



# VIEW*S* & VISIONS

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## Are Yesterday's Rules Relevant in a Wireless World?

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Others have written in this edition of *Views & Visions* about the unprecedented challenges and opportunities new technologies bring to our schools. If today's first-graders thrive upon graduating high school in 2025, much of the credit will go to policymakers and educators who are wisely changing the face of public education to capitalize on technology's promise.

No doubt tomorrow's curricula, instruction and facilities will differ markedly from today's. But what about the rules of law that strike a balance between the rights of students and the power of school authorities? Are yesterday's rules suited to the new world, or must they be rewritten to remain relevant in the environment of the Internet, hand-held devices and social media?

We often caution public school administrators against leaping to the conclusion that legal standards developed in a pre-wireless world don't apply to student behavior involving technology. The trick is to not be distracted by the glitter and newness of technology, and to recognize when age-old legal issues are merely dressed in new clothes.

A good example is the rule that applies when a public school pupil is suspected of misconduct and, in investigating the suspicion, a school administrator searches the pupil or the pupil's possessions for evidence.

Balancing the student's constitutional right to be free from unreasonable searches against the duty of school authorities to protect students and keep order in the schools, the courts have long followed a rule announced by the United States Supreme Court in the case of *New Jersey v. T.L.O.* 1985. Under that rule, school officials needn't show probable cause and obtain a warrant before searching a public school student or the student's property. Instead, the requirement is that, prior to the search, school officials must have reasonable grounds to suspect that the search

will uncover evidence that the student violated a school rule or the law; the scope of the search must be reasonably related to the objective of the search; and the search must not be excessively intrusive to the student.

In the 1985 case, the rule was applied to a principal's search of a student's purse, based upon a report that the student smoked a cigarette in the school restroom, which the student denied. In searching her purse for cigarettes, the principal found a pack of cigarettes. But he also found rolling papers, which made him suspect that the student also possessed marijuana. For that reason, he continued to search the purse, even though he had already found what he had been looking for. Upon searching more thoroughly, the principal found marijuana, as well as evidence that the student had sold the drug to other students.

The student later sought to exclude the marijuana and related evidence from a delinquency proceeding on the grounds that the search was illegal. The Supreme Court disagreed. It ruled that the report of the student smoking in the restroom gave the principal a reasonable suspicion that he would find cigarettes in her purse, that the rolling papers gave him reasonable suspicion that she illegally possessed marijuana, and that the continued search, which uncovered the controlled substance, was reasonable.

Fast forward almost 30 years. A principal receives a teacher's report that a student has a cell phone in class, in violation of school rules.

Confronted by the principal, the student denies the accusation. Searching the student's coat pocket, the principal finds the cell phone. He takes it back to his office and, out of curiosity, browses through the photos stored on the phone. One is a video recording of the student painting

graffiti on a school wall. The student is then disciplined not only for having the cell phone in class, but for defacing school property, and a complaint is filed against the student in juvenile court.

Even though cell phones and texting did not exist in 1985 and personal video recordings were a rarity, the court will undoubtedly apply the rule first articulated by the Supreme Court in 1985. The court will find that the principal had reasonable suspicion to search for the phone and that his search of the student's coat was reasonable in scope. However, because the principal lacked reasonable suspicion that the student committed any other act of misconduct, the court will likely exclude the fruits of his fishing expedition in the photos file.

This isn't to say, however, that all of today's tech-related issues can be resolved by applying old rules. Sometimes the nature of the technology confounds the analysis, leads to inconsistent decisions and cries out for a new rule. This recently happened when different courts were presented with cases in which students, after school and on private property, used privately owned computers to vilify and embarrass others.

In one case, *J. S. v. Blue Mountain School District*, a Pennsylvania student, during a weekend and on her home computer, created a fake MySpace profile that made fun of her principal. The profile used the principal's official photo, made false reference to the principal's sexual behavior and used sexually explicit content. As news of the profile traveled, there were rumblings about it in the school, but no significant disruption or threat of disruption of the educational process. Upset and angry, the principal suspended the student from school.

The student's parent sued the school district, contending that the suspension violated her First Amendment free speech rights and that the school district had no right to punish her out-of-school speech.

Ultimately, the United States Court of Appeals for the Third Circuit agreed with the parents. The court held that even though the content of the fake profile was disturbing, the public school lacked authority to punish students for off-campus speech that is not school-sponsored, does not occur at a school-sponsored event and that causes no substantial disruption at school. The court rejected the school district's defense that the suspension was justified because it was reasonable for school officials to forecast that the student's conduct *might* have led to disruption of the educational process.

In *Kowalski v. Berkeley County Schools*, a separate but similar case that arose in West Virginia, another student, after school and on her home computer, created a discussion group webpage on MySpace. She and others used it to ridicule and post defamatory information about another student, by name, including information suggesting that the other student had a sexually transmitted disease. The next day the student targeted by the discussion stayed home from school. Her father filed a harassment complaint. Finding that the website was a "hate website" that violated the school's policy against harassment, bullying and intimidation, school officials suspended the student who created the webpage.

The suspended student brought suit against the school district and school officials. She contended that in disciplining her for private, out-of-school speech, the school violated her First Amendment free speech rights.

The United States Court of Appeals for the Fourth Circuit disagreed. It held that the student's suspension was permissible because her conduct outside of school interfered with the operation of the school by predictably causing the victim to miss school to avoid further abuse. The court also observed that if school authorities had not intervened by suspending the student, her misbehavior might have snowballed into continuing and more serious harassment.

Addressing the parents' contention that their daughter's actions occurred on private premises and, as such, were protected under the First Amendment, the Fourth Circuit Court of Appeals made a point that illustrates why, in some situations, today's technology may strain the application of familiar legal rules:

*This argument, however, raises the metaphysical question of where her speech occurred when she used the Internet as the medium. Kowalski indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.*

Even though they arguably took quite different approaches under current law to the issue of public schools disciplining students for off-duty Internet behavior, neither the *Blue Mountain* nor the *Kowalski* case was accepted for review by the U.S. Supreme Court. In their contrasting approaches, these cases illustrate the potential of technology, by its nature, to sometimes unsettle traditional legal analysis and, quite possibly, beg for new rules by which we school the Class of 2025. ▽

