

Cyber Bullying: Legal Guidelines for Policy Construction

Author(s): *Joe Dryden*

Affiliation: Texas Wesleyan University

2011

Abstract

Cyber bullying is a growing epidemic. A review of cases dealing with off-campus student cyber expression reveals some interesting yet troubling patterns. Courts have yet to articulate a uniform legal standard leaving school officials with little if any legal authority to protect individual victims. Most court attempt to apply *Tinker's* substantial disruption test, but this test will not protect individual victims. *Tinker's* second prong must be considered. Only two cases have been adjudicated dealing with student-on-student cyber bullying, and different standards were applied in each case. Every other off-campus student cyber expression case involves cyber attacks on school personnel. A review of all such cases revealed several were decided on the basis of policy construction. This article provides analysis and policy recommendations for school officials who wish to intervene to protect victims of cyber bullying with policy that may withstand judicial scrutiny.

Sociological Context

The Internet and other forms of electronic communication have had, and will continue to have, a transformative impact on our society, but these changes are not all positive (Laser, 2010). Malicious expressions posted by students on the Internet or sent via electronic communication devices have contributed to tragic outcomes (Make a Difference for Kids, 2008). Many people are familiar with the widely publicized story of Megan Meier, a 13-year-old girl who committed suicide after receiving malicious and insulting messages from a woman posing as a 16-year-old boy. (Magg, 2007). While Megan's story is shocking, it is not isolated. Ryan Patrick Halligan was bullied and tormented over the course of several years due to learning and motor disabilities. He made the mistake of telling one of his classmates about a medical checkup that included a rectal exam. The classmate misrepresented the description of the exam and posted the story online. Before long, many of Ryan's classmates began taunting him about being gay. Ultimately, Ryan could no longer take the public humiliation, and he took his own life (Halligan, 2009). Phoebe Prince, a 15-year old transfer student from Ireland, committed suicide after being cyber bullied through text messages and social networking sites (Kotz, 2010). For each of these tragic stories, many others exist. What has become clear is that an epidemic in the form of cyber bullying and cyber harassment is sweeping the country, and school officials need guidance (Bradshaw, 2010). No uniform standard currently exists leaving school officials powerless to intervene to protect cyber bully victims.

A Review of Cases

In some cases, off-campus student cyber expression has produced a substantial disruption of school operations (*J. S. v. Bethlehem Area School District*, 2002; *Wisniewski v. Board of Education of Weedsport Central School District*, 2007). In these cases, courts consistently apply *Tinker's* substantial disruption test which gives school officials the authority they need to protect the overall learning environment. Unfortunately, what constitutes a substantial disruption for one court does not for another and the result is conflict and confusion. This conflict was never more evident than in the cases of *J. S. v. Blue Mountain*

School District (2010), and *Layshock v. Hermitage School District*, (2010). These Third Circuit cases both involved student cyber attacks on school officials from off-campus locations yet the initial holdings, handed down on the same day, were paradoxical. The *Layshock* panel ruled in favor of the student and the *Blue Mountain* panel ruled in favor of the school district. Recognizing this embarrassing outcome, the Third Circuit vacated both rulings and retried each case *en banc*. Ultimately, in both cases, the court ruled that the actions of school officials violated the students First Amendment right of expression due to the fact that their expressions did not create a substantial disruption of school operations.

In these cases, and most others dealing with off-campus student cyber expression, *Tinker's* second prong, expressions which interfere with the rights of others, was not considered as a viable legal basis for school intervention. As a result, individual victims of cyber bullying have very little protection. Most are forced to suffer in isolation, withdrawal and depression set in, and in many cases, students commit suicide. When the victim of the cyber attack is an individual student, the likelihood of a substantial disruption is almost nonexistent. As a result, the only recourse these victims have is through civil and criminal remedies. To address this unfortunate situation, several researchers and authors have called for the utilization of *Tinker's* second prong which would allow school officials to intervene when a student's expressive activities interferes with the rights of others (Dryden, 2010; McCarthy, 2009; Shiffhauer, 2010).

An analysis of cases involving off-campus student cyber expression reveals some interesting yet troubling patterns. Dryden (2010) noted that of the 19 cases identified dealing with off-campus expression at that time, 18 involved student-on-adult cyber bullying, only one dealt with student-on-student cyber bullying, *J.C. v. Beverly Hills Unified School District*, 2010. Recently, The Fourth Circuit Court of Appeals ruled on a second case dealing with student-on-student cyber bullying, *Kowalski v. Berkeley County Schools* (2011). In *J.C.* the court refused to consider the application of *Tinker's* second prong and ruled in favor of the student. In *Kowalski*, the Fourth Circuit Court of Appeals supported "the School District's recognized authority to discipline speech which...collides with the rights of others" (p. 2). If other circuits will follow the foresight of the Fourth Circuit and recognize the applicability of *Tinker's* second prong in cyber bullying cases, school officials would have the legal authority to intervene with reasonable, proportionate punishments to protect individual victims.

Policy Construction

In some off-campus student expression cases, school officials relied on policies that the courts found to be vague and overly broad. (*Coy v. Board of Education of North Canton City Schools* 2002; *Killion v. Franklin Regional School District*, 2001) In *Killion*, the policy stated "if a student verbally or otherwise abuses a staff member, he or she will be immediately suspended from school. It may then be the recommendation...that they indefinitely suspend or expel the student involved" (p. 458). The court recognized several problems with this policy. First, the policy made no geographic distinctions between on-campus and off-campus expression. Second, the application of the policy could easily reach constitutionally protected speech in light of the ambiguous nature of the term "abuse."

In *Coy*, the court was guided by several widely accepted principles. First, as the Supreme Court stated in *Bethel School District No. 402 v. Fraser* (1986), "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship" (p. 686). In light of the unique characteristics of the school environment, a school's code of conduct need not be as detailed and specific as a criminal code that imposes criminal sanctions. However, it must be detailed enough so that those who are subjected to its sanctions understand which types of behaviors are prohibited. This necessitates the use of unambiguous language or language which is defined within the policy.

In *Leonardson v. City of East Lansing* (1990), the court described a vague ordinance as one which "denies fair notice of the standard of conduct to which a citizen is held accountable" (p. 196). Vague ordinances or policies give rise to constitutional concerns because they give governmental authorities the power to define the terms, which can lead to arbitrary and discriminatory enforcement. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application" (*Grayned v. City of Rockford*, 1972, p. 109). To avoid this constitutional problem, school policies must be described in enough detail so students and parents have fair notice as to which types of behaviors are prohibited and so school officials know the limits of their authority.

Second, a policy is considered overbroad if it "reaches a substantial number of impermissible applications relative to the law's legitimate sweep" (*Déjà vu of Nashville, Inc. v. The Metropolitan Government of Nashville and Davidson County*, 2001, p. 396). If part of the purpose of a school policy is to protect students from cyber bullying and school personnel from cyber harassment in the form of malicious attacks on their reputations, policy developers should avoid using terms such as "abuse," "disrespect," "inappropriate," "offensive," and "hurtful." Use of such ambiguous and subjective terms would permit the policy to reach a number of impermissible applications beyond the legitimate scope of state interest.

Policy Recommendations

To survive judicial scrutiny, policies which grant school officials authority over off-campus student expression must be narrowly tailored to cover well-defined, limited types of speech. Policy makers must keep in mind that what they seek to regulate is not the content of the expression, but its impact. A great place to start would be with the language used in *Tinker* (Zande, 2009). A school district could adopt a policy which stated: "Any student whose expressions, on campus or off campus that produces, or poses a likelihood of creating a material or substantial disruption of school operations can be subjected to disciplinary measures." Several definitions and clarifications would be necessary to make sure students understood the types of expression which could subject them to school discipline. Examples would need to be listed so students understood what a material or substantial disruption looked like and what conditions might make such a disruption foreseeable.

Since true threats are not protected, districts could include language in a policy which stated: "Any student whose expressions, on campus or off campus, threaten the safety of fellow classmates or school personnel can be subjected to disciplinary measures." If a district decides that it wants to try to protect the individual victims of off-campus cyber bullying it could include language which stated: "Any student whose expressions, on campus or off campus, that interfere with the rights of fellow classmates or school personnel can be subjected to disciplinary measures." The rights of fellow students and school personnel would need to be listed and defined. Terms such as "bully," "defamation," "malice," and "harass" would need to be clearly articulated so students would be put on notice that while legitimate criticisms of school policy and practice are protected speech, intentionally attacking the character and reputation of fellow classmates and school personnel with expressions that are known to be false are not.

A school district might consider using language from the Cyberbullying Research Center (2008) which defines cyber bullying as the "willful and repeated harm inflicted through the use of computers, cell phones, or other electronic devices" (p. 1). This definition contains several factors that must be present before a student's off-campus cyber expression could be considered cyber bullying. The expression must be deliberate and repeated. The onetime occurrence of an inappropriate comment, although offensive, is not enough to constitute cyber bullying. In addition, the definition would consider the viewpoint of the victim, not the perpetrator, thereby removing the possibility that a student could avoid responsibility by claiming they were only kidding. For courts to find that cyber bullying exists, the actions leading to

complaints might need to be severe and pervasive enough "that the victim-students are effectively denied equal access to an institution's resources and opportunities" (*Davis v. Monroe County Board of Education*, 1999, p. 651). This language from *Davis* could supply the standard for determining harm as referenced in the definition above. Finally, the communication would have to take place using electronic communication devices, such as computers or cell phones.

Policy makers should articulate a reasonable and graduated schedule of disciplinary consequences. Draconian punishments are not viewed favorably by the courts. For onetime minor infractions, disciplinary consequences should be limited to conferences between the parents, student, and school officials. The student could be asked to remove the expression and to post, in its place, a public apology to the victim. Schools could consider issuing assignments where the student is asked to read about the tragic consequences of cyber bullying and respond with a reflective report. School counselors could speak with perpetrators to help them understand why their actions were wrong. For more severe infractions, short term suspensions may be appropriate, but expulsion should be limited to either repeated egregious violations or clear threats where school officials believe the student's continued presence on campus poses a danger to other students or school personnel.

Conclusion

As schools attempt to mediate between First Amendment student expression rights, and the destructive consequences associated with cyber bullying, policies must be carefully drafted to provide students and parents with the appropriate notice and to guide school officials as they attempt to address this growing epidemic. Problems with policy construction should not serve to insulate cyber bullies from the consequences of their actions. Following the guidelines outlined in this article should be useful in the construction of a policy which may withstand judicial scrutiny.

References

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).

Bradshaw, C. (2010). *Student staff and parent perspectives on bullying and school climate: Implications for school-wide bullying prevention*. Retrieved from <http://www2.ed.gov/about/offices/list/osdfs/bullyingagenda.pdf>

Coy v. Board of Education of North Canton Schools, 205 F. 2d. 791 (N.D. Ohio, 2002).

Cyberbullying Research Center. (2008). *Defining cyberbullying*. Retrieved from <http://cyberbullying.us/blog/defining-cyberbullying.html>

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

Déjà vu of Nashville, Inc. v. The Metropolitan Government of Nashville and Davidson County, 466 F. 3d 391 (6th Cir. 2001).

Dryden, J. (2010). School authority over off-campus student expression in the electronic age: Finding a balance between a student's constitutional right to free speech and the interest of schools in protecting school personnel and other students from cyber bullying, defamation and abuse. (Doctoral dissertation). Retrieved from ProQuest. (3451974).

Grayned v. City of Rockford, 408 U.S. 104 (1972).

Halligan, J. (2009). *Ryan's story: In memory of Ryan Patrick Halligan, 1989-2003*. Retrieved from <http://www.ryanpatrickhalligan.org/>

J.C. v. Beverly Hills Unified School District, No. CV 08-03824 (C. D. Cal. 2010).

J. S. v. Bethlehem Area School District, 569 Pa. 638 (S.C. Penn. 2002).

J. S. v. Blue Mountain School District, 593 F. 3d 286 (3rd Cir. 2010).

Killion v. Franklin Regional School District, 136 F. 2d. 446 (W.D. Penn. 2001).

Kowalski v. Berkeley County Schools, No 10-1098 (4th Cir. July 27, 2011).

Kotz, P. (2010). *Phoebe Prince, 15, commits suicide after onslaught of cyber bullying from fellow students*. Retrieved from http://www.truecrimereport.com/2010/01/phoebe_prince_15_commits_suici.php

Laser, M. (2010). *Loses from Internet crime nearly doubled in 2009*. Retrieved from <http://arstechnica.com/web/news/2010/03/losses-from-internet-crime-more-than-doubled-in-2009.ars>

Layshock v. Hermitage School District, No 07-4465 (3rd Cir. February 4, 2010).

Leonardson v. City of East Lansing, 896 F.2d 190 (6th Cir. 1990).

Magg, C. (2007, November 28). A hoax turned fatal draws anger but no charges. *The New York Times*. Retrieved from <http://www.nytimes.com/2007/11/28/us/28hoax.html?fta=y>

Make a Difference for Kids. (2008). *Cyberbullying*. Retrieved from <http://www.makeadifferenceforkids.org/cyberbullying.html>

McCarthy, M. (2009). Student expression that collides with the rights of others: Should the second prong of *Tinker* stand alone? *West's Educational Law Reporter*. 240 Ed. law Rep. 1.

Shiffhauer, , M.I. (2010). Uncertainty at the outer boundaries of the First Amendment: Extending the arm of school authority beyond the schoolhouse gate into cyberspace. *Saint John's Journal of Legal Commentary*, 24, 731.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Wisniewski v. Board of Education of Weedsport School District, 494 F. 3d 3 (2nd Cir.2007).

Zande, K. (2009). When the school bully attacks in the living room: Using *Tinker* to regulate off-campus student cyberbullying. *Barry Law Review*, 13, 103.

Author Note

Joe Dryden, School of Education, Texas Wesleyan University

Portions of this manuscript are based upon researched conducted for a doctoral dissertation by Joe Dryden while attending the University of North Texas.

Correspondence concerning this manuscript should be addressed to Joe Dryden, School of Education, Texas Wesleyan University, Fort Worth, TX 76105.

Contact: jdryden@txwes.edu