Technology and Teachers

Technological devices and applications pose challenges for both schools and courts. The following case and the accompanying question-and-answer responses illustrate the current legal issues arising from teacher use of technology. In the January/February 2009 issue, this column focused on a sampling of the case law specific to public school students. In September/October 2013, we examined staff email and other social media. Here, the focus shifts to teachers' "private" uses of a computer or other such device that end up as a high-stakes issue in court.

The Case

In the 2011–2012 academic year, Mr. W, a teacher with 12 years of service, taught language arts and social studies to fifth-grade students at Strasburg Elementary School in eastern Ohio. For the previous thee years, the principal had rated him as highly effective. His record contained one instance of discipline—a five-day suspension for abuse of sick leave.

At the beginning of each school year, teachers received an acceptable use policy (AUP) for staff members regarding the school computers and network. One of the provisions prohibits transmission of any language or images of a graphic sexual nature. The related AUP for computer online services stated: "Users shall not view, download, or transmit material that is threatening, obscene, disruptive, or sexually explicit."

The district provided Mr. W with a laptop computer for his use in his classroom. At the end of the previous school year on June 6, 2011, Mr. W signed out his laptop for use during the first part of the summer on a form that acknowledged that use was exclusively for school-related purposes. He agreed to return it by the end of June.

During June and July, he worked at various football clinics in the Midwest and South, taking a vacation with his family in the interim between two of the clinics. At the end of July, he returned the laptop to the elementary school, leaving it on his desk. Finding it there, the principal gave

the laptop to the IT department. An IT staff member discovered in the laptop's temporary Internet files 84 thumbnail images with graphic sexual content. These files had been cached on July 26.

The IT representative informed the principal, who in turn reported the matter to the superintendent. On August 19, the superintendent met with Mr. W, explaining what the IT department had found on the laptop. Mr. W acknowledged and apologized for the inappropriate content. He asserted that while at a coaching clinic in Michigan on July 26, one of the coaches mentioned an actor named "Shane Diesel." That evening in his hotel room, Mr. W conducted a Google search of this name, yielding a Wikipedia article that identified Diesel as a pornographic actor. Mr. W further explained that when he clicked on a link in the Wikipedia article for the "Internet Movie Database," a series of "porn thumbnail pop-ups" appeared on the screen. At the end of the meeting, Mr. W offered to resign, but he later withdrew his offer.

One week later, the superintendent notified Mr. W in writing that he would recommend to the school board to consider suspending or terminating Mr. W for alleged immorality. Under Ohio law, which requires "good and just cause" and designated procedures for termination, an advisory referee assigned by the state commissioner of education held a hearing pursuant to the school board's formal dismissal notice. In January 2012, the referee issued his advisory decision. Based on the length and quality of Mr. W's record, the referee recommended mitigation of termination to a 45-day suspension without pay for inappropriate use of the school's computer. His recommendation also included banning Mr. W from removing district property from school premises, mandating specified continuing education coursework, and requiring him to issue a written public apology. In February 2012, the school board voted to accept the referee's findings of fact but to reject his suggested sanction, deciding instead on termination of Mr. W.

In response, Mr. W filed suit in state court to challenge the district's decision, concluding that viewing of the images was not hostile to the community and was private conduct that did not impact his professional duties. The trial court reversed the school board's decision, ordering his reinstatement with full back pay and benefits. The school board filed an appeal.

What do you think was the judicial outcome of the appeal?

In *Winland v. Strasburg-Franklin School District Board of Education* (2013), the Ohio Court of Appeals affirmed the trial court's decision. The appellate court accepted the school board's

contention that an employee using an employer-provided computer has no expectation of privacy in the computer's data, but reasoned that the issue, instead, was whether Mr. W's conduct was a private act that negatively impacted his professional duties or was hostile to the school community. The court deferred to the trial court's conclusions, finding that Mr. W's viewing of these sexual images during summer break did not involve students, was not a criminal act, and otherwise did not have a serious effect on the school community or his professional duties.

Does this court decision apply more generally to other cases of teachers' inappropriate use of technology?
Not at all. The case was limited to Ohio, which has rather particular procedural precedents regarding the grounds for termination. As a contrasting example, Pennsylvania does not require a state-designated hearing officer, and, more importantly, defines immorality in its teacher termination law to be based on local community standards without any requirement for an impact or nexus to school duties. As another example, some jurisdictions provide for binding arbitration, where a reduced sanction is more likely and courts often defer to the arbitrator's decision. The Wisconsin appellate court's decision in *Middleton Education Association v. Middleton-Cross Plains Area School District* (2013), for example, which upheld an arbitrator's reduction of the discipline of teachers who had accessed sexually explicit material on school computers, illustrates such an approach.

Second, the key was Mr. W's victory at the trial level; in general, appellate courts give wide latitude to the lower court's decision. A different trial judge in Ohio may have decided differently.

Third, the outcome will depend to a large extent on the specific facts of the case. For example, where the district's AUP strictly prohibited such access, the Seventh Circuit upheld a teacher's termination for viewing pornographic images on a school computer (*Zellner v. Herrick*, 2011).

Does Mr. W have a privacy expectation for his desk, if not his school computer?
Not necessarily. First, his privacy expectation in his desk, which—like his computer—is district property, will depend in part on whether the school policy warned him that the desk was subject to inspection without limitation and that teachers should not leave their private objects or information in or on it.

Second, even in the absence of such a policy, the courts have made clear that the relatively relaxed reasonable suspicion standard applies under the Fourth Amendment to searches of teacher desks in investigations of work-related misconduct or for noninvestigative work-related purposes.

For school-provided communication devices, the Fourth Amendment does not provide the level of protection that extends, for example, to the teacher's home.

Would the outcome of the Fourth Amendment issue likely have differed if school officials had found illicit sexual materials in (a) Mr. W's school email account, or (b) if he were in an administrative or other position that provided such devices, his school-issued pager- device, or smart-phone?
For his email account, the outcome would depend on various factors, starting with the district's AUP. For example, in *Brown-Criscuolo v. Wolfe* (2009), a federal court denied the superintendent's motion for summary judgment, thus preserving the case for further proceedings, because the district's AUP provided the employees with an expectation of privacy in their school email accounts and factual issues remained as to whether the initiation and scope of the superintendent's search were reasonable.

For school-provided communication devices, the Fourth Amendment does not provide the level of protection that extends, for example, to the teacher's home. In *City of Ontario v. Quon* (2010), the Supreme Court ruled that even if a public employee had a reasonable expectation of privacy in his text messages, they were subject to the public employer's review without offending the Fourth Amendment where the employer had reasonable grounds for the search and it was not excessively intrusive. However, the Court warned against overgeneralized rulings based on the fluidity of technological developments.

Conclusion
In the Ontario decision, the Supreme Court warned: "Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior." However, with courts' continuing and even strengthening deference to school authorities, teachers need to think twice or even thrice about which technology to use and how to use it. Amidst this rapid change, the traditional image of the teacher as a professional entrusted with modeling as well as molding our youth endures in judicial reasoning.

Principals need to keep current with the fast pace of technology, including not only recognition of its widespread effects, but also the updating of pertinent policies, so that the frequency and outcomes of court cases do not interfere with the pursuit of educational excellence. The overall message is be aware, if not beware, of teachers' uses of technology beyond the prescribed curriculum. P

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