

CYBERBULLYING:

LEGAL AND POLICY ISSUES

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Lately, a significant amount of attention has been directed toward a few states that are working through the process of developing cyberbullying legislation. Specifically, they are codifying a requirement for school districts to update their policies to include cyberbullying or other types of electronic harassment in their definitions of prohibited behavior. This is certainly a step in the right direction.

We have been reluctant to create a fact sheet detailing the legal issues surrounding cyberbullying for a number of reasons. First, we are not lawyers. While we often conduct legal research, we recognize the difference between "law on the books" and "law in action." Second, there currently does not exist any clear legal consensus about how to deal with many types of cyberbullying incidents.

To be sure, there are a number of cyberbullying behaviors that already fall neatly under existing criminal legislation (e.g., harassment, stalking, felonious assault), though these instances occur with relative infrequency. Also, most can agree that certain forms of cyberbullying do not require formal (legal) intervention (e.g., minor teasing). That said, few can agree on the point when cyberbullying behavior crosses the threshold at which the criminal or civil law is implicated.

At the time of this writing, we are aware of the pending legislation in the following states: Arkansas, Florida, Hawaii, Idaho, Utah, Rhode Island, South Carolina, South Dakota, and Washington. For example, Florida's law would add: "*Bullying or harassment of any student or school employee is prohibited: (c) Through the use of data or computer software that is accessed through a computer, computer system, or computer network of a public K-12 educational institution.*" Some proposals have been criticized for being ambiguous or for seeking to regulate behavior that is considered free speech. We personally argue that those who feel harassing, threatening, or otherwise intimidating speech or communications is (or

should be) protected by the First Amendment are misguided.

Courts have provided some direction to school districts on what types of behaviors may be regulated. Typically, courts making decisions involving the speech of students refer to one of the most influential U.S. Supreme Court cases: *Tinker v. Des Moines Independent Community School District (1969)*. In *Tinker*, the court ruled that the suspensions of three public school students for wearing black armbands to protest the Vietnam War violated the Free Speech clause of the First Amendment.

There are two key features of this case that warrant consideration. First, the behavior occurred on campus. Second, the behavior was passive and non-threatening. In short, the court ruled that: "A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid **substantial interference with school discipline or the rights of others**, is not permissible under the First and Fourteenth Amendments" (emphasis added). Thus, the Court clarified that school personnel have the burden of demonstrating that the speech or behavior resulted in a substantial interference.

School districts are well within their legal rights to intervene in cyberbullying incidents – even if those incidents were initiated off-campus – if it can be demonstrated that the incident resulted in a substantial disruption of the educational environment.

One of the major areas of contention, however, seems to be whether school districts can interfere in the behavior or speech of students that occurs *away from campus*. While this is muddy legal water, some cases have upheld the actions of school

administrators in disciplining students for off-campus actions. Again, in these cases it is the responsibility of school district authorities to demonstrate that the off-campus activity negatively affected the educational mission of the school in a significant way. In *J.S. v. Bethlehem Area School District (2000)*, the Commonwealth Court of Pennsylvania reviewed the case where J.S. was expelled from school for creating a web page that included threatening and derogatory comments about specific school staff.

In its ruling, the court in *J.S.* made it clear that schools *do* have the authority to discipline students when speech articulated or behavior committed off-campus results in a *clear disruption* of the classroom environment. In this case, the school district was able to demonstrate significant disruption of the school environment and a negative impact on the target of the incident. The court concluded: "Regrettably, in this day and age where school violence is becoming more commonplace, school officials are justified in taking very seriously threats against faculty and other students."

In *Emmett v. Kent School District No. 415 (2000)*, however, the U.S. District Court for the Western District of Washington reviewed a case where Nick Emmett was initially expelled (the punishment was later modified to a five day suspension) for creating a web page entitled the "Unofficial Kentlake High Home Page" that included mock obituaries of students and an online mechanism for visitors to vote on who should die next.

The key issue in this case, however, was the fact that the school district failed to demonstrate that the web site was "intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever. This lack of evidence, combined with the above findings regarding the out-of-school nature of the speech, indicates that the plaintiff has a substantial likelihood of success on the merits of his claim" (*Nick Emmett v. Kent School District No. 415 [W.D. Wa. 2000]*). The school district was unable to show that anyone listed on the site was

actually threatened by the site, or that it resulted in a significant disturbance at school.

In a more recent case, *Layshock v. Hermitage School District (2006)*, a U.S. District Court examined "whether a school district can punish a student for posting on the Internet, from his grandmother's home computer, a non-threatening, non-obscene parody profile making fun of the school principal." While the court noted that the act of creating the web site parody was in fact protected by the First Amendment, when the act resulted in an "actual disruption of the day-to-day operation" of the school, it became punishable by the school district. Here again, the school district clearly articulated how the actions of Layshock negatively affected the school environment. First, many school staff were required to devote an extraordinary amount of time to addressing and resolving the problem. Second, because the computer system had to be shut down, many students were unable to use the computers for legitimate educational purposes and a number of classes had to be cancelled.

Based on the information reviewed, a well-designed anti-bullying policy should contain the following elements:

- Specific definitions for harassment, intimidation, and bullying (including the electronic variants)
- Graduated consequences and remedial actions
- Procedures for reporting
- Procedures for investigating
- Specific language that if a student's off-school speech or behavior results in "substantial disruption of the learning environment," the student can be disciplined
- Procedures for preventing bullying (workshops, staff training, curriculum enhancements)

This fact sheet represents just a few examples of court cases and pending legislation that can help school districts evaluate and improve their current anti-bullying policies. We will update this information as necessary. Please contact us if you are aware of any court cases or other incidents that may be used to help clarify the actions taken by school districts in cases of cyberbullying.