

Cyberbullying Legislation and Case Law

Implications for School Policy and Practice

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When we first started studying cyberbullying more than two decades 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 consensus has been reached regarding key constitutional and civil rights questions, schools struggle to appropriately address problematic online behaviors of students while simultaneously avoiding any civil liability. What can they do when students misbehave online? When must they respond and when can't they? These are all challenging questions.

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who are, and who specialize in harassment or student speech cases, struggle with the complexities involved in applying outdated legislation or conflicting case law to these situations. 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 the incidents you face (after careful consultation with appropriate legal counsel).

CYBERBULLYING LEGISLATION

All states now have some version of a bullying prevention law. For an updated list of legislation in your state, please visit <https://cyberbullying.org/bullying-laws>. All state laws 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.

As of this writing there are at least 28 states that include language about off-campus bullying in their anti-bullying legislation. Florida law, for example, states that schools are allowed to discipline students for off-campus harassment when it "substantially interferes with or limits the victim's ability to participate in or benefit from the services, activities, or opportunities offered by a school or substantially disrupts the education process or orderly operation of a school." Similarly, Illinois law prohibits student bullying carried out "through the transmission of information from a computer that is

accessed at a nonschool-related location, activity, function, or program or from the use of technology or an electronic device that is not owned, leased, or used by a school district or school if the bullying causes a substantial disruption to the educational process or orderly operation of a school."

Most states have balked at passing comprehensive, thoughtful laws to address bullying and cyberbullying and instead opt to simply direct schools to deal with the problem. This passage from Iowa law is representative: "On or before September 1, 2007, the board of directors of a school district and the authorities in charge of each accredited nonpublic school shall adopt a policy declaring harassment and bullying in schools, on school property, and at any school function, or school-sponsored activity regardless of its location, in a manner consistent with this section, as against state and school policy." Colorado law states "School Districts are required by law to adopt a written conduct and discipline code relating to the discipline, conduct, safety and welfare of all students enrolled in the public schools of the District." In short, most laws have fallen short when it comes to providing solutions to the problem of cyberbullying and instead simply tell schools "you need to pass a policy that addresses cyberbullying and handle it yourself."



Schools should review the bullying laws in their state to ensure their policies and procedures conform to the mandates included. School administrators should also be proactive in working with legislators in their state to formulate laws that are applicable to their needs. For example, all legislative school mandates need to include funding appropriations. Several state laws

require schools to educate students on bullying or the safe and responsible use of technology, though very few laws actually include funding to support these efforts.

Many states formally criminalize cyberbullying or other forms of electronic harassment; that is, they specify criminal sanctions such as fines and even jail time for the conduct. On top of that, 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 applied. However, most forms of cyberbullying do not warrant formal (legal) intervention (e.g., minor teasing). Like school 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. Nevertheless, criminal statutes may apply to the cyberbullying situation schools face (especially when it comes to serious threats of harm), above and beyond any school intervention. Indeed, there may be circumstances where schools truly can't do much about a particular cyberbullying incident, but law enforcement could (for example if a student is being threatened online by a student from another school). School officials should consult with their School Resource/Liaison Officer or other local law enforcement officials about when and how the police should be involved when addressing cyberbullying.

CYBERBULLYING CASE LAW

When it comes to the authority and responsibility of schools to regulate student speech (e.g., to punish students for their on campus or online behaviors), 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 pub-



lic 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 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 in school operations in order to restrict it. This has become the default standard that schools apply when evaluating their ability to discipline students for their misbehaviors at school. And that is mostly true when it comes to off-campus behaviors as well.

It is important to point out that courts have traditionally compartmentalized expressions by students on campus as appropriate for restrictions, while disallowing constraints on off-campus speech. For example, in *Thomas v. Board of Education, Granville Central School District* (1979), the Court said:

"When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself."

In general, students have a right of free expression, at school and even more so away from school, but those rights are more easily restricted on campus. If a student substantially disrupts the work of the school, interferes with the rights of other students (including the right to be safe), or uses vulgar or threatening language *at school*, it is likely that schools can enforce discipline.

ADDRESSING OFF-CAMPUS BEHAVIORS

Schools especially grapple with the question of whether they can intervene in online behaviors that occur away from school. Part of the problem is the US Supreme Court hasn't directly weighed in on the issue. Various lower courts have held that school districts are allowed to intervene in situations

where off-campus speech is clearly harassing and threatening to students or staff and/or disruptive to the learning environment.

For example, in *Kowalski v. Berkeley County Schools* (2011), a student created an online profile disparaging another student, insinuating she had herpes. The student responsible for the profile was suspended for ten days (later reduced to five) for violating the school's harassment, bullying, and intimidation policy. The student sued the school for violating her free speech rights. 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[es] with the requirements of appropriate discipline in the operation of the school and collid[es] with the rights of others.'"

In short, there are many circumstances under which school discipline is warranted. It really depends on: 1) what is done or said, 2) where it occurred, and 3) the consequences of the behavior/speech. The Supreme Court wrote in *Tinker* that "conduct by the student, in class or out of it, which for any reason whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."

That said, schools must also understand that not all improper behavior by students—especially what occurs online—falls under the disciplinary purview of schools. There have been many recent cases where school officials have overstepped their authority by disciplining students for constitutionally protected, non-disruptive online speech. In one high profile example, a sophomore student was kicked off the junior varsity cheerleading team for posting a vulgarity-laced rant on Snapchat about not making the varsity squad. She sued and the case made it all the way to the Supreme Court in 2020 (*B.L. v. Mahanoy Area School District*). The Court ultimately decided that the school could not discipline the student for this speech because it was not substantially disruptive to the learning environment at school. [We feel that the Court erred in its ruling \(primarily because students do not have a constitutional right to extra-curricular activities\)](#). Fortunately, the Court did re-affirm the ability of schools to intervene in certain online behaviors, including "...serious or severe bullying or harassment targeting particular individuals [and] threats aimed at teachers or other students..."

CYBERBULLYING SHOULDN'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 at school. For instance, a high school student in southern New York was harassed and threatened for years based on his race, and the behaviors persisted even though the school took some remedial steps to discipline the students involved. 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 indifferent" in its response, which led to the 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 does not occur again, 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.

BE REASONABLE

Schools have a responsibility to demonstrate that they are exercising reasonable care to address cyberbullying so as to not appear deliberately indifferent to threatening or harassing behaviors that disrupt the ability of students to learn. They also have an obligation to respond to bullying behaviors in a reasonable manner. The important word in both of these sentences is reasonable. It isn't expected that teachers and school administrators have full knowledge of all of the intricacies of the law. (Many attorneys disagree about these issues.) In most cases where schools were sued and lost, they failed to make reasonable efforts to stop persistent or severe harassing behaviors, applied discipline to aggressors that was unreasonable, and/or failed to make a clear connection between the online behaviors and the school. "Courts generally defer to school administrators' decisions regarding student speech so long as their judgment is reasonable. (*Norris v. Cape Elizabeth School District*, 2020). It is unlikely that schools will be sued for having a conference with a student and his or her parents to discuss questionable online behavior. Similarly, they will not be sued for giving detention,

or requiring Saturday school, or assigning a research paper on the effects of harassment. Schools generally only face lawsuits when students were given a long-term suspension or expulsion.

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 exclusion, sexual harassment, racism and other forms of bias-based harm, cyberbullying, threats, the creation of deepfakes, AI-generated attacks, and more)
2. Graduated consequences and remedial actions (based on the type, frequency, and duration of the misconduct; how it affected one or more students' education; the number of persons involved; the subject(s) of harassment or discrimination; the situation in which the incident occurred, and the presence of other related incidents at the school)
3. Procedures for reporting (what anonymous or non-anonymous mediums to use, what digital evidence should be submitted, which staff members will take the lead, and how will misuse of the reporting system be disciplined)
4. Procedures for investigating (how to collect statements from each party, how to collect, document, and legally store screenshots and screenrecordings of digital evidence, how and when to involve mental health, law enforcement, school attorneys, and parents)
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 (school assemblies, professional development for faculty and staff, school climate initiatives, experiential learning projects, consistent and resonant messaging strategies, curriculum enhancements, social norming campaigns, student-led activities, and more)

These six areas are explored in much more detail in our book: [Bullying Beyond the Schoolyard: Preventing, and Responding to Cyberbullying](#) (3rd 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 (and cover emerging best practices related to prevention and response).

Like the apps and platforms that youth are using today, the legal principles concerning student speech and behavior are constantly changing. As such, while the information contained in this fact sheet was current as of January, 2024, new developments in case law and statutory law are continually affecting the state of cyberbullying legal issues. For the most up-to-date information, the reader is encouraged to consult with an attorney who has expertise in school and/or Internet law. Similarly, the improper use of technology by students will continue to evolve as communications technology evolves. Vigilance is important in continually modifying and improving the base of school policies that address online harm.

If you have any questions, email us at info@cyberbullying.org.

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