Legal Issues Related to the Use of Filtering Software in Schools

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Students' Right to Access Information in Schools

The leading case involving students' right to access information is the case of *Board of Educ., Island Trees Union Free Sch. Dist. No 26 v Pico.*[1] The *Pico* case involved a school board's decision to remove some books from the school library after receiving a list of "objectionable" books from a politically conservative organization. The court's ruling must be read in light of the facts of the case -- the actions of the board were obviously politically motivated, the decision affected the removal of books that had already been acquired, and the books were present in a library and thus were optional, not compulsory, reading. In this context, the Court stated:

> "[T]he state may not, consistent with the spirit of the First Amendment, contract the spectrum of available knowledge. In keeping with this principle, we have held that is a variety of contexts the Constitution protects the right to receive information and ideas.'. . . . [J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active participation in the pluralistic, often contentious society in which they will soon be adult members.. . . [S]tudents must always be free to inquire, to study and to evaluate, to gain new maturity and understanding. The school library is the principle locus of such freedom. * * * In the school library, a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum.[2]

The Court stated that it did not deny that the school board had a "substantial legitimate role to play in the determination of school library content, but that if the intent of the board was to deny access to ideas with which the board disagreed, removal of material was inappropriate.[3]. The message of *Pico* is that it is appropriate for education officials to exercise good faith educational judgment in the selection of materials, but not to attempt to suppress unpopular ideas.

Is *Pico* directly applicable to student's use of the Internet? On one hand, the language of the Court certainly makes a strong case for this -- try substituting the word "Internet" for the word "library" in the above passage. On the other hand, there is a clear difference in the manner in which materials are selected for use in a school library by professional educators acting under guidelines established by the board and the manner in which materials are made available on the Internet.

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[1] 457 U.S. 853 (1982).

[2] *Id.* at 866-96 (citations and quotations omitted).

[3] *Id.* at 869.

Trying to translate the standards for textbook or library book selection into a provision in an Internet Use Policy that will clearly convey to students the boundaries for acceptable access does present difficulties. Thus, the challenge for districts is to develop a standard for access that is based on educational judgment, not a desire to suppress unpopular ideas, and that also provides clear guidance to students about what they are and are not to access.

Constitutional Problems Related to Filtering Software

There are potential constitutional problems related to the installation of filtering in schools. There are no cases that directly address this issue. The *Pico*[4] case, and a recent case involving a public library, *Loudoun v. Board of Trustees of the Loudoun County Library*[5] provide a basis for analysis.

In *Loudoun*, the court found that the library had "entrusted all preliminary blocking decisions -- and by default, the overwhelming majority of final decisions -- to a private vendor"[6] that "has refused to provide the criteria it uses to block sites"[7] and whose blocking decisions are not based on "any legal definition of obscenity or even the parameters of the (library's) policy." This delegation, the court determined, was impermissible.

In the case of *Pico*, the Court was especially concerned that the list of "books that should be banned" had been provided to the board members by a conservative political organization. The Court reaffirmed the right of the board and school officials to make decisions about materials to provide to students. In fact, the principal objection set forth in dissenting opinion in the case argued strenuously that school board officials, administrators, and teachers should be responsible for making decisions about the appropriateness of certain material for students, not the courts.[8]

Filtering companies provide only limited information about their criteria for blocking and do not release lists of the sites that they have blocked. Some filtering companies have close relationships with conservative religious organizations which appears to guide their filtering decision-making, but generally the companies do not disclose this bias in their advertising. Schools may unknowingly select a product from a company that is making decisions to block access to certain sites based on the intention to block access to unpopular ideas. In many cases companies block material that students clearly should have access to, such as safe sex information or information for gay and lesbian teens, in the same category as material that would clearly not be acceptable, such as pornography.

Can *or should* districts legally turn over the responsibility of determining what their students can or cannot access to private companies that do not fully disclose the basis upon which they are making their decisions and that may be engaging in viewpoint discrimination? The answer to this question is unclear.

There is legislation currently pending in Congress that would require schools to install filtering to receive funds through the Universal Service Fund (E-rate). If this legislation is enacted into law in its current form, it will be held to be unconstitutional. All of the decisions issues in *Pico*, the plurality, concurring, and dissenting opinions, emphasized the right and responsibility of school officials in making the determination about the appropriateness of material for their students. Congress cannot require that school officials entrust this important decision-making responsibility to private commercial vendors.

Potential Liability if a Student accesses Inappropriate Material in School

[4] *Board of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico* 457 U.S. 853 (1982).
[5] 24 F. Supp. 2d 522 (E.D. Va. 1998).
[6] *Id* at 569.
[7] *Id.*
[8] *Board of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico* 457 U.S. 853, __ (1982).

Although there are no cases directly on point, it is probable that schools will enjoy federal immunity for harm if a student accesses material placed on the Internet by a third party. This immunity was established through a section of the Computer Decency Act of 1996.[9]. Other sections of the Computer Decency Act were ruled unconstitutional, however, this section remains in force and has been upheld in a number of court cases.

§ 230(c)(1) provides:

> (1) Treatment of Publisher or Speaker- No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.[10]

As to whether an education institution offering Internet access to its students is an "interactive computer service", the question is directly addressed by § 230 [(f)](2):

> The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.[11]

§ 230(e)(3) provides:

> "(3) State Law- Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."[12]

In sum, § 230(c)(1) provides that an "interactive computer service" is not to be treated the same as a content provider; § 230 [(f)](2) provides that an education institution offering Internet access is an interactive computer service; and § 230[(e)](3) provides that inconsistent state laws may not be used as a basis of liability.

The word "immunity" is not in the statute itself. But in *Zeran v. America Online, Inc*.[13] the Fourth Circuit Court of Appeals expressly held that "[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[14]

In a recent case, *Kathleen R. v City of Livermore*,[15] a mother of a teenage boy sued the library because her son had accessed sexually explicit pictures through the library's Internet service. The City made two arguments based on § 230. The first argument was that § 230 provides federal immunity from liability to service providers for the speech of third-party content providers. The second argument was that in enacting § 230, Congress preempted any state law that may be contrary to § 230. The action was dismissed without a written opinion.

What remains in question is whether a parent could successfully establish a negligence action against a school for harm caused to students due to access to material through the district system, notwithstanding the provisions of § 230. Clearly, a school has a higher duty of care to protect children than does a public library. This question has not been addressed.

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[9] 47 U.S.C. § 230(c) (1999).
[10] 47 U.S.C. § 230(c)(1) (1999).
[11] 47 U.S.C. § 230(f)(2) (1999).
[12] 47 U.S.C. § 230(e)(3) (1999).
[13] 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).
[14] *Id.* at 330.
[15] (Alamedia County Superior Court, 1999)

The elements of a cause of action for negligence are determined by state law, which varies from state to state. The common elements are a duty of care, foreseeable risk of harm, negligence, causation, and injury or harm. Negligence is the failure to take reasonable precautions against a foreseeable risk.

The critical legal question in the event of problems arising from Internet use will be whether the district had exercised reasonable precautions against a foreseeable risk. The steps that a district can take to reduce the potential of liability are those that relate to the exercise of reasonable precautions. These are activities that a conscientious district would do regardless of concern about liability.

Reasonable precautions could include:

- Restrictions in the district's Internet policy addressing personal safety and access of harmful material.
- Provision of information to the parents about the potential dangers prior to their approval of their child's access.
- Ongoing provision of safety information to parents.
- Ongoing instruction to students about personal safety and responsible use issues.
- Professional development for teachers regarding safety issues.
- Adequate supervision and monitoring of student use of the Internet.
- Affirmative action taken by district staff, if questions or concerns arise.

Filtering software *may* act to prevent access to dangerous information and, as such, may be considered a reasonable precaution. The biggest danger presented by the installation of filtering software is the false sense of security and complacency that often results from such a decision. Educators who do not recognize the limitations of filtering software may falsely assume that the software will alleviate all possible areas of concern. This false assumption could result in the failure to take other necessary reasonable precautions, which could raise the potential of being found to be negligent.

Given deficiencies of filtering technology, the constitutional concerns about its use, and the potential detrimental effects of false security, at this point in time it can probably be concluded that filtering is *a* reasonable precaution, but not a *legally required* reasonable precaution.