

# How to Respond to Cyberbullying Without Getting Sued: What Are the Boundaries of the “Schoolhouse Gate” in Cyberspace?

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## Caveats

- This presentation does not provide legal guidance
- No guarantees on the “without getting sued” statement ~ sorry ;-)
- Some of the questions asked will remain unanswered
- Some of the answers could change with new case law
- If this were easy, we would not be here

## Personal Perspective

- “It can hardly be argued that either students shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Tinker
- Achieving better clarity on the boundaries of the “schoolhouse gate” is THE most critical factor to be addressed by schools to respond to the challenge of cyberbullying

## The Challenge

- The most harmful incidents are cyberbullying are occurring when students are posting material harming other students while off-campus
  - Because this is where they have much greater unsupervised use
- But the harmful impact is being felt at school
  - Because this is where students are physically together

## Conclusion First

- School officials have the authority to impose discipline for harm caused by off campus online speech when ~ and only when ~ that speech has, or a reasonable person would anticipate it will:

- Cause an impact at school
- That is substantial (not mere annoyance)
- And that interferes with the rights of a student or students to be secure and/or receive an education

- Or is a “true threat”

## But

- “Disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech ...
  - *Beussink v. Woodland* (1998)

## First Amendment History

- Historical underpinnings of First Amendment
- Moral Authority
  - Government has the authority to determine what speech is **contrary to the public good**, including such social values as order, morality, and religion
    - English common law Blackstone
- Natural Rights
  - The role of government is to enforce the fundamental rights of individuals **if those rights are injured** by the exercise of speech by another
    - John Locke

## Historical and Now

- The courts have used both theories in cases involving student speech - without discussing the underlying rationale
  - If school officials understand the underlying rationale, it is far easier to determine when disciplinary actions are or are not appropriate

## Foundation Cases

- US Supreme Court Cases on Student Speech

- *Tinker v. Des Moines Indep. Community School District* (1969)
- *Bethel School District No. 403 v. Fraser* (1973)
- *Hazelwood School District v. Kuhlmeier* (1988)
- *Morse v Frederick* (2007)

#### Tinker v. Des Moines

- Black arm bands on campus for war protest
- Schools can impose discipline only if speech causes or threatens substantial disruption or interference with the rights of students to be secure
  - Not just mere annoyance or discomfort with unpopular views
  - *Natural Rights*

#### Bethel v. Fraser

- Sexual and vulgar speech at a school assembly
- Schools can censor student speech that is "lewd," "vulgar," "indecent," "plainly offensive" or "inconsistent with its basic educational mission."
  - *Moral Authority*

#### Hazelwood v Kuhlmeier

- Student articles in school newspaper
- Schools can exercise editorial control over the style and content of student speech in school-sponsored expressive activities
- Educationally-based restrictions
  - *Editorial Control*

#### Morse v. Fredrick

- Bong Hits 4 Jesus banner at a school activity
- School officials can impose discipline on on-campus speech that a reasonable observer would view as supporting illegal drug use
  - *Moral Authority*

#### Morse v. Fredrick

- "...no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue."
  - *But No Viewpoint Discrimination*

#### **Related Legal Issues**

- True Threat
- On-Campus T-Shirt Cases

- Off-Campus School Newspaper Cases
- Student Free Press Laws
- Free Speech v. Civil Rights
- Off-Campus Online Speech
- District Liability
- Parent Liability
- Criminal Violations

#### True Threat

- A true threat is a statement that, considered as a whole, would cause a reasonable person to regard the statement as showing an immediate, unequivocal attempt to cause harm
  - *Lovell v. Poway Unified School District* (1996)
- True threats are not protected speech under the First Amendment.

#### On-Campus T-Shirts

- Lower court decisions
- Standard applied has depended on the type of speech
  - If the speech is lewd, vulgar, indecent, plainly offensive, or advocates illegal acts, the courts apply *Bethel*
  - Otherwise, the courts apply *Tinker*

#### Off-Campus Newspapers

- Lower court decisions
- Courts apply *Tinker*
  - In most cases, the courts have not found the necessary substantial disruption
  - But they have always noted that if such disruption occurs or is threatened, school officials have authority to respond

#### Student Free Press Laws

- State laws grant students greater speech rights in student-created media
  - Newspapers and school web site
- Common exceptions
  - Obscene, libelous, invasion of privacy, advocates unlawful acts, violation of school policy, or incites substantial disruption

#### Civil Rights Laws

- Title VI ~ Race, color, and national origin

- Title IX ~ Sex, including sexual orientation
- IDEA & Section 504 ~ Disability
- Hostile environment
  - Unwelcome conduct that is so severe, persistent, or pervasive that it affects a student's ability to participate in or benefit from an education program or activity, or creates an intimidating, threatening or abusive educational environment
  - Some courts have used “hostile environment” language in the context of determining “substantial disruption”

### Free Speech v. Civil Rights

- The Problem: Speech that one student considers “protected political speech” that creates a “hostile environment” for other students or could lead to violence
  - Generally T-Shirt or clothing cases
  - But could also be web sites
- Older civil rights cases
  - Confederate flags or symbols
  - Considered racist, despite historical nature
- Courts apply Tinker standard
  - If schools provide any showing of past or potential violence, the courts support restriction on speech
- New civil rights issues
  - Homosexuality
    - “Homosexuality is a sin”
    - “Our school has embraced what God has condemned”
  - Immigration
    - “They can’t deport all of us”
    - “If you can’t speak English, go back to where you came from”
  - More contentious
  - Tied to current issues about which people have differences of opinion
  - Objections to homosexuality grounded in religion
    - Religion has often been basis for discrimination
  - Students with minority sexual orientation do not often resort to violence at school
    - They commit suicide
  - Schools are in “catch-22” situation, facing

- Civil rights claims for hostile environment
- Free speech claims for political or religious speech
  - Courts are struggling, but this will likely be the next case to go to the Supreme Court
  - My perspective
    - There is a difference between speech that promotes a political viewpoint and that denigrates others

### Off-Campus Online Speech

- All but one case was speech directed at staff
- Courts have applied Tinker
  - Courts are not clear on standards for on-campus versus off-campus speech
  - Lack of clarity relates to considering the presence of speech on campus versus impact of speech on campus
- Personal opinion: The impact at school must be the deciding factor
  - School officials have an important obligation to ensure the safety of students and the delivery of instruction
  - Regardless of where the speech occurs, when the impact jeopardizes the safety of students or the delivery of instruction, school officials must be able to respond as they deem necessary
- Vast majority of cases, the districts lost
  - Because school officials had imposed excessive discipline based on Moral Authority rationale
    - In the one case the district won because the teacher was so traumatized she took a leave of absence, thus creating significant interference with instruction

### **District Liability**

- When must a school respond to cyberbullying?
  - District liability concerns are raised when cyberbullying is occurring through district Internet system or via cell phone or other digital devices used on campus
  - They may arise if the combination of off-campus online activity and student interactions at school rise to the level that

is so hostile it is preventing a child from receiving an education

### Negligence

- Do schools have a duty to exercise precautions against student cyberbullying through district Internet system and through use of cell phones on campus?
- Did the school fail to exercise a reasonable standard of care?
- Was it foreseeable that students would use the district Internet system to cyberbully others?
- Is there an actual injury?

### “Reasonable” Steps

- Personal opinion of “reasonable steps:”
  - Assess problem
  - Evaluate Internet and PDD policies and Internet use management practices
  - Ensure effective practices to supervise and technically monitor student Internet use
  - Educate students and teachers
  - Implement an effective report, review, and intervention process
  - Engage in ongoing evaluation

### Civil Rights Violation

- Federal and state civil rights statutes
  - Has school effectively caused, encouraged, accepted, tolerated, or failed to correct a sexually or racially hostile environment of which it has actual or constructive notice?
  - “Constructive notice” ~ if upon reasonably diligent inquiry, school should have known of the discrimination

### Civil Rights Liability

- School officials can be held liable under civil rights laws if they are
  - Deliberately indifferent to harassment
  - Of which they have actual knowledge
  - That is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.
  - School must have authority to take remedial actions

- Harassment must occur under the operations of the school
  - Davis v Monroe (1999)
- Given that the courts have held that school officials have the authority to respond to off-campus speech that is creating a substantial disruption or interference at school
  - May not be able to control off-campus speech
  - But can control whether student is at school and in what classrooms
- And school officials can be held liable under civil rights laws if they have the authority to respond to a pervasively hostile environment, but fail to do so
- Can school officials be held liable if they fail to respond to off-campus online speech combined with on-campus-related activities have created a pervasively hostile educational environment for a student?
  - Answer: Unknown - but possible
- Upon report of concern
  - Review district computer records of all involved students
  - Ask about related on-campus interactions
  - Might also be on-campus activity
    - Provides even greater authority to respond
    - If you do not look/ask, an attorney will use failure to do so as evidence of deliberate indifference

### **Another Civil Rights Concern**

- Many filtering companies block access to sites addressing sexual orientation in a manner appropriate for students in categories with material that would not be appropriate for students
- Restricting student access to these sites constitutes unconstitutional viewpoint discrimination and civil rights discrimination

### **Parental Liability**

- Parents of minors who engage in intentional torts (wrongdoings) can face the potential of personal financial liability
  - Informing parents of this potential can provide “motivation” to take proactive steps to remove harmful material and prevent any ongoing harm

- Advising school staff to sue parents for truly egregious online speech is a safer strategy than imposing discipline

### Parental Liability

- Parental liability statutes
  - Provide the ability for anyone injured by the intentional act of a minor to sue the parents, regardless of whether or not the parents knew
- Parental negligence
  - Parents can be sued if their child has engaged in an intentional tort and the parent knew or should have known and was negligent in preventing the harm
    - Notice by school that their child has been engaging in cyberbullying would increase potential for liability

### Causes of Action

- Defamation
  - Someone publishes a false statement about a person that damages his or her reputation
- Invasion of privacy/public disclosure of private fact
  - Someone publicly discloses a private fact about a person under conditions that would be highly offensive to a reasonable person
- Invasion of personal privacy/false light
  - Publicly disclosing information that places an individual in a false light
- Intentional infliction of emotional distress
  - Someone’s intentional actions are outrageous and intolerable and have caused extreme distress

### Possible Criminal Violations

- Making threats of violence to people or their property
- Engaging in coercion
- Making obscene or harassing telephone calls (this includes text messaging)
- Harassment or stalking
- Hate or bias crimes
- Creating or sending sexually explicit images of teens
- Sexual exploitation
- Taking a photo of someone in place where

privacy is expected (like a locker room)

### **Cyberbullying**

- Six Situations
  - District Internet system ~ School Day
  - District Internet system ~ After School
  - Personal Digital Devices ~ On-Campus
  - Off-Campus - Students in Same School
  - Off-Campus - Students from Different Schools
  - Off-Campus ~ Political v. Hostile

### **District Internet ~ School Day**

- Using the district Internet system during school day
- Staff supervision is possible
- Technical monitoring is possible
- Filtering software is ineffective
  - Students can bypass filter
- 1:1 programs significant concerns because of supervision challenges

### Legal Issues

- Search and Seizure
  - Routine supervision and technical monitoring
  - Individualized search, if reasonable suspicion
  - “Locker search” standard
- Possible Liability
  - Negligence or civil rights
- Discipline
  - Internet use subject to disciplinary code and Internet use policy
  - School web site postings subject to educational-based restrictions

### **District Internet ~ After School**

- Range of possible uses
  - After-school programs, extracurricular activities, open lab, take-home
- Staff supervision less or not possible
- If take-home computers, significant potential for misuse, no staff supervision, and possibly no parent supervision
- Technical monitoring is possible

## Legal Issues

- Search and Seizure
  - Routine technical monitoring
  - Individualized search, if reasonable suspicion
- Liability
  - Negligence or civil rights
  - What are reasonable precautions when computer use can't be supervised?
    - Technical monitoring is essential
- Discipline
  - All use subject to disciplinary code and after-school/take-home Internet use policy

## **PDDs ~ On-Campus**

- Personal Digital Devices: Cell phone, personal digital assistants (PDAs), laptop, camera
- Staff supervision difficult
- Students not reporting cell phone bullying, because are not supposed to be using cell phone at school
- Newer PDAs are computers, with Internet access
  - Not district Internet ~ no filtering or technical monitoring
  - Students will expect to use PDAs in classroom for educational activities

## Legal Issues

- Search and Seizure
  - Review of electronic records of cell phones and PDAs is likely subject to state wire-tapping law
  - Which requires consent
    - Minors are not capable of giving legal consent
  - Generally, parents of a cyberbullying target will consent
  - If need to review an offender's PDA or cell phone and no parental consent, confiscate device and contact school attorney
  - If possible criminal concern, let the police deal with review
  - Possible long-term options for review
    - Signed consent or implied consent policy
      - Agreeing to review if reasonable suspicion of misuse
    - Signed consent for classroom use

- Agreeing to routine review
- Amend state legislation to allow for review
- Liability
  - Negligence or civil rights
    - What are the reasonable precautions?
    - Can't ban ~ can regulate
      - Reasonable uses
      - Risky uses
      - Classroom use
  - Encourage and respond to reports of misuse
- Discipline
  - All use on campus subject to disciplinary code and personal digital device code

## **Off-campus ~ Same School**

- Using the Internet or PDDs off-campus, directed at students attending same school
  - The combination of harmful off-campus activity and physical presence of students at school can create hostile environment and/or disruption at school
  - Frequently, there are on-campus altercations related to the off-campus speech

## Legal Issues

- Search and Seizure
  - No ability
- Liability
  - If combination of off-campus harmful speech and on-campus interactions between students have created a hostile environment that is effectively denying a child the right to receive an education and school officials fail to respond, liability is possible
- Discipline
  - School can impose formal discipline if off-campus activity causes or threatens substantial disruption
    - Significant interference with instructional activities, school activities, or school operations
    - An environment for any student that is abusive, intimidating, threatening, or hostile and impairs that student's ability to participate in educational programs or school activities

- Physical or verbal violent altercations between students
- Or if speech constitutes a “true threat”
- Discipline
  - School officials cannot impose discipline based on Moral Authority
    - No matter how offensive the speech
  - Will rarely meet standard if targets staff
    - Check with school attorney before imposing discipline for off-campus speech targeting staff

### Off-Campus ~ Different Schools

- Using the Internet or personal digital devices off-campus directed at students attending a different school
- Combination of harmful off-campus online activity and presence of students at competition events can create disruption at competition events

### Legal Issues

- Search and Seizure
  - No ability
- Liability
  - If know of possible concern in advance and deliberately indifferent, liability is possible
- Discipline
  - Schools have greater ability to discipline in context of extra-curricular activities
  - But strongly advised to follow *Tinker* standard
    - Creates or threatens substantial disruption
      - Significant interference with extracurricular activity
      - A hostile environment that impairs another student’s ability to participate in extracurricular activities
      - Physical or verbal violent altercations between students

### Off-Campus ~ Political v. Hostile

- What about off-campus speech that is political and potentially hostile?
  - A student creates a hate site based on race or homosexuality
- Tinker has been applied both to off-campus online speech and on-campus T-shirts

- Would there be a difference in how courts would view identical speech on a T-shirt worn at school or on a web site?
- No case law, but probably “yes”
  - “Speech may be more readily subject to restrictions when a school audience is “captive” and cannot avoid the objectionable speech”
    - Justice Alito in *Saxe*
- Students have a free speech right to create a hate site
- When does this “cross the schoolhouse gate?”
- Consider the impact or potential impact **at school**
  - Personalized online attacks creating a hostile environment for individual student(s)
  - Direct or veiled threats to a class of students
  - Close relationship with actual incidents of violent altercations on campus
  - Other?

### Boundaries of Schoolhouse Gate

- Authority
  - Legal right to impose formal discipline or restrictions
- Responsibility
  - Legal obligation to exercise reasonable precautions and to respond to reports of concerns
- School officials have the **authority** and **responsibility** to respond to any on-campus or off-campus harmful or inappropriate speech through the District Internet system
  - Have the ability to supervise and technically monitor
- School officials have the **authority** and responsibility to respond to any harmful speech that takes place while students are using personal digital devices on-campus
  - But ability to monitor and review is limited, so must depend on student report
  - And searching a student’s cell phone or PDA without parent permission may violate state wiretapping laws
- School officials have the **authority** to respond to off-campus online speech that creates or

threatens substantial disruption at school or interference with the rights of students to be secure or is a true threat

– But not offensive speech and only rarely if speech targets staff

- School officials **may** have the **responsibility** to respond to off-campus online speech that has created a hostile environment at school for a protected class student, if they know of the concern
  - School officials definitely have a responsibility to respond if district Internet system was used or there are associated on-campus altercations

### **Cyberbullying Policy/Legislation**

- Recommended language
  - bullying or harassment 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, through the use of the district Internet system while on or off-campus, through the use of a personal digital device on campus, or off-campus activities that cause or threaten to cause a substantial disruption at school.
  - “Substantial disruption” means:
    - Significant interference with instructional activities, school activities, or school operations
    - An environment for any student that is abusive, intimidating, threatening, or hostile and impairs that student’s ability to participate in educational programs or school activities
    - Physical or verbal violent altercations between students
- Will provide greater guidance for school officials and courts

### **Without Getting Sued**

- The attached template has been designed to guide an investigation and evidence retention to reduce likelihood of getting sued
  - Remember, no promises, sorry ;-)

### Bypassing the Filter

- All administrators, counselors/ psychologists, and school resource officers **MUST** have the ability and authority to immediately bypass

the filter to review any site to assess risk!

- This is not a violation of the Children’s Internet Protection Act (CIPA)
- Essential to protect student safety

### No Moral Authority Off-Campus

- Make sure you are not imposing discipline for off-campus speech grounded in Moral Authority ~ offensive speech
  - Parents are responsible for imposing Moral Authority on their children

### If You Are the Target

- NEVER investigate or make a disciplinary decision if you are the target of the speech or are emotionally upset by the speech
  - You are at greater risk of making a bad decision

### Speech That Targets Staff

- Seek informal resolution
  - Ask parents to discipline the child ~ most will
- Consider suing the parents of truly egregious speech
  - Greater likelihood of success
  - Will communicate an important message to other parents about the need to monitor their children’s online activities

### Investigate Possible On-Campus

- Always conduct a full search of district Internet system for online activities of all participants
- Always ask about related altercations at school
  - What initially appears to be off-campus speech may also be on-campus speech/activity
    - Different legal standard for discipline
    - Greater potential for liability if you could have found this information, but did not look or ask

### Get to the Bottom

- Sometimes the student who posts harmful material online is the victim of emotional harm inflicted by other students ~ or staff
  - Students need to be held accountable for what they post online
  - But everyone who engaged in harmful

acts should be held accountable

- Or the problem will fester

#### Document, Document, Document

- You MUST fully investigate and retain all evidence
- You must be able to PROVE that student safety, school security, and/or instruction were substantially disrupted or at clear risk of disruption
  - Based on the facts, a reasonable, objective person would perceive risk of substantial disruption
- Good documentation will ward off lawsuits
- Kinds of material
  - All online harmful material
  - Independent psychological assessment of target(s)
  - Grades, attendance, participation in school activities of target(s)
  - Reports from parents
  - Reports from teachers
  - Reports from friends of target(s)
  - Prior or related in-school incidents

#### No Excessive Discipline

- Do not impose excessive discipline
- Goals of discipline
  - Child who posted material feels remorse, so harm will not continue
  - Parents feel remorse and shame and will prevent any continuation
- Excessive discipline
  - Turns remorse into anger at the school official and target
    - Can result in vicious online retaliation
    - Parents may rationalize that actions of their child were not that bad
    - Can lead to lawsuits

#### Not Just Discipline

- Whether or not you can impose formal discipline may end up being the least important question
  - Stopping the harm is the most important objective
  - With or without formal discipline, other actions must be taken ...
    - Make sure all harmful materials are removed to the best degree possible

- Ward against retaliation
- Seek to “bully-proof” the target
- Find ways for bully to repair the damage

#### Consult Your Attorney

- Consult with your district’s attorney if ...
  - You intend to impose discipline for speech targeting a staff member
  - You want to evaluate the records on a student’s personal digital device and do not have parent permission
  - You think the speech constitutes a “true threat”
  - The speech is political in nature, but raises civil rights concerns
  - Harmful speech on-campus or off-campus has arguably created a hostile environment for a student
  - You intend to impose what would be considered excessive discipline
  - You are really upset and angry
  - You are ever in doubt

#### **Bottom Line**

- Cyberbullying is causing significant emotional harm to students
- Students will not report this to adults, unless they trust adults will respond effectively
- So we need to ensure that school administrators can and will respond effectively