenile hall and even require them to register as sex offenders, with all of the associated impact on where they can live, attend school, work, and more. When handling these cases, it is important for officials to distinguish between stupid behavior and malicious behavior. Child-pornography laws were designed to protect children from exploitation by adults, not to prosecute children, but a few prosecutors have used these laws for this purpose. Many, however, take a far more holistic approach to the problem, especially where there is no evidence of malicious intent.

Except in cases where malicious intent or intimidation is involved or where a student is deliberately spreading around images of others, it's generally best to have a conversation with the students and their parents, making sure they understand both the possible social and legal consequences of their behavior.

Score one for the right of kids to express themselves on campus.

In 1983, in *Bethel School District v. Fraser*, the Supreme Court did place some limits on student speech. In that case, Matthew Fraser was suspended for using sexual innuendos in a student government nomination speech of a fellow student.

Fraser was suspended for disruptive activity and, after a series of legal decisions and reversals, the Supreme Court finally ruled that it was appropriate for the school to take action. The court found a big difference between the political protest of the Tinker self-expression and the lewdness of Fraser's speech. Chief Justice Warren Burger wrote, "Democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these 'fundamental values' must also take into account consideration of the sensibilities of others." He added, "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences."

To simplify these two rulings, it could be said that schools must not punish political expression as long as it doesn't lead to disruption, but they can impose sanctions against certain types of lewd speech that go beyond the "boundaries of socially appropriate behavior." Based on that ruling, it would seem pretty obvious that schools have the right—some would say responsibility—to intervene in cases of harassment or cyberbullying. But the case law refers to activities that took place on campus. These landmark cases were decided long before students started using cell phones and Internet browsers that could reach across time and space.

Let's put this in a modern context. As I said at the start, kids don't have to be in school to impact what happens in school. Let's say a group of students decide to create a webpage stating that "Susie is a slut." Susie might have grounds for a civil lawsuit based on defamation (though she may have difficulty finding a lawyer willing to take such a case), but the students' statement is clearly not a violation of any criminal law. But what happens if, on the next day at school, other kids start laughing at Susie or making lewd or mean comments? Suddenly the students' off-campus behavior is having an impact at school and could even jeopardize Susie's ability to obtain an education.

In that case, says Nancy Willard, executive director of the Center for Safe and Responsible Internet Use, the school may have grounds to intervene. "When it's outside of school, officials only have the authority to respond if the impact of that speech is going to come to school and will substantially disrupt school or interfere with the rights of other students at school," she says. "But they don't have the authority to respond to everything else or seek to impose moral values or respond to speech contrary to the school's mission."

Willard, who is not a practicing attorney but does have a law degree, believes that schools can and should intervene if the off-campus actions cause "a hostile environment for a student that is preventing that student from receiving an education." And she adds, "If [the action] applies to a protected class—racial, sexual, or disability—there is a probability that officials have an obligation to respond."

Scott Laurence, an administrator with the Palo Alto (Calif.) Unified School District, agrees with Willard. He states, "We

have the right to intervene if [the activity] has spilled into the educational system and has a direct impact on the educational learning environment. Jurisdiction is always hard, but when you see it has a direct impact I believe that is when we have the right and responsibility to intervene.” Laurence says it is similar to an off-campus fight on a Saturday night that spills over at school. We don’t need to go back to the fight, he says, but we have the responsibility to make sure it’s a good environment on Monday morning.

Jennifer MacLennan, a school-law attorney with Arizona law firm Gust Rosenfeld, says, “The test for being able to discipline the person who set up the site is whether there is a nexus or a connection from the off-campus activity or comment to activities occurring on the school campus.” For example, if other kids are discussing the webpage while at school and treating the victim differently, then MacLennan says there is enough of a connection that you can discipline the students who created site. Like others, she points out that administrators may get into a battle of competing rights. “The district could be sued for disciplining a child or failing to discipline a child,” she says.

## A Dissenting View

American Civil Liberties Union staff attorney Aden Fine challenges the right of schools officials to take any actions for behavior, however offensive, that occurs off campus. “When students are not in school, it’s for parents to decide what students can and can’t say. It is not for the schools to be involved.” Fine says speech on the Internet is protected like all other speech. Even if there is an impact at school, he believes that does not justify suppressing or punishing speech. If a disruption at campus occurs, officials should punish the students who are being disruptive, not students whose speech may or may not have inspired that disruption.

If school officials are to act against a student accused of off-campus online harassment, then districts should gather information about where and when it occurred. “Is it related to a larger pattern of bullying and harassment that’s taking place on and off campus?” asks Sara Levitan Kaatz, school-law attorney with the California law firm of Lozano Smith. She says that courts want to see substantial disruption—not that a kid pulled out a printout of a MySpace page in class and caused a distraction. Rather, districts need to document how many kids are talking about it, if they are accessing it on campus, and if and how it is disrupting the educational experience at school for the victim.

Kaatz says there is a balancing act between free speech and the district’s commitment to keeping a safe environment. “I don’t know a single administrator who wants to violate a student’s free-speech right, but I do know a lot of administrators who wake up every morning wanting to make sure this is a safe school environment for everybody there,” she states.

In 2005, the U.S. District Court of the Western District of Pennsylvania heard the case *Latour v. Riverside Beaver School District*, in which 14-year-old Anthony Latour and his parents sued the school for expelling him for writing rap music in

## Tomorrow’s 911: Bystander Awareness

As a culture, we haven’t yet begun to mine the emotional and psychological data that kids offer up online. As Web content becomes increasingly user-generated, kids are revealing more online about their state of mind, leaving telltale indicators, or “bread crumbs,” of their well-being. In this setting, other users (bystanders) are in a position to reach out to at-risk youth—those showing an interest in self-destructive behaviors such as suicide, self-mutilation, or drug use—to help them get the help they need.

On another level, bystanders are in a position to improve the general Web environment and behavior of all users by self-enforcing acceptable behavior. Web service providers, such as social-networking, gaming, and blogging sites, require that users behave according to acceptable use guidelines outlined in terms of service agreements. Owners of these sites want their service to be a safe place where users will return often. Participants are subject to receiving warnings and ultimately losing membership if their behavior violates acceptable use parameters. All major service providers prohibit harassment, vulgarity, pornography, and terrorist activity, and they provide easy mechanisms for reporting bad behavior online. When violations occur, providers are quick to act on behalf of those who do the reporting.

All Web users, particularly teens, benefit when bad behavior is reported. Experiencing real consequences for online behavior helps teens understand that online communications are public, and though they may feel anonymous, all digital interactions can be traced by service providers and law enforcement back to the user.

Resilient digital citizens know where to go for help and support when something goes wrong online. Educators can encourage a culture of active bystander awareness by helping students understand that it’s okay to flag friends when they’re involved in risky behavior or they’ve crossed a line of good citizenship.

—Marsali Hancock

his home and publishing it online. The child, who never wrote music at school or brought his songs in, posted a song that contained violent language as part of a rap battle with another musician. The school worried that the songs contained terrorist threats and harassment. Speaking on National Public Radio, Latour’s attorney Kim Watterson said, “You can’t punish based upon words alone... [You need to determine] whether the speaker means to communicate an expression of an intent to do serious bodily harm.” In a preliminary injunction, the court ruled in favor of the student, who was reinstated at school. The settlement included a \$90,000 payment and the district’s agreeing to amend its policy regarding circumstances as to when it can exclude students from school based on speech.

In *Weedsport Central School District v. Wisniewski*, however, the court ruled in favor of the district after an eighth-grader sent messages to friends from home that contained an icon depicting a pistol firing at a man’s head with the words “Kill Mr.

VanderMolen,” the student’s English teacher. The Second Circuit District court judge concluded that the icon was not protected speech because it constituted a true threat.

Tom Hutton, senior staff attorney for the National School Board Association, sees it both ways, acknowledging that there is a good deal of uncertainty. Hutton observes that technology changes much faster than law and policy; because some of these issues “play out in schools before they do in the rest of society, school officials need to make decisions before they have clear guidance from the law.”

Hutton notes that states are passing cyberbullying laws asking schools to tackle the problem, while at the same time schools are being accused of overreaching and acting like Internet police. “No matter what you do, a lot of people are going to be unhappy,” says Hutton. “You can’t win that debate.”

Hutton recommends that school officials become familiar with their state’s cyberbullying laws. Several states are considering cyberbullying laws and at least 13 states have already passed one, including Arkansas, California, Delaware, Idaho, Iowa, Michigan, Minnesota, Nebraska, New Jersey, Oklahoma, Oregon, South Carolina, and Washington.

The specifics of the laws vary by state. Some simply require school boards to have a policy while others are more detailed. California law AB 86 went into effect in January 2009, giving schools the authority to suspend or expel students for bullying via the Internet, in text messages, or via other electronic means. The bill covers activities on school grounds, while going to or coming from school, during lunch period whether on or off campus, and during or while going to or coming from a school-sponsored activity.

## Steps Schools Can Take

Hutton, along with every other expert interviewed for this article, argues that disciplinary action shouldn’t be a first response. “If you are confronted with the situation, you need to think of the full range of options you have,” he says. “It may be that in the final analysis some discipline is warranted, but you should ask yourself if there’s a way to solve the problem that doesn’t bring up these legal issues.”

Short of unleashing disciplinary action, there are a wide range of actions available to staff, including confronting the child, bringing in the parents, or even contacting the social-networking sites involved to see if they have any remedies.

Hutton says educators also can make sure kids know that actions have consequences. Make sure they are aware that college admission counselors and employers know how to search for names, and victims have rights and can sue the students. In addition, students also can be expelled from social-networking sites for violation of terms of service, which universally prohibit bullying, harassment, and impersonation along with nudity and other inappropriate content.

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Molly McCloskey, director of constituent services for the Association for Supervision and Curriculum Development, feels that conversations with students often can go a lot further than confrontations and disciplinary actions. “I come at this from a school-counselor lens,” she says. “Once kids are in school, the adults in school are responsible for the health, safety, and support of each child in that building. Whether it happens off campus or on, it impacts the building and the ability of each child to be successful. So the school needs to respond from a climate lens rather than a punitive lens.”

Regardless of whether the school has jurisdiction to officially intervene in something that happened off campus, it has—in McCloskey’s opinion—the responsibility and moral authority to educate and try to prevent bullying before it becomes an issue. “The school is responsible for what happens inside the building, but the most powerful way that schools and communities can deal with this situation is to be aligned way before it happens,” she states. Coordination with other agencies is the key to success. “If the value of school, social-service agencies, Boys and Girls Clubs, and other groups are all in harmony, then this sort of situation is less likely to happen,” asserts McCloskey.

Camille Townsend, an attorney and Palo Alto, Calif., school board member, advises parents and educators to start with a non-disciplinary approach: “If your kid is being bullied, you look for help wherever you can find it. If the student is being a bully, certainly their parents don’t want that to happen either. Rarely do you get a parent that doesn’t want that to stop.” Getting both sets of parents involved can often stop the problem. “The school can operate with a pretty gentle glove to get things to the point where they need to be,” she says. ●●●

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## R E S O U R C E S

**Center for Safe and Responsible Internet Use.**  
[www.cyberbully.org](http://www.cyberbully.org)

**ConnectSafely: Tips to Prevent Sexting.**  
[www.connectsafely.org/sexting](http://www.connectsafely.org/sexting)

**National Campaign to Prevent Teen and Unplanned Pregnancy, Sex and Tech.**  
[www.thenationalcampaign.org/sextech](http://www.thenationalcampaign.org/sextech)