

# **Cyberbullying Legislation and School Policies**

## **Where are the Boundaries of the “Schoolhouse Gate” in the New Virtual World?**

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Legislation is pending in a number of states to address the concern of cyberbullying. Many school districts are also adopting policies to address cyberbullying. This memo will address key issues related to such legislation and policies.

Cyberbullying is being cruel to others by sending or posting harmful material or engaging in other forms of social cruelty using the Internet or other digital technologies. It has various forms, including direct harassment and indirect activities that are intended to damage the reputation or interfere with the relationships of the student targeted, such as posting harmful material, impersonating the person, disseminating personal information or images, or activities that result in exclusion.

### **Key Points**

- Schools must address instances of cyberbullying occurring through use of the district Internet system or use of personal digital devices, such as cell phones, digital cameras, personal computers, and PDAs, while on campus.
- Some cyberbullying activities occurring off-campus are causing significant emotional harm to students. When students are emotionally harmed they may present a danger to themselves and to others. If school officials fail to effectively respond to these situations when they are at the “harmful speech” level, there is a risk that they will eventually have to respond at the “school failure,” “school violence,” or “student suicide” level.
- The legal standard enunciated by the courts governing when school officials can respond to off-campus online harmful speech is that school officials may impose formal discipline only when such speech causes, or threatens to cause,

substantial and material disruption at school or interference with rights of students to be secure (*Tinker* standard). The *Tinker* standard reflects an appropriate balance between student free speech rights and the school interests in ensuring student safety. It is strongly recommended that the *Tinker* standard be specifically incorporated into the legislation. Example language is set forth below.

- It is further strongly recommended that school districts incorporate prevention and education strategies into safe schools plans to address cyberbullying and related online risks and that the planning activities involve school employees, law enforcement, community organizations, parents, and students. This may be accomplished through an amendment to a state statute addressing safe schools planning.

### **Cyberbullying Background**

Cyberbullying is occurring both within the school environment and off-campus. Sometimes students are using the district Internet system – during school, during after school activities, or at home if the district has a laptop program or allows students to access the district system from home. Students may also use personal digital devices while at school, such as cell phones, digital cameras, PDAs, and personal computers while to engage in cyberbullying. In increasing numbers, students are bringing personal digital devices to school with the expectation that these devices will be used in the classroom for instructional activities. Misuse of the district Internet system and personal digital devices on campus is clearly a concern that must be addressed by schools.

More frequently, students are engaging in the cyberbullying activities off-campus – but the harmful impact is being felt at school. There was a report of a school murder in Japan that was associated with cyberbullying. There are many emerging reports of school fights and other altercations, as well as reports of students who are so significantly emotionally harmed that they are avoiding school, forced the change schools, or are simply failing. Also, there are increasing reports of youth suicide associated with cyberbullying.

It is necessary to understand that while the harmful online speech or interactions have been occurring off-campus, personal interactions between the bully(ies) and target(s) are occurring at school. It is this combination of online harm and on-campus interactions that presents significant concerns and risks for the safety of the students.

Because the original harm is being inflicted off-campus, responding to the harmful speech necessarily raises questions about the ability and responsibility of school officials to address this concern, as well as issues related to the free speech rights of students.

The following are some examples of cyberbullying and its possible impact at school:

Some high school students created a “We hate Ashley” profile on a popular social networking profile. On this “slam book” profile, they have posted cruel and vicious comments about Ashley. They invite students to send Ashley email messages telling her how ugly she is and how no one likes her.

Three students were involved in a school altercation. One was African American. Two were Caucasian. The principal addressed the situation and thought it had been resolved. Shortly thereafter, the two Caucasian students created a threatening racist profile on a social networking site. This site contained references to dragging African-American people behind cars and lynchings. Other students at school linked to the profile. The African American student found out about the site and has told the Black Student Union.

In the first incident, there is clearly a significant risk that Ashley will have difficulties in school, resulting in school failure and avoidance. Further, she could respond by attacking the bullies at school or by committing suicide. In the second incident, there is a significant risk of school violence, as well as the perception among African-American students that the school is not safe for them.

## **Legal Background**

When students are using the district Internet system, the district may govern student speech under standards enunciated in *Hazelwood School District v. Kuhlmeier*.<sup>1</sup> The *Hazelwood* standard allows schools to impose educationally based restrictions on student speech. There are additional concerns related to student use of personal digital devices that will be fully addressed in a subsequent memo. Schools should be able to also impose *Hazelwood* standards whenever students are using such devices in the classroom for instructional activities. However, it is clear that schools can require that all on-campus use of these personal digital devices be covered by the district’s policy against bullying and harassment.

Several courts have ruled on cases involving off-campus, online harmful speech. The legal standard these courts applied was the *Tinker* standard.<sup>2</sup> Under the *Tinker* standard, school officials may only respond with formal discipline in cases where the off-campus speech causes, or threatens to cause, a substantial and material disruption at school or interference with the rights of students to be secure. In most of these cases, the courts found that impact of the off-campus online speech did not meet the *Tinker* standard.<sup>3</sup>

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<sup>1</sup> 484 U.S. 260 (1988).

<sup>2</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503 (1969).

<sup>3</sup> In *Killion v. Franklin Reg. Sch. Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001) the court found that the student’s off-campus online speech did not cause a substantial disruption at school. In *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Commw. 2000), the court found that the student’s off-campus speech did cause a substantial disruption.

The application of the *Tinker* standard to off-campus student cyberbullying cases represents an appropriate balance between student free speech rights and the safety and security interests of schools. However, the imposition of a formal disciplinary response, such as suspension, will certainly be insufficient in and of itself to resolve these incidents. It is essential to ensure that harmful material is removed, the harmful activities cease, and retaliation by the student or by others at the student's request does not occur.

Additionally, if there is a question about the appropriateness of a formal disciplinary response under the *Tinker* standard, there should be nothing to prevent a school official from seeking to resolve the concern informally. The most effective response is to provide the parents of the cyberbully with a downloaded copy of the harmful online material and advise the parents of their potential personal liability if they do not take proactive steps to ensure the harmful activities cease. It is preferable for school officials to seek to intervene informally, rather than to wait until such time that the standard of "substantial disruption or threat thereof" has materialized.

It should be recognized that the question of what standard should be applied to off-campus speech is an issue that is currently under consideration by the Supreme Court in the case of *Morse v. Fredricks*. As of the writing of this document, this case has not yet been decided. However, the brief submitted by the ACLU for the Petitioner in this case strongly urged the adoption of the *Tinker* standard for off-campus speech. Some example comments:<sup>4</sup>

The Court (in *Tinker*) acknowledged the "special characteristics of the school environment" by permitting school officials to prohibit student speech if that speech would "substantially interfere with the work of the school or impinge upon the rights of other students."<sup>5</sup>

*Tinker* appropriately recognized that school officials have a duty to maintain an environment in which teachers can teach and students can learn.<sup>6</sup>

A bill to address cyberbullying that has been signed into law in Arkansas, HB 1072, fully incorporated the *Tinker* standard and further provided legislative guidelines on the kinds of activities that were considered to meet the standard of "substantial disruption."<sup>7</sup> This legislation provides an excellent model. However, it is likely not necessary to specifically include examples of what kinds of activities constitute "substantial disruption." If such examples are included, they should be prefaced by language that states: "including, but not limited to."

## **Pending Legislation**

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<sup>4</sup> *Morse v. Fredricks*, Respondent's Brief. [http://www.aclu.org/pdfs/scotus/morse\\_v\\_frederick\\_respondentsbrief.pdf](http://www.aclu.org/pdfs/scotus/morse_v_frederick_respondentsbrief.pdf)

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.* at 21.

<sup>7</sup> Arkansas State Legislature, HB 1072, <http://www.arkleg.state.ar.us/>

In Oregon and Washington, the existing and current pending legislation presents concerns about the ability of school officials to respond to any off-campus online harmful speech – even if such speech meets the *Tinker* standard. The Washington legislation presents additional concerns. There is legislation pending in other states that has not yet been fully researched. The issues raised by the legislation in these two states can be very instructional. (The language that presents concerns is underlined.)

Washington S.1706 reads:<sup>8</sup>

(5) By August 1, 2008, each school district shall amend its harassment, intimidation, and bullying prevention policy to include a section addressing acts of bullying, harassment, or intimidation that are conducted via electronic means by a student while on school grounds and during the school day.

Essentially, what the language of the proposed Washington legislation would do is to restrict school officials from responding to cyberbullying incidents that are accomplished off-campus – even if such off-campus online speech met the *Tinker* standard of causing, or was threatening to cause, a substantial and material disruption at school or interference with the rights of students to be secure.

Based on the above language, Washington school officials would also apparently be restricted from imposing discipline for cyberbullying activities conducted by students using the district Internet system after school hours, such as an after school program or a laptop program that allows students to take school computers home.

The existing Oregon Revised Statute addressing harassment, intimidation, and bullying reads:

**339.351 Definitions for ORS 339.351 to 339.364.** As used in ORS 339.351 to 339.364, “harassment, intimidation or bullying” means any act that substantially interferes with a student’s educational benefits, opportunities or performance, that takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop, and that has the effect of: ...

Oregon HB 2637 amends this statute to include a definition of cyberbullying.<sup>9</sup>

In Oregon, the problem is not the current legislation, but the existing language of the statute, that appears to preclude a school district response to off-campus online speech that would meet the *Tinker* standard. Clearly, the existing language in the Oregon statute was an appropriate limitation at the time it was enacted, but with the emergence of cyberbullying concerns, this language presents limitations on the ability of school officials to effectively respond to this new concern.

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<sup>8</sup> <http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/Senate%20Bills/5288-S.pdf>

<sup>9</sup> <http://www.leg.state.or.us/07reg/measures/hb2600.dir/hb2637.intro.html>

## Legislative History Analysis

My investigations into the background of the Washington and Oregon bills lead me to several conclusions:

- The legislators involved clearly recognize the concern of cyberbullying and want the bills to generate a more effective response to address these concerns at the district and school level.
- There appears to be a lack of understanding about the legal dimensions of this situation among these legislators and school leadership organizations.
- Some free speech advocates have argued that school officials simply should have no right whatsoever to intervene in cases of off-campus online speech.<sup>10</sup> A spokesperson for the Washington ACLU was quoted in the newspaper as saying that they had no concerns about the language in the Washington cyberbullying bill because it would not apply to any off-campus behavior.<sup>11</sup> This reported perspective is inconsistent with the argument set forth by the ACLU in their respondent's brief in the *Morse v. Fredricks* case. In this brief, the ACLU clearly recognized the need for school officials to respond to disruptive off-campus speech under the *Tinker* standard.
- School leadership organizations are reportedly concerned that a statutory requirement that schools address cyberbullying would create a responsibility for school officials to be *in loco parentis* in the homes of all of their students. Clearly, this is a legitimate issue of concern, but would not be a consequence of a properly drafted statute that is in accord with the *Tinker* standard.

## Additional Factors

There are several additional factors that are highly relevant to this situation:

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<sup>10</sup> "A threshold question concerns whether student Internet expression can be characterized as on-campus or off-campus. If the expression takes place off-campus, there is an argument that school officials simply do not have jurisdiction over the student's speech. The matter would be one for parental, not school, discipline." Hudson, D.L. *Student Online Expression: What Do the Internet and MySpace Mean for Students' First Amendment Rights?* First Amendment Center. <http://www.firstamendmentcenter.org/PDF/student.internet.speech.pdf>.

"The question becomes more difficult if the Internet content is created wholly away from school and the creator does not distribute the material, but the material indeed creates a substantial disruption at school. One commentator says that if school officials can document substantial disruption, then school officials "should be able to punish the student speech that caused this disruption without fearing that they will violate the First Amendment." ...The problem is that this analysis would allow school officials to punish students for off-campus conduct — an area beyond their jurisdiction." (This is not an accurate statement of the law.) Hudson, D. (2000) *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*. First Amendment Center. Part 4 (citations omitted) <http://www.freedomforum.org/packages/first/censorshipinternetspeech/index.htm>.

<sup>11</sup> "Jennifer Shaw, a lobbyist for the ACLU of Washington, said that since the bill was amended so it wouldn't apply to behavior occurring outside of school hours and away from school property, she doesn't think it raises free speech concerns." Santos & Nyhan, Cyberbullying is target of Olympia bill, *Seattle Post Intelligencer*, March 12, 2007 [http://seattlepi.nwsourc.com/local/307203\\_bullying13.html](http://seattlepi.nwsourc.com/local/307203_bullying13.html).

- It is really not necessary to amend state laws or district policies addressing bullying and harassment to include cyberbullying. Bullying and harassment are bullying and harassment regardless of the means by which this harm is accomplished. The underlying motivation of legislators, as well as school districts, in including this new language appears to be that of communication. Message from legislature to school districts: “We are hearing increasing reports of the harm caused by cyberbullying and we want school districts to address this concern.” Message from school districts to students: “Cyberbullying is bullying and harassment and it is not okay.”
- State statutes related to bullying and harassment address disciplinary responses. The imposition of a formal disciplinary response to harm caused by off-campus speech will necessarily be limited by the *Tinker* standard. Ideally, schools should also be implementing a more comprehensive, preventive approach to more effectively address the concern of cyberbullying. The comprehensive approach would allow for a range of informal responses by school officials and would also seek to educate students about how to prevent and respond to these situations and educate parents on strategies to ensure their child does not engage in such harmful online activity, is not at risk of victimization, and the range of response options that are available. A more comprehensive approach can be developed in the context of safe schools planning.

### **Recommendations for Legislation and Policies**

The following are three key recommendations for legislation and school policies to effectively address cyberbullying:

- State statutes and school policies directed at cyberbullying must specifically allow school officials to respond to instances of off-campus online speech that meets the *Tinker* standard, as well as address the use of the district Internet system and any personal digital devices used on campus. Two critical components of such legislation or policies are:
  - Addition of cyberbullying in the list of prohibited actions. The best way to do this is to simply indicate that cyberbullying encompasses any of the already prohibited actions – such as bullying, discrimination, harassment, intimidation – accomplished through electronic means.
  - Expansion of the description of the extent of authority to include any use of the district Internet system and on-campus use of personal digital devices and to include off-campus behavior that meets the *Tinker* standard. An example is the following language: “Any act that takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop, use of the district Internet system, use of a personal digital device on campus, or off-campus activities that cause or threaten to cause a

substantial and material disruption at school or interference with the rights of students to be secure.”

- Most districts and schools have developed safe schools plans in compliance with the No Child Left Behind Act. These plans address a full range of safety issues, including prevention. Effective planning involves teachers, administrators, students, parents, law enforcement, and community representatives. Legislation could either require or recommend that districts and schools incorporate cyberbullying into their safe schools plans would be an effective way to more effectively address the concern of cyberbullying. Even without such legislation, school districts are encouraged to approach the concern of cyberbullying in the context of safe schools planning.
  - *Cyberbullying and Cyberthreats: Responding to the Challenge of Online Social Aggression, Threats and Distress* provides guidance on this planning. Further information is online at <http://cyberbully.org>.
- Additionally, given that there are other areas of youth risk online that could also directly impact schools, and clearly are impacting youth well-being, consideration should be given to including language in such legislation that will expand the safe schools planning activities to address a wider range of youth risk online issues. The most significant additional issues of concern include:
  - Unsafe online communities that are promoting cutting, anorexia, and suicide.
  - Dangerous groups, including hate groups and gangs.
  - Risky online sexual activities, that range from posting sexually provocative material, to arranging for sexual “hook-ups,” to involvement with online sexual predators.

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