



A Fresh Look at the Cyberbullying Landscape

BY MARC H. ZITOMER

There is no doubt that technology has transformed public education. Even the youngest elementary school students learn skills that earlier generations could never have dreamed of, from doing online research to creating websites and “Prezis.” Terms such as one-to-one initiatives, makerspaces, data-driven instruction and social media are all part of daily life in the classroom.

For the most part, the advent of technology in schools has been for the good.

But technology can also have a negative side. While there is, unfortunately, nothing new about bullying as a problem in schools, the rise of technology has opened a whole new avenue for it, providing new tools in the form of webcams, cell phones and the internet, and creating a new form of bullying known as “cyberbullying.”

Many states, including New Jersey, have adopted new, tougher anti-bullying legislation that includes addressing cyberbullying. But confusion and misunderstanding exist about what bullying and cyberbullying is, and what it is not. It

is important to explore that landscape, including taking a close look at the circumstances under which a school district can punish students for cyberbullying that takes place off campus, on the student’s own device and on students’ own time – all of which are common features of cyberbullying.

What is Bullying/Cyberbullying? Every state has a somewhat varied definition of what constitutes bullying. The most common definition involves elements of repeated conduct by one or more persons against another person which has the intent or effect of harming or demeaning that person in some way. An imbalance of power between bully and victim is often considered a key component of bullying. Bullying can occur through verbal or physical conduct or through an electronic communication such as text message, email, Tweet, video, social media post, fake online profile or homemade website. This electronic form of bullying is what is commonly known as cyberbullying.

New Jersey’s definition of bullying is

somewhat unique compared to other states, in that in order for conduct to constitute bullying or cyberbullying, it must be “motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic.” The New Jersey Commissioner of Education has held that examples of “other distinguishing characteristics” include students being bullied for their height, weight, athletic ability, intelligence, having head lice or even being a vegetarian.

Simply put, New Jersey’s anti-bullying law, known as the “Anti-Bullying Bill of Rights,” is in essence an anti-bias/discrimination statute. Thus, while a knee-jerk reaction these days is to characterize almost everything mean and destructive and targeted towards another person as bullying or cyberbullying, that is not always the case. Rather, the conduct may simply be a regular disciplinary infraction and not a true case of harassment, intimidation or bullying



(“HIB”) under the law. This is often to the chagrin of many parents who think every bad act taken against their child should be characterized as bullying.

The Effects of Cyberbullying Nevertheless, the effects of this conduct, whether labeled cyberbullying or not, should not be minimized because it can be very damaging even for the most thick-skinned victim. Tragically, there have been many incidents across the country that led to students taking their own lives.

The example in New Jersey that comes to mind is the case of Rutgers University student Tyler Clementi, who took his own life after his roommate, Dharun Ravi, spied on him via webcam during Clementi’s romantic tryst with a man in his dorm room. Ravi secretly watched the two from another location in the dorm and tweeted about it. After Clementi learned via Twitter about the spying, he went missing. His car was later found near the George Washington Bridge, and his body was discovered in the Hudson River. Ravi was charged and eventually pleaded guilty to attempted invasion of privacy. He also spent a brief period of time in jail.

The Anonymity of Cyberbullying What often makes cyberbullying unique, compared to more “traditional” forms of bullying, is the somewhat anonymous and “behind closed doors” manner in which it may occur. Many students would never have the audacity to confront another student face-to-face and, for example, call them “gay,” “loser,” “fat,” “ugly,” “ginger,” or some other damaging remark. But those same students often would not hesitate to say these things through some form of electronic communication.

Perhaps this is because the bully does not get to experience first-hand the emotional toll his or her actions have on the victim. It can also be perpetrated from the

safety of one’s own bedroom, where the bully does not have to worry about being punched in the nose or reported to the school principal (at least not immediately). Moreover, cyberbullying can sometimes be done anonymously, or worse, in the name of somebody else who is unaware of being set up in this way.

Students are often also under the mistaken view that their online conduct cannot be traced, or can be permanently deleted, as implied or touted by apps such as “After School,” “Yik Yak,” “Whisper” or “SnapChat,” where the picture or post vanishes from cyberspace shortly after it is published, leaving no trace of the cyberbullying conduct in its wake. However, as most computer security experts and law enforcement officials emphasize, there is an electronic footprint of almost everything done in cyberspace. Through good detective work and/or a subpoena or two, it becomes abundantly clear that nothing truly vanishes forever, and there is very little that cannot be recovered.

As such, educators and parents alike must do a better job of making this known to our children, to remove the false sense of, “I can act with impunity.” Moreover, parents and students should be aware that while most cyberbullying is typically addressed through civil laws, there can also be criminal prosecution for this conduct through harassment charges or various hate-crime laws.

Cyberbullying Versus the First Amendment

One constant struggle for school officials in the complex, evolving area of cyberbullying includes understanding under what circumstances a school can, and cannot, discipline students for cyberbullying which takes place beyond the walls of the school-house gate, and not at a school-sponsored event or activity. In other words, if Johnny creates a fake Instagram account on his own iPad, on his own time, in his own

house on a Saturday afternoon, which he uses to bully a fellow classmate because of an actual or perceived characteristic, when can and should school officials intervene and take appropriate action against the bully? A corollary issue is, under what circumstances is such speech protected by the First Amendment?

New Jersey’s anti-bullying statute requires that school district anti-bullying policies include a provision addressing bullying conduct that occurs off school grounds. However, it must be consistent with the district’s code of conduct. The New Jersey code of conduct regulation, which addresses disciplining pupils for conduct that occurs off school grounds, provides guidance for school officials in this regard.

Specifically, it provides that the authority of school officials to discipline pupils for conduct which occurs off school grounds “shall be exercised only when it is reasonably necessary for the student’s physical or emotional safety, security and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds...” Moreover, “the authority shall be exercised only when the conduct that is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.”

Simply put, for a school to have “jurisdiction” to take appropriate disciplinary action for cyberbullying or other off-campus conduct, the behavior must: (1) present a health, safety or welfare issue; (2) have a nexus to the school district; and (3) significantly disrupt school operations.

In a recent U.S. District Court decision involving the Greater Egg Harbor Regional High School District, the court addressed a case involving a high school student’s claims that school officials vio-



lated his First Amendment rights when they disciplined him for an off-campus YouTube video and certain Twitter postings found to have violated the school's anti-bullying policy. The case in question was *Dunkley v. Bd. of Ed. of Greater Egg Harbor Reg. H.S. District, et al.*, 2016 U.S. Dist. Lexis 145389 (D.N.J. 2016).

Specifically, the plaintiff, a high school senior, was suspended for two days for his YouTube video which criticized a fellow football player. Two months later, he was suspended for nine days for posts made on his out-of-school Twitter account which he shared with a fellow pupil. The tweets were insulting towards fellow pupils and contained demeaning hashtags, as well as comments such as, "I wonder if @[student name] owns a can opener because if not, her teeth can DEFINITELY get the job done." Another post tweeted, "Usually girls get better looking when they get their braces off, but that's not the case with [student name]."

The plaintiff argued he should not have been disciplined, and that his civil rights were violated because the posts were innocuous and did not disrupt the school environment. Conversely, school officials argued that the postings harassed, intimidated and bullied other students and did, in fact, cause substantial disruption in the school environment. In analyzing both parties' claim, the court cited the U.S. Supreme Court's 1969 opinion in *Tinker v. Des Moines Independent Community School District* for the proposition that students have certain First Amendment rights, but that school officials can take appropriate action if the speech would "materially and substantially disrupt the work and discipline of the school."

As to the YouTube video, the court found that even accepting plaintiff's argument that the speech did not meet the definition of bullying, the initial discipline

nevertheless did not chill plaintiff's First Amendment rights because he engaged in similar conduct vis-à-vis the same student thereafter. The court found those posts clearly met the definition of harassment, intimidation and bullying because they were "insulting and demeaning to plaintiff's classmates, and were motivated by race, gender, or other distinguishing characteristics of those students."

Moreover, the court found the tweets materially and substantially disrupted school operations because administrators were legally required to investigate the complaints, which took them away from their other professional responsibilities, and which proceeded even longer because the plaintiff initially lied about his involvement. Accordingly, the court found that the cyberbullying satisfied the standard which allowed school officials to discipline plaintiff for his off-campus conduct.

The court in *Dunkley* analogized its fact pattern and holding to the Fourth Circuit Court of Appeals' ruling in *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011), in which a student created an off-campus MySpace webpage entitled, "Students Against Shay's Herpes," directed towards another pupil by that name. The court in the *Kowalski* case found that the school district did not violate the webpage creator's First Amendment rights when it suspended her for nine days for creating this disruptive website in violation of the school's anti-bullying policy. The court explained that:

"While *Kowalski* does not seriously dispute the harassing character of the speech on the 'S.A.S.H.' webpage, she argues mainly that her conduct took place at home after school and that the forum she created was therefore subject to the full protection of the First Amendment. This argument, however, raises the metaphysi-

cal question of where her speech occurred when she used the Internet as the medium. *Kowalski* indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment...First, the creation of the 'S.A.S.H.' group forced Shay N. to miss school in order to avoid further abuse. Moreover, had the school not intervened, the potential for continuing and more serious harassment of Shay N., as well as other students, was real. Experience suggests that unpunished misbehavior can have a snowballing effect, in some cases resulting in "copycat" efforts by other students or in retaliation for the initial harassment."

Similarly, the court in *Dunkley* reiterated that the plaintiff's demeaning tweets were directed towards his classmates, and garnered 50-100 followers. Moreover, the plaintiff clearly intended for his tweets to reach his victims as well as his followers, which they did. As a result of student and parent complaints, school officials fully investigated the plaintiff's actions. The investigation was unnecessarily prolonged due to the plaintiff's dishonesty about his involvement in the matter. Finally, like in *Kowalski*, the court noted that if the plaintiff's Twitter page had been ignored, it could have caused further disruption to the school environment and the lives of its intended targets.

The court's analysis and holding in the *Dunkley* decision demonstrates that the bar is fairly low for school officials to impose discipline on students who engage in off-campus cyberbullying. In order to meet the "material and substantial disruption" test it appears to be enough to show that: (1) the conduct required an investigation by school officials (which it most often does under New Jersey's HIB law); (2) the conduct impacted the student victim in some way;



and (3) school intervention was necessary to terminate the bullying conduct.

Where are the Boundaries of the Schoolhouse Gate? All of the foregoing demonstrates that as technology becomes more sophisticated, widespread and instantaneous, the boundaries of the schoolhouse gate continue to become blurred. In other words, it is becoming increasingly more difficult for students to hide behind the excuse that the cyberbullying conduct did not emanate

from school property and, therefore, they cannot be disciplined by the school for it. Rather, when the conduct materially and substantially impacts school operations and the victim, the necessary nexus between the cyberbullying and school district exists for school officials to act without running afoul of the First Amendment.

This also presents unique challenges for school officials who not only have to concern themselves with on-campus misconduct, but with off-campus misconduct

as well. Nevertheless, the responsibility for combatting cyberbullying should not solely fall on the shoulders of administrators; parents, community officials and law enforcement should, and must, also play a role in combatting this challenging and constantly evolving issue.

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