Responding To The Bully And Her Avatar: The Law's Response to Bullying in the Cyber Age

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A Word of Caution

No two legal matters are exactly alike. This material is designed to assist educators in understanding how the law responds to the problem of bullying and cyber-bullying, to explain who the law deems to be a bully/aggressor, to explore how schools can lawfully respond to bullying, and to define the Constitutional limitations on our potential responses. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case.

I. OVERVIEW

The purpose of this material is to assist individuals in understanding how the law responds to the problem of bullying and cyber-bullying, to explain who the law deems to be a bully/aggressor, to explore how schools can lawfully respond to cyberbullying, and to define the Constitutional limitations on our potential responses. This material does not cover every aspect of the law, and you are encouraged to seek an opinion from your legal counsel regarding any specific case.

II. What Authority did Schools have to Prevent Bullying and Cyber-Bullying before Anti-Bullying Laws were Adopted (see e.g. RSA 193-F)?

A. Regulation of On-Campus Conduct and Speech

1. Conduct

Historically, districts have always had the authority to regulate student conduct that occurred on-campus. See e.g. RSA 193:13 (suspension and expulsion of pupils for "gross misconduct, or for neglect or refusal to conform to the reasonable rules of the school"). Limitations on this authority generally resulted from due process considerations, as a result of student discipline.

In the case of Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992 (1975)*, re-hearing denied* 421 U.S. 921, 95 S. Ct. 1589 (1975) the US Supreme Court held that the right to education is a property right and a liberty and thus no school district can deny a student that right without granting the student "due process of law." Thus, districts cannot impose a long-term suspension (greater than 10 days) or expel a student without first providing that student with due process. See e.g. Goss v. Lopez, 419 U.S. 565 (1975).

2. Speech

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Constitution, Amendment 1.

Not all speech is protected by the First Amendment. For example, "fighting words," which have been defined as "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction" and "true threats," defined as "those statements where the speaker means to communicate a serious expression of an intent to commit an act

of unlawful violence to a particular individual or group of individuals," are not protected. Virginia v. Black, 538 U.S. 343, 359 (2003).

In the school setting, certain additional categories of speech may be regulated:

- Student speech may be limited, restricted, or punished provided that there are facts which may reasonably lead school authorities to believe that the speech will substantially disrupt the school environment or materially interfere with school activities. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

- Speech that is "vulgar, lewd, obscene and plainly offensive," may be limited, restricted, or punished by school officials. Bethel School District v. Fraser, 478 U.S. 675 (1986).

- Reasonable restrictions may be placed on school - sponsored speech, such as school-sponsored publications. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

- Schools may punish students who advocate illegal drug use while in school. Morse v. Frederick, 551 U.S. 393 (2007).

Schools may enact policies that are both content and viewpoint neutral, even if those policies result in the suppression of speech. Douglass v. Londonderry School Board, 372 F.Supp.2d 203 (D.N.H. 2005). To withstand constitutional muster, policies pertaining to speech, including harassment and bullying policies, should be limited to speech that is unprotected by the First Amendment (i.e., a "true threat"), and speech that falls into the categories set forth by the Supreme Court in Tinker, Bethel School District, Hazelwood, and Morse.

B. Regulation of Off-Campus Conduct and Speech

Recently, courts have struggled with the extent to which school administrators may regulate off-campus conduct. With the advent of instant messages and websites such as Facebook.com, MySpace.com and Friendster, internet communications have substantially increased. Courts are generally holding that schools may discipline students for off-campus conduct, including internet speech, if there is a nexus between the conduct and the school. See Cohn v. New Paltz Central School District, 363 F.Supp.2d 421 (N.D.N.Y. 2005). The inquiry is whether the off-campus conduct caused a substantial disruption of the educational process. See Packer v. Bd. of Educ. of the

Town of Thomaston, 717 A.2d 117 (Conn. 1998).

While the full extent to which school officials may regulate off-campus conduct, including speech, is unclear, the following cases do shed some light on this issue:

Donovan v. Ritchie, 68 F.3d 14 (1st Cir. 1995)

Facts: On Sunday, September 18, 1994, a group of 15 students created a 9-page document entitled "The Sh[__] List." The document listed the names of 140 students, with each name "being followed by one or more lines of crude descriptions of character and/or behavior." A handful of freshman, more than 30 sophomores and juniors, and more than 60 seniors "were characterized by epithets that were not merely insulting as to appearance, but suggestive, often explicitly so, of sexual capacity, proclivity, and promiscuity."

The following Thursday, a high school senior and two other students made copies of the list and put them in a trash barrel. They were delivered to the school and discovered by a faculty member the following day. The Principal informed the school that the list was harmful and degrading and encouraged students to provide information as to the perpetrators. The following Monday, the three boys who had copied the list went to the principal's office and denied any involvement in the matter. The next day, they returned to the principal's office, said they photocopied the list, but denied knowing the contents of the list. They also indicated that they had photocopied the list off-campus. The principal informed them that they would likely face discipline.

In the meantime, the principal had discovered the names of the 15 students who were involved in creating the list. The principal sent a letter to those students and scheduled a meeting with them and their parents. During the meeting, the principal indicated that the list violated the school's rules against harassment and obscenity. After the meeting, the principal met with the high school senior who instituted this case and informed him that he was indefinitely suspended. Shortly thereafter, the principal wrote to the student and his parents and informed them that he was suspended for 10 days and was to be excluded from extracurricular activities.

The student brought suit against the school, seeking injunctive relief, compensatory and punitive damages, and attorney's fees, alleging that the District failed to follow required procedures prior to suspending him, and that the suspension violated state law which prohibited the "suspension of a student for 'marriage, pregnancy, parenthood or for conduct which is not connected with any school-sponsored activities.'"

Held: For the district. The student's due process rights were not violated. The court found that the student's "admitted off-campus conduct led to the distribution of the

list on school premises."

Gendelman v. Glenbrook N. High Sch., 2003 U.S. Dist. LEXIS 8508, 2003 WL 21209880 (N.D. Ill. May 21, 2003)

Facts: Plaintiffs, members of the junior and senior classes at Glenbrook N. High School, met for the annual "powder puff" football game, on a Sunday afternoon, off school grounds. All individuals in attendance were students at the High School. During the game, the juniors were "subjected to a variety of offensive and physical contacts, including violence, at the hands of the senior students," described by the court as "hazing and harassment of an extreme sort." The "game" was videotaped, and subsequently, several participants were charged with violations of the school handbook rules prohibiting hazing and harassment. The students were brought before several administrators, given the opportunity to respond to the charges against them and were then suspended for 10 days; thereafter, they filed a complaint seeking an injunction ordering defendants to vacate their suspensions.

Plaintiffs alleged that the district did not have the authority to discipline the students because the event was not sponsored or sanctioned by the school, it did not take place on school property or during school hours, and the school had no interest in what had occurred. The District argued that its handbook prohibited hazing and harassment, and it did not limit that prohibition to school sponsored events.

Held: Plaintiff's request for a temporary restraining order was denied. It was unlikely that plaintiff's would succeed on the merits of their claim. "[G]iven the egregious nature of some of the conduct depicted in the videotapes, the nexus of the event to the . . . High School and the fundamental relationship that all of the participants had to the school, to hold that the school was powerless to act in these circumstances is patently absurd. When one set of students sets to prey upon another set of students in a ritualistic exercise, the consequences of which will necessarily effect the students' relationships while they are all in attendance at the s[a]me school, the ability of school officials to act in the area and discipline those who went beyond the pale of tolerable student behavior is manifest."

Impact: There is a strong public interest in keeping school environments safe and free from persons and events that will impede the learning process. To accomplish this purpose, school districts must be allowed to discipline students when discipline is warranted. The public interest is served when districts are permitted to punish students participating in incidents involving "egregious conduct."

Note: Student hazing is a misdemeanor in New Hampshire. See RSA 631:7. Student hazing is defined as "any act directed toward a student, or any coercion or

intimidation of a student to act or to participate in or submit to any act, when:

1) Such act is likely or would be perceived by a reasonable person as likely to cause physical or psychological injury to any person; and
2) Such act is a condition of initiation into, admission into, continued membership in or association with any organization."

RSA 631:7, I(d).

A person is guilty of a misdemeanor if such person:

1) Knowingly participates as an actor in any student hazing; or
2) Being a student, knowingly submits to hazing and fails to report such hazing to law enforcement or educational institution authorities; or
3) Is present at or otherwise has direct knowledge of any student hazing and fails to report such hazing to law enforcement or educational institution authorities.

RSA 631:7, II(a).

An educational institution, which includes "any public or private high school . . . or other secondary . . . educational establishment," or "an organization operating at or in conjunction with an educational institution is guilty of a misdemeanor if it:

1) Knowingly permits or condones student hazing; or
2) Knowingly or negligently fails to take reasonable measures within the scope of its authority to prevent student hazing; or
3) Fails to report to law enforcement authorities any hazing reported to it by others or of which it otherwise has knowledge."

RSA 631:7, II(b).

III. The Pupil Safety and Violence Prevention Act, RSA 193-F

A. Legislative History

In 2000 the state legislature adopted the "Pupil Safety and Violence Prevention Act of 2000." RSA 193-F:1, et seq. The Pupil Safety and Violence Prevention Act was a direct response to incidents of school violence that had occurred throughout our nation. Educators and lawmakers alike observed a persistent theme where the perpetrator of violence had been the victim of bullying in the school setting.

The law was amended in 2004 to mandate that schools provide a tangible

remedy to the problem of bullying.

In 2010, the Legislature repealed and reenacted the majority of RSA 193-F, expanding the scope of the bill to include cyberbullying. See N.H. Laws of 2010, Chapter 155 (enacting HB 1523).

B. The Purpose and Intent

With the 2010 amendments, the Legislature expanded the purpose and intent of the Pupil Safety and Violence Prevention Act. It now reads as follows:

i. All pupils have the right to attend public schools, including chartered public schools, that are safe, secure, and peaceful environments. One of the legislature's highest priorities is to protect our children from physical, emotional, and psychological violence by addressing the harm caused by bullying and cyberbullying in our public schools.

ii. Bullying in schools has historically included actions shown to be motivated by a pupil's actual or perceived race, color, religion, national origin, ancestry or ethnicity, sexual orientation, socioeconomic status, age, physical, mental, emotional, or learning disability, gender, gender identity and expression, obesity, or other distinguishing personal characteristics, or based on association with any person identified in any of the above categories.

iii. It is the intent of the legislature to protect our children from physical, emotional, and psychological violence by addressing bullying and cyberbullying of any kind in our public schools, for all of the historical reasons set forth in this section, and to prevent the creation of a hostile educational environment.

iv. The sole purpose of this chapter is to protect all children from bullying and cyberbullying, and no other legislative purpose is intended, nor should any other intent be construed from the enactment of this chapter.

See RSA 193-F:2.

C. Definitions

As amended, the Pupil Safety and Violence Prevention Act includes several new

definitions. They are as follows:

- Bullying: a single incident or pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, directed at another pupil which:
    - Physically harms a pupil or damages the pupil's property; or
    - Causes emotional distress to a pupil; or
    - Interferes with a pupil's educational opportunities; or
    - Creates a hostile educational environment; or
    - Substantially disrupts the orderly operation of the school.

- Bullying also includes "actions motivated by an imbalance of power based on a pupil's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the pupil's association with another person and based on the other person's characteristics, behaviors, or beliefs." See RSA 193-F:3, I(a)-(b).

Note: When bullying constitutes a "pattern of incidents" it may give rise to a duty to refer that student for special education and related services. See e.g. N.H. Ed. 1105.02 (discussing child find).

- Cyberbullying: conduct defined in paragraph I of this section [the definition of bullying] undertaken through the use of electronic devices. RSA 193-F:3, II.

- Electronic devices: include but are not limited to, telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites. RSA 193-F:3, III.

- Perpetrator: a pupil who engages in bullying or cyberbullying. RSA 193-F:3, IV.

- School property: all real property and all physical plant and equipment used for school purposes, including public or private school buses or vans. RSA 193-F:3, V.

- Victim: a pupil against whom bullying or cyberbullying has been perpetrated. RSA 193-F:3, VI.

D. Who Does the Law Consider to be a Bully?

The new law also specifies that bullying or cyberbullying occurs when "an action or communication as defined in RSA 193-F:3:

a. Occurs on, or is delivered to, school property or a school-sponsored activity or event on or off school property; or

b. Occurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event."

RSA 193-F:4, I.

E. The Pupil Safety and Violence Prevention Policy

By January 1, 2011, the school board of each school district (and the board of trustees of chartered public schools) must adopt a written policy prohibiting bullying and cyberbullying. The law contains numerous requirements – both substantive and procedural - pertaining to the development of the policy and the contents of the policy. RSA 193-F:4, II, IV.

IV. Cyberbullying: Balancing First Amendment Rights with your Statutory Duty

A. Cyberbullying Issues

Cyberbullying is an area in which a school district is more likely to receive a report that, on its face, appears deficient. At first blush, texting and instant messaging after hours, may not meet the criteria for an "action or communication" defined as bullying, in that there may be little or no indication that the after school hours off campus activity has "interfered with a pupil's educational opportunities," or "substantially disrupted" the orderly operation of the school.

Unfortunately, the nature of digital communication is such that messages generated after hours, off campus, usually migrate onto campus. For example, the after-hours text message, e-mail, and instant messaging, is all located on the perpetrator or victim's smart phone when they enter the school. Therefore, the best practice is to treat all reports of inappropriate digital communication as a potential incident of cyberbullying.

B. Investigating Allegations of Cyberbullying

There is an open legal question with regard to the authority of a school administrator to search a student's cell phone. The case of Klump v. Nazareth Area School District, 425 F.Supp. 2d 622 (E.D. Pa. 2006) is instructive on this issue. In Klump, the school district prohibited cell phone usage and display, but did not prohibit the presence of a phone on campus. The phone slid out of the student's pocket and came to rest on his leg. His teacher enforced the anti-display policy by confiscating the phone. She and the principal then began making calls with his phone to see if other students were violating the cell phone policy. They accessed the student's phone number directory to do such. They examined his text messages and listened to his voicemail messages. They also held an online conversation with the student's brother without identifying themselves. The conduct by the educators resulted in a multiple count law suit alleging violation of the Fourth Amendment, invasion of privacy, two violations of the wiretap laws, violation of the state constitution and negligence. The court declined to dismiss the Fourth Amendment, invasion of privacy, and one of two wiretap claims. Significantly, they allowed these claims to proceed against the individual defendant teacher and principal.

The search of cell phones is an emerging area of the law and the jurisprudence addressing the issue is scant. However, all indicators are that the seminal case of New Jersey v. TLO, 469 U.S. 325 (1985) sets the legal standard for the search of a cell phone. TLO stands for the premise that students are protected by the Fourth Amendment, but that the probable cause requirement does not apply to students in the school setting. Instead, the Supreme Court held that a student search must satisfy the reasonableness requirement of the Fourth Amendment. In the context of school, this means that the search must be justified at its inception and reasonable in scope. For a search to be justified at its inception, there must be reasonable grounds for believing that the search will turn up evidence that the student has violated, or is violating either the law or the rules of the school. See TLO, 469 U.S. at 341-342.

These legal principles are instructive with regard to the investigation of cyberbullying. As a general rule, principals should seek permission from the victim/student and their parents before looking at that child's cell phone. The search of a perpetrator's phone should only occur if the administrator has a reasonable basis for concluding that either the law or a rule of the school has been violated.

C. Recent Decisions

J.C. v. Beverly Hills Unified School District, 711 F. Supp. 2d 1094 (C.D. Cal. 2010)

Facts: In May 2008, plaintiff was a student at Beverly Vista High School. On the afternoon of Tuesday, May 27, 2008, after students had been dismissed from school, plaintiff and several other students went to a local restaurant. While there, plaintiff recorded a four-minute and thirty-six second video of her friends talking. The video was recorded on equipment owned by the plaintiff, and it showed her friends talking about a classmate, C.C. One of plaintiff's friends said that C.C. was a "slut," that she was "spoiled," and that she was "the ugliest piece of sh[__] I've ever seen in my whole life." In addition, her friend "talk[ed] about boners" and "use[d] profanity during the recording." During the video, plaintiff could be heard encouraging her friend to "continue with the [C.] rant."

That evening, plaintiff used her home computer to post the video on YouTube. Plaintiff called between 5 and 10 students and told them to look at the video. She also called C.C. and told her about the video. C.C. told her the video was mean, but said that plaintiff could leave the video online. C.C.'s mother told C.C. to tell plaintiff to keep the video online so that they could show the video to school administrators. That night, the video received 90 hits.

The next day, plaintiff heard 10 students discussing the video at school. C.C., who was very upset, came to school with her mother to tell administrators. C.C. was crying and told the school counselor that she did not want to go to class because she was "humiliat[ed] and had hurt feelings." C.C. spoke with the guidance counselor for approximately 20-25 minutes, and then went to class.

School administrators watched the video and called plaintiff to the office to write a statement. They also demanded that she delete the video from YouTube and from her home computer. Administrators also questioned the other students who were in the video; the student who went on the "rant" was taken home by her father, who was also called to the school to watch the video.

Plaintiff was suspended for two days. No other students were disciplined. Plaintiff had a prior history of videotaping teachers at school. In April 2008, she was suspended for secretly videotaping her teachers, and was told not to make any further videotapes on campus. During the investigation about the video that was posted on YouTube, administrators discovered that plaintiff had also posted a video of two friends talking on campus.

Students cannot access YouTube from school computers, and there was no evidence that any student viewed the video while at school. Plaintiff filed suit against the district, seeking injunctive relief and nominal damages. Both parties filed motions for summary judgment.

Held: For the plaintiff. While the school could discipline the student for off-campus speech, it could not do so in this case, because the speech did not cause, or threaten to cause, a substantial disruption at school. The actual disruption (C.C.'s refusal to go to class and her upset parent) did not rise to the level of a substantial disruption, and the fear that students would gossip or pass notes about the video was not a foreseeable risk of a future substantial disruption.

D.J.M. v. Hannibal Pub. Sch. Dist. #60, 647 F.3d 754 (8th Cir. 2011).

Facts: D.J.M. sent instant messages from his home computer "to a classmate in which he talked about getting a gun and shooting some other students at school." The transcript from the instant message log read, in part, as follows.

> Student to D.J.M.: "What kinda gun did your friend have again?"
>
> D.J.M.: "357 magnum."
>
> Student to D.J.M.: "haha would you shoot [L., a student who recently spurned D.J.M.] or let her live?"
>
> D.J.M.: "i still like her so i would say let her live."
>
> Student to D.J.M.: "well who would you shoot then lol"
>
> D.J.M.: "everyone else."

[sic]. D.J.M. went on to name specific students that he wanted to "get rid of," and made several additional negative comments about specific students.

The classmate, who received the messages on her home computer, told an adult, and they contacted the school principal about their concerns. The principal then notified the superintendent who contacted the police; the police took a statement from D.J.M. that evening, and placed him in juvenile detention. Subsequently, a juvenile court judge ordered that he be admitted to a hospital for a psychiatric evaluation.

One week later, D.J.M. was suspended for ten days and then expelled for the remainder of the school year, on the basis that his instant message conversation had caused a substantial disruption to the school. In particular, the administration had received "numerous phone calls from concerned parents asking what the school was doing to address D.J.M.'s threats and whether their children were on a rumored hit list." In addition, the school "increased campus security in several respects, including assigning staff to monitor entrances and public areas, limiting access to the school, and

communicating these changes to parents."

His parents filed suit against the district, alleging that the discipline of D.J.M. violated his *First Amendment* rights.

Held: For the district. The court noted that D.J.M.'s off-campus speech created a substantial disruption to the school, as school officials were required to spend considerable time dealing with concerns from parents about the rumored 'hit list' and who had been targeted. In addition, school officials made changes to the school environment to increase campus security to ensure that appropriate safety measures were in place.

The court also noted that the speech constituted a "true threat" and therefore was not protected by the *First Amendment*. The court found that a "reasonable recipient would have interpreted [D.J.M.'s statements] as a serious expression of an intent to harm or cause injury to another," and the reaction of those who read his message was "evidence that his statements were understood as true threats." Thus, the district did not violate the *First Amendment* by contacting the police about the instant messages and subsequently disciplining D.J.M.

Kowalski v. Berkeley County Schs., 652 F.3d 565 (4th Cir. 2011).

Facts: Plaintiff, a high school senior, used her home computer to create a MySpace.com webpage called "S.A.S.H.," which plaintiff claimed stood for "'Students Against Sluts Herpes' and which was largely dedicated to ridiculing a fellow student, Shay N." Plaintiff invited approximately 100 people on her MySpace friends list to join the group; approximately two dozen students joined the group.

The first student to join, Ray P., did so from a school computer during an after hours class at the school. He uploaded a photograph of himself and another student holding their noses while displaying a sign that read "Shay Has Herpes," referring to Shay N. Plaintiff promptly responded, stating "Ray you are soo funny!=) [sic]." Later, plaintiff posted another response, and several other students also commented on the picture. Ray P. also uploaded two other pictures, both of Shay N., which he edited to include references to herpes. The commentary on the group focused primarily on Shay N.

A few hours after the photographs and comments were posted on MySpace, Shay's father contacted Ray on the telephone and expressed his anger over the photographs. Ray contacted plaintiff and she unsuccessfully attempted to delete the group and remove the photographs. When she was unable to delete the group, she renamed it "Students Against Angry People."

The next day, Shay and her parents filed a harassment complaint with the district, regarding the MySpace group, and provided the district with a copy of the page. Shay then left school with her parents, as she did not want to attend class that day.

The principal conducted an investigation into the matter, which included interviewing the students who had joined the group. Plaintiff admitted that she had created the group, but denied posting the photographs or making disparaging remarks about Shay.

The district concluded that the plaintiff had created a "hate website" in violation of the school policy against harassment, bullying, and intimidation. She was suspended for 10 days and received a 90-day "'social suspension,' which prevented her from attending school events in which she was not a direct participant." Ultimately, her suspension was reduced to 5 days, but the social suspension remained unchanged.

Plaintiff filed suit, alleging that the district violated her *First Amendment* rights for disciplining her for her private, off-campus speech.

Held: For the district. The court noted that "school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning," and that the plaintiff's off-campus speech caused a substantial disruption to the school environment. The court noted that the group caused Shay to miss school to avoid further abuse, and if the school had not intervened, the potential for continuing and more serious harassment of Shay and other students remained.

Wynar v. Douglas County Sch. Dist., 2011 U.S. Dist. LEXIS 89261 (D. Nevada Aug. 10, 2011).

Facts: During an off-campus instant message conversation with another student, plaintiff threatened several female classmates and discussed a purported 'hit list.' The plaintiff's message included the following:

> no im shooting her boobs off then paul (hell take a 50rd clip) then a reload and take out everybody else on the list hmm paul should be last that way i can get more people before they run away…
>
> and ill probably only kill the people i hate?who hate me then a few random to get the record.
>
> that stupid kid from vetch. he didnt do sh[*]t and got a record. i bet

> i could get 50+ people and not one bullet would be wasted.
>
> i wish then i could kill more people but i have to make due with what I got. 1 sks & 150 rds, 1 semi-auto shot gun w/ sawed off barrel, 1 pistle.

[sic].

The student that the plaintiff was messaging forwarded the messages to another student, who suggested that the messages be sent to the school administrators. The two students provided a copy of the transcript to school officials, and the plaintiff was arrested and removed from school pending an investigation. Following the investigation, he was suspended from school for 10 days, and was subsequently expelled for 90 days.

Plaintiff filed suit against the district, alleging that the discipline violated his *First Amendment* rights.

Held: For the district. The court noted that when off-campus speech "is violent or threatening to members of the school, a school can reasonably portend substantial disruption." In this case, the court found that the school had a

> reasonable basis to forecast a material disruption to school activities. In his messages, [plaintiff] invoked the image of the Virginia Tech massacre. He stated that he had access to guns and ammunition. He wrote about getting 'the record' for school shootings and made specific references to girls and the school by name. Further, he had a specific date in mind for carrying out his threats, April 20th, the anniversary of the Columbine massacre. Even assuming, as the court must for the present motion, that [plaintiff] was joking when he made the statements and had no intent to carry out the conduct he described, DHS school administration still had a reasonable basis to forecast a substantial disruption to school activities upon receiving the statements because there is no inference that can be drawn solely from his statements that he was joking or had no intent to carry out the threats.

In contrast, in the following cases, the court held that the students' off-campus speech did not create a substantial disruption in the school setting, and therefore, the school districts violated the students' *First Amendment* right to free speech by disciplining them for their off-campus speech.

Layshock v. Hermitage School District, 650 F.3d 205 (3d Cir. 2011).

Facts: Justin Layshock, a seventeen-year old high school senior, created a parody profile of the school principal on MySpace.com.[1] The parody was created off-campus during non-school hours. Although Justin only informed a few of his close friends about the parody, word spread until most, if not all, of the student body was aware of the parody. After meeting with the principal, Justin was informed that the school intended to hold an informal hearing to consider disciplinary action, based on violations of the school disciplinary code. Following the hearing, Justin received a ten-day suspension, was removed from his advanced placement classes and placed in the Alternative Curriculum Education Program, and was prohibited from participating in school events, including graduation. Justin and his parents brought suit, alleging that the district violated his First Amendment rights.

The district court held that the school district could not establish a sufficient nexus between the speech and a substantial disruption of the school environment. The district appealed that decision to the Third Circuit Court of Appeals.

On appeal, the school district did not challenge the trial court's finding that the profile did not cause a substantial disruption at the school. Instead, it argued that there was a sufficient nexus between the creation and distribution of the vulgar and defamatory profile of the principal to permit the district to regulate the conduct. The

[1] The parody included the following statements: "I...AM...SUCH...A...BIG...HARD-A[__]!!!!!," "Birthday: too drunk to remember," "Eye Color: Big," "Hair Color: Big," "Height: Big," "Right-Handed or Left-Handed: Big," "Your Heritage: Big," "The Shoes You Wore Today: Big," "Your Weakness: students laughing at me," "Your Fears: students laughing at me," "Your Perfect Pizza: big," "Goal You Would Like to Achieve This Year: be big," "Your Most Overused Phrase On an Instant Messenger: big," "Thoughts First Waking Up: too...damn...big," "Your Best Physical Feature: bigness," "Your Bedtime: big," "Your Most Missed Memory: bein blogger [sic]," "Pepsi or Coke: big pepsi," "McDonalds or Burger King: big king," "Single or Group Dates: big dates," "Lipton Ice Tea or Nestea: bigtea," "Chocolate or Vanilla: biganilla," "Cappuccino or Coffee: bigaccino," "Do you Smoke: big cigs," "Do you Swear: big words," "Do you Shower daily: ?," "Have you Been in Love: big heart," "Do you want to go to College: big principal," "Do you want to get Married: big," "Do you believe in yourself: bigly," "Do you get Motion Sickness: big puke," "Do you think you are Attractive: big n beer-gutted," "Are you a Health Freak: big steroid freak," "Do you get along with your Parents: dads too big," "Do you like Thunderstorms: big cloud," "Do you play an Instrument: big drum," "In the past month have you Drank Alcohol: big keg behind my desk," "In the past month have you smoked: big blunt," "In the past month have you been on Drugs: big pills," "In the past month have you gone on a Date: big hard-on," "In the past month have you gone to a Mall: big credit card," "In the past month have you eaten a box of Oreos: big familysize dubbel stufds [sic]," In the past month have you eaten Sushi: big fish tires," "In the past month have you been on Stage: big yell at students," "In the past month have you been Dumped: big dump in pants," "In the past month have you gone Skinny Dipping: big lake, not big d[___]," "In the past month have you Stolen Anything: big keg," Ever been Drunk: big number of times," "Ever been called a Tease: big whore. . . ."

school district argued that the student's speech

> initially began on-campus: [the student] entered school property, the School District web site, and misappropriated a picture of the Principal. The 'speech' was aimed at the School District community and the Principal and was accessed on campus by [student]. It was reasonably foreseeable that the profile would come to the attention of the School District and the Principal.

Held: For the parents. The court held that the district could not punish the student for his off-campus speech unless it resulted in a foreseeable and substantial disruption in the school.

J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011).

Facts: In Spring 2007, J.S., an 8th grader at Blue Mountain Middle School, created a Myspace profile from her home on a Sunday evening, using her parents' computer. The URL for the profile was "http://www.myspace.com/kidsrockmybed," and the subject of the profile was J.S.'s principal. Rather than identify the principal by name, J.S. referred to him as "m-hoe=]" and she copied and pasted his picture from the middle school website onto the profile.[2]

The following day, numerous students approached J.S. to talk about the profile at school, generally saying that they found it funny. After school, J.S. made the profile private so that it could only be viewed by people J.S. invited to be "m-hoe=]'s" friend. J.S. granted "friend" status to 22 other students. Students could not view the profile at school because the school computers blocked access to myspace.

On Tuesday, a student informed the principal about the profile and told him that J.S. created it. The next day, the student gave the principal a hard copy of the profile. That day, the principal met with the Superintendent and they concluded that the profile

[2] The profile included the following: "Interests: general: detention. being a tight a[__]. riding the fraintrain. spending time with my child (who looks like a gorilla). baseball.mygolden pen. f[___]ing in my office. hitting on students and their parents. Music: I love all kinds. favorite is techno. Television: almost anything. I mainly watch the playboy channel on directv. OH YEAH BITCH! Heroes: myself. ofcourse. About me: HELLO CHILDREN yes. It's your oh so wonderful, hairy, expressionless, sex addict f[_]ga[__], put on this world with a small d[___] PRINCIPAL I have come to myspace so I can pervert the minds of other principal's to be just like me. I know, I know, you're all thrilled Another reason I came to myspace is because- I am keeping an eye on you students (who i care for so much) For those who want to be my friend, and aren't in my school I love children, sex (any kind), dogs, long walks on the beach, tv, being a d[___] head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN so please, feel free to add me, message me whatever [sic]"

violated the school's Acceptable Use Policy because it violated copyright laws (by using the principal's picture without permission).

On Thursday, J.S. was suspended for ten days. That day, two teachers had to quiet their classes because students were talking about the profile. In addition, a guidance counselor had to proctor a test so that an administrator could sit in on the meeting with J.S., her parents, and the Principal. When J.S. returned from her suspension, two students decorated her locker to welcome her back and several students congregated in the hallway while it was being decorated.

J.S. filed suit against the district, arguing that the district violated her First Amendment right to free speech by punishing her for creating the profile. The District Court granted summary judgment in favor of the district and J.S. appealed.

Held: For the parents. The Tinker standard applies to student speech, whether on or off campus, that causes or threatens to cause a substantial disruption of or material interference with school or invades the rights of other members of the school community. The profile J.S. created did not cause a substantial disruption and could not reasonably have led school officials to forecast that a substantial disruption would occur.

The court found that the student created the profile as a

> joke, and she took steps to make it 'private' so that access was limited to her and her friends. Although the profile contained [the principal's] picture from the school's website, the profile did not identify him by name, school, or location. Moreover, the profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its contents seriously, and the record clearly demonstrates that no one did.

Moreover, the school district computers block access to MySpace, so students were not able to access the profile while at school. Thus, "beyond general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist [the principal] in dealing with the profile, no disruptions occurred."

Thus, a substantial disruption was not created, and it was not reasonably foreseeable that the speech would create a substantial disruption in the school. Therefore, the district erred when it disciplined the student for her off-campus speech.

Similarly, in the case of T.V. v. Smith-Green Community Sch. Corp., 2011 U.S. Dist. LEXIS 88403 (N.D. Ind. Aug. 10, 2011), the court held that the district violated the

student's *First Amendment* right to free speech, when it disciplined the student by banning her from participating in extra-curricular activities for her off-campus conduct (posting inappropriate pictures of herself on Facebook). The court noted that the pictures did not create a substantial disruption to the school, and it was not reasonably foreseeable that they would create a substantial disruption.

The court rejected the argument from the district that two telephone calls from parents, complaining about the pictures, created a substantial disruption. At best, the photos could be said to have "caused discussion outside the classrooms, but no interference with work and no disorder." The court noted that evidence of a substantial disruption could include: "a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school."

Key Points:

- In order to discipline a student for off-campus internet speech, there must be a reasonable belief that the speech will substantially disrupt or interfere with the educational environment.

- Speech that originated off-campus may be considered "on-campus speech" when "the speech is aimed at a specific school and/or its personnel [and it] is brought onto the school campus or accessed at school by its originator"

- When determining whether off-campus speech may be regulated, ask:

    1. Did the speech constitute a "true threat"?

    2. If not a "true threat", is there a sufficient nexus between the speech and the school to consider the speech as occurring on-campus?

    3. Did the speech cause a substantial disruption to the school? Could a substantial disruption be reasonably anticipated?

V. The Interplay Between Cyber-bullying, Stalking, and Criminal Harassment

Criminal harassment includes, among other things:

- Making a telephone call, whether or not a conversation ensues, with no legitimate communicative purpose or without disclosing his or her identity and with a purpose to annoy, abuse, threaten, or alarm another; or

- Making repeated communications at extremely inconvenient hours or in offensively coarse language with a purpose to annoy or alarm another; or

- Insulting, taunts, or challenges another in a manner likely to provoke a violent or disorderly response; or

- Knowingly communicating any matter of a character tending to incite murder, assault, or arson; or

- With the purpose to annoy or alarm another, communicating any matter containing any threat to kidnap any person or to commit a violation of RSA 633:4; or a threat to the life or safety of another; or

- With the purpose to annoy or alarm another, having been previously notified that the recipient does not desire further communication, communicating with such person, when the communication is not for a lawful purpose or constitutionally protected.

The term “communicating” is defined as “to impart a message by any method of transmission, including but not limited to telephoning or personally delivering or sending or having delivered any information or material by written or printed note or letter, package, mail, courier service or electronic transmission, including electronic transmissions generated or communicated via a computer. For purposes of this section, "computer" means a programmable, electronic device capable of accepting and processing data. RSA 644:4.

Impact: Conduct that constitutes cyber-bullying may also constitute criminal harassment. A victim may have the ability to press criminal charges against the perpetrator. Note that depending on the facts, other conduct constituting bullying may also rise to the level of a crime (ex: assault). In certain instances, this could also give rise to the duty to file a report under the Safe School Zones Act, RSA 193-D.

VI. Conclusion

As a general rule, when courts are confronted with allegations pertaining to peer-to-peer cyberbullying, the district will be judged based on the reasonableness of its actions. Thus, to prevent cyberbullying, and when responding to bullying or cyberbullying, you should consider the following:

- Are the district’s bullying policies reasonable?

- Once you (the district) have received a report that bullying has occurred, did you respond in an appropriate timeframe?
    - What due process was afforded to the victim(s) and the aggressor(s)?
    - Were the steps that you took reasonably calculated to reduce the risk of future bullying?

Appropriately answering these questions should result in both protecting children and reducing risk for children and school districts.

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