

Cyberbullying Legislation and Case Law

Implications for School Policy and Practice



Sameer Hinduja, Ph.D. and Justin W. Patchin, Ph.D.
Cyberbullying Research Center

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When we first started studying cyberbullying over a decade ago, very few states had comprehensive anti-bullying legislation and none of those included specific information about cyberbullying. Now just about every state has something on the books related to this issue. What is more, federal law can be implicated in certain cyberbullying incidents, especially when student speech is being restricted or if one's civil rights are violated. Because the law is continuously evolving and little crystal-clear consensus has been reached regarding key constitutional and civil rights questions, schools struggle to appropriately address problematic online behaviors committed by students while simultaneously avoiding any civil liability.

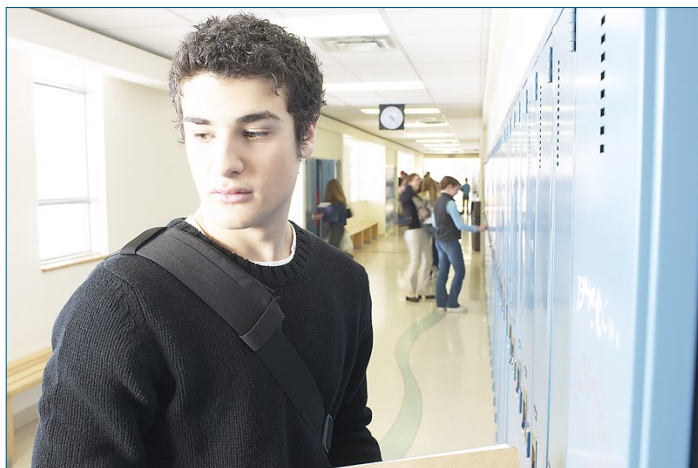
It is important to acknowledge before moving forward that we are not attorneys. Even those who are, and who specialize in harassment or student speech cases, struggle with the complexities involved in applying outdated legislation or conflicting case law new electronic communications. With this in mind, this fact sheet will provide you with a summary of what is currently known, and you can apply this information to your unique situation (after careful consultation with appropriate legal counsel).

Cyberbullying Legislation

As of January of 2015, forty-nine states (all but Montana) have enacted bullying prevention laws (for a regularly updated list of state legislation, please see: www.laws.cyberbullying.org). All of these require schools to have policies to deal with bullying, and almost all of them refer to electronic forms of harassment (or cyberbullying specifically), but there exists great variation across states regarding what exactly is mandated.

A few states formally criminalize cyberbullying; that is, they specify criminal sanctions such as fines and even jail time for the conduct. In addition, many cyberbullying behaviors already fall under existing criminal (e.g., harassment, stalking, felonious assault, certain acts of hate or bias) or civil (e.g., libel, defamation of character, intentional infliction of emotional distress) legislation, though

these laws are infrequently implicated. Also, most forms of cyberbullying do not demand formal (legal) intervention (e.g., minor teasing). Like traditional bullying, cyberbullying behaviors vary significantly along a continuum ranging from isolated, trivial, and innocuous incidents to serious and enduring torment. The problem is that few can agree on the precise point at which a particular behavior crosses the threshold and becomes something that should be addressed in a courtroom.



Most states have balked at passing new laws to further criminalize cyberbullying and instead opted to direct schools to deal with the problem. When it comes to the authority and responsibility of schools to regulate student speech, reference is usually made 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 considered in *Tinker* 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 in-**

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 (or has a reasonable likelihood of resulting in) a substantial interference. This has become the default standard that schools apply when evaluating their ability to discipline students for their misbehavior. And that is mostly true when it comes to off-campus behaviors as well.



The School’s Ability to Intervene in Off-Campus Cyberbullying

One perennial area of contention among educators is when they can control or discipline the behavior or speech of students that occurs away from campus. While this is still fairly murky legal water, some courts have upheld the actions of school administrators in disciplining students for online behaviors that occurred off-campus. In *J.S. v. Bethlehem Area School District* (2000), the Commonwealth Court of Pennsylvania reviewed an incident where J.S. was expelled from school for creating a webpage that included threatening and derogatory comments about specific school staff.

In its ruling, the court 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 school environment. Here, the school district was able to strongly demonstrate disruption 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 *Kowalski v. Berkeley County Schools* (2011), a student created an online profile disparaging a peer – which seemingly precipitated another instance when a substantial disruption took place. Kara Kowalski was the high school senior who created a “S.A.S.H.” MySpace group page which she claimed was an acronym for “Students Against Sluts Herpes.” However, other classmates later admitted that it was an acronym for “Students Against Shay’s Herpes,” referring to another Berkeley County Schools’ student, Shay N. (the main subject of discussion on the webpage). As a result, Kara was suspended for 10 days (which was later reduced to 5 days) for violating the school’s harassment, bullying, and intimidation policy.

Kara then sued the school for violating her free speech rights and due process. Upon deliberation, the lower court upheld the suspension and the case was appealed to the Fourth U.S. Circuit Court of Appeals which affirmed the lower court opinion, stating: “Kowalski used the Internet to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment as to implicate the School District’s recognized authority to discipline speech which ‘materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school and collide[s] with the rights of others.’”

In short, courts have generally supported the reasonable discipline of students whose online behaviors away from school have substantially disrupted the learning environment at school. That said, there have also been a number of examples where schools overstepped their authority or applied unwarranted and unproductive discipline.

School Authority is Not Universal

Just because schools *can* intervene in certain off-campus online incidents doesn’t mean that they have universal authority in all cases. For example, in *Emmett v. Kent School District No. 415* (2000), the U.S. District Court for the Western District of Washington reviewed a case where a student was initially expelled (the punishment was later modified to a five day suspension) for creating a webpage 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 major issue in this case was that the school district failed to

demonstrate that the website was “intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.”

In *J.S. v. Blue Mountain School District* (2011), eighth-grade honor roll student J.S. and her friend were suspended for 10 days for creating a parody MySpace profile about their principal James McGonigle. The lower court that reviewed the evidence supported the actions of the school, ruling that students can be disciplined for lewd off-campus behavior, even if such behavior didn’t necessarily cause a substantial disruption. On appeal, however, the Third Circuit Court of Appeals ultimately ruled that: “... the school district violated J.S.’s First Amendment free speech rights when it suspended her for speech that caused no substantial disruption in school, and that could not reasonably have led school officials to forecast substantial disruption in school.”

Overall, U.S. courts are oriented toward supporting First Amendment rights of free expression of students. Certain expressions, however, are not protected and allow intervention and discipline, including those that:

- substantially or materially disrupts learning;
- interfere with the educational process or school discipline;
- utilize school-owned technology to harass; or
- threaten other students or infringe on their civil rights.

Cyberbullying Can’t be Ignored

Even though many school personnel are understandably hesitant to get involved in cases of cyberbullying that occur off-campus, they have a responsibility to stop anything that has the potential to deny a student a safe learning experience. For example, a high school student in southern New York was harassed and threatened for years based on his race, and even though the school took some remedial steps to discipline the students involved, the behaviors persisted. The student sued the school and was awarded over \$1 million (*Zeno v. Pine Plains Central School District [2012]*) because the court ruled that the school did not do enough and was “deliberately indiffer-

ent” in its response, which led to continued harassment. What educators should take away from this ruling is that once they learn of such victimization taking place, they have a duty to do everything in their power to ensure that it stops. Simply disciplining the student who did the bullying is not enough; you must ensure that it actually stops and that the person targeted is safe. Responses to bullying need to be targeted (focusing on the nature of the harassment), comprehensive (long-term recurring programming vs. a one-time brief presentation), and demonstrably effective (the bullying has to stop or at least be significantly reduced). Due diligence involves more than just applying an immediate response – it demands that the response move behaviors in the desired direction.

Implications for School Policy

After carefully reviewing the language from many state laws and recent court cases, we advocate for six primary elements of what would constitute an effective school policy. They include the following:

1. Specific definitions of harassment, intimidation, and bullying (including the electronic variants)
2. Graduated consequences and remedial actions
3. Procedures for reporting
4. Procedures for investigating
5. Language specifying that if a student’s off-campus speech or behavior results in “substantial disruption of the learning environment,” or infringes on the rights of other students, the student can be disciplined
6. Procedures for preventing cyberbullying

These six areas, and the laws and cases behind them, are explored in much more detail in our book: [Bullying Beyond the Schoolyard: Preventing, and Responding to Cyberbullying](#) (2nd edition) which is available from Sage Publications (Corwin Press). In it, we devote an entire chapter to an analysis of the challenges facing educators when intervening and disciplining students for cyberbullying behaviors. If you have any questions, email us at info@cyberbullying.org.

Sameer Hinduja, Ph.D. is a professor at Florida Atlantic University and **Justin W. Patchin**, Ph.D. is a professor at the University of Wisconsin-Eau Claire. Together, they travel across the United States and abroad teaching teens how to use technology safely and responsibly. The Cyberbullying Research Center is dedicated to providing up-to-date information about the nature, extent, causes, and consequences of cyberbullying among adolescents. For more information, visit www.cyberbullying.org.

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