School Response to Cyberbullying and Sexting: 
The Legal Challenges

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The wonderful new interactive communication technologies that are immersing and 
benefitting our society--are also causing some major headaches for school leaders. Young people 
are engaging in what is commonly called “cyberbullying,” the use of electronic communication 
technologies to intentionally engage in repeated or widely disseminated acts of cruelty towards 
another that results in emotional harm. The newly emerging issue of sexting, sending nude sexy 
images via cell phone texting, presents ever more challenging concerns. These two concerns 
clearly overlap. Distributing nude images is one form of cyberbullying.

A major challenge for school officials is that many of these interactions are occurring 
when students post information while they are off-campus or when they are using their personal 
digital devices while at school, which is hard to detect. But the harmful impact of these 
interactions is clearly evident at school, because this is where students are physically together. 
Electronic aggression is clearly a contributing factor in altercations that occur on campus and is 
creating the conditions where students are do not feel safe coming to school or are unable to 
effectively focus on their studies.

When school officials seek to formally respond, that is impose a disciplinary 
consequence, in situations that involve student speech, this necessarily raises issues of the extent 
of their authority and questions of student free speech. Other legal issues also arise in the context 
of seeking to address these situations, including questions about the extent of district
responsibility—as well as tricky issues of search and seizure of records, which may include nude images of minors, on student personal digital devices.

There is limited case law in this area. This article will explore these issues, setting forth recommendations that appear to be supported by a reasonable analysis of existing case law. This article will provide an analysis to support the following standards:

- School officials have the authority to respond to off-campus student speech if that speech has caused, or there are particular reasons to believe it could cause, a substantial disruption at school or interference with the rights of students to be secure.
  - This disruption or interference could include violent physical or verbal altercations between students, significant interference with the right of a student to receive an education and feel safe at school, or significant interference with instruction or school operations.

- The disruption or interference likely must impact students and interfere or potentially interfere with their right to be safe at school and receive an education.¹
  - If the off-campus speech has targeted a staff member, school officials may only have the authority to respond if the off-campus speech has caused, or threatens, a substantial disruption of school activities that will interfere with school operations or the ability of the school to deliver instruction. The fact that a school official must take the time to investigate or that material posted is highly offensive likely does not likely give rise to the authority to formally respond with discipline. However, a range of informal responses, including talking with the student and

¹ As will be discussed below, this standard may be changed in the context of an upcoming decision by the Third Circuit Court of Appeals.
notifying the parents, as well as the potential of civil or criminal litigation may be appropriate.

• School officials do not have the responsibility to monitor or supervise student’s off-campus or personal communications—and, in fact, this would be impossible.
  - But school officials likely do have a responsibility to respond to situations involving both off- and on-campus harmful interactions that have created a hostile environment at school, when they are informed about the situation.

• School officials have the authority and responsibility to respond to any harmful or inappropriate speech through the District Internet system based on pedagogical reasons, if such speech is lewd or otherwise inconsistent to the educational mission of the school, or the speech has caused, or threatens a substantial disruption at school or significant interference with the rights of students to be secure.

• School officials may have the authority and responsibility to respond to any harmful or inappropriate speech of students using cell phones or other personal digital devices at school if the speech is lewd and inconsistent with the school’s educational mission. or if the speech has have caused, or threatens, a substantial disruption at school or interference with the rights of students to be secure.

• To search the records held on a student’s cell phone or other personal digital device, a school official must have a reasonable suspicion that the records will reveal that a law or school policy has been violated and that search is likely to turn up evidence of that violation. The extent of the search must be reasonably related to the circumstances which justified the search in the first place. The simple fact that a device is visible or
has been used at school when it is not supposed to be will not, without more, justify searching all of the records on that device.

- However, state wiretapping laws may impact the authority to search. These laws vary by state. School districts should consult with their legal counsel for guidance on the application of their state’s wiretap law on a student’s personal communication device.

- The possession and distribution of a nude image of a minor may constitute a federal and state crime. There are generally no exceptions in these statutes provided for school officials, thus school officials face the potential of prosecution. This is a concern that must be addressed through the development of an investigation protocol that has been approved by the local district attorney.

**Student Speech and School Safety**

The most recent Supreme Court student speech case, *Morse v Frederick* will provide the initial framework for the free speech analysis.² *Morse* involved a cryptic, supposedly pro-drug use, statement, “Bong hits 4 Jesus,” on a banner raised by a student across the street from a school during a time when students had been released to watch a parade for the Olympic torch.

In a split 5-4 decision, the Court ruled that public school officials may restrict student speech at a school event when the speech is reasonably viewed as promoting illegal drug use. The Court specifically rejected the argument advanced by the petitioners and school leadership organizations that the First Amendment permits school officials to censor any speech that could fit under some definition of offensive or might interfere with a school’s educational mission.

Instead, the focus of the Court was on the student safety concerns.

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Despite questions about the intent of the language on the banner, the Court supported the perspective that the principal’s interpretation that the banner was advocating illegal drug use was valid. The Court noted: “Drug abuse can cause severe and permanent damage to the health and well-being of young people.” The Court further described, in detail, these concerns. The Court cited statistics that documented the concerns, discussed federal and state initiatives directed towards preventing drug abuse, and noted the important role schools play in addressing this concern.

The importance of the focus on student safety was strengthened by the comments made by Justice Alito in his concurring opinion:

(Any argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. ... During school hours, however, parents are not present to provide protection and guidance, and students’ movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.

In most settings, the First Amendment strongly limits the government’s ability to suppress speech on the ground that it presents a threat of violence. ... But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, Tinker’s “substantial disruption” standard permits school officials to step in before actual violence erupts."

Thus, the Morse majority and concurring opinions provide strong support for the belief that when faced with speech that can be demonstrated to have the potential of significantly

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3 Id. at *.
4 Id. at *.
5 Id. at *. (Alito, S. concurring).
interfering with the safety of students or could potentially cause violence, the Court will support
the authority of school officials to effectively respond to such speech.

**Harms of Bullying and Cyberbullying**

This section will discuss the concerns associated with bullying and cyberbullying in a
manner that parallels the approach taken by the majority opinion in *Morse*. The *Morse* Court
indicated that deterring drug use by schoolchildren was an “important—indeed, perhaps
compelling” interest. The following will provide the basis for the legal conclusion that deterring
bullying and aggression among school children is a compelling interest.

Bullying is often seen as an inevitable part of school culture or a rite of passage of youth.
Recently, attention to bullying among has increased dramatically. School personnel and policy
makers have recognized that the consequences of bullying can be significant, affecting not only
the young people who are bullied, but also those who bully. Bullying behavior also seriously
damages the school climate.

Research indicates that bullying is prevalent in school. The rates of bullying vary
depending on how the questions are asked. In a recent study, over 49% of elementary, middle,
and high school students reported being bullied by other students at school at least once during
the past month. Additionally, 30.8% of the students reported bullying others during that
time.

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Both bullies and victims are at high risk of suffering from serious health, safety, and educational risks. Targets of bullying report more sleeping difficulties, despondency, headaches, stomach pains, and other health symptoms than other children. Targets avoid school, which can affect their lead to school failure, are more likely to suffer from depression and low self-esteem, and are at increased risk of depression and suicide. Perpetrators are more likely than others to get into frequent fights, be injured in a fight, vandalize or steal property, drink alcohol, smoke, be truant from school, drop out of school, and carry a weapon.

Bullying is also associated with school violence. Perpetrators of school-based homicides were more than twice as likely to report being bullied by their peers. In a study of the violent school attacks in the United States from 1974 through June 2000, the U.S. Office of Safe and Drug Free Schools and Secret Service found that almost three-quarters (71%) of the attackers felt persecuted, bullied, threatened, attacked, or injured by others prior to the incident.

Research on cyberbullying is just emerging. In September 2006, the Centers for Disease Control and Prevention convened a panel of experts to discuss issues related to the emerging public health problem of electronic aggression. The panel included representatives from research surveys that were previously published in different journals.

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universities, public school systems, federal agencies, and nonprofit organizations. A special issue of the Journal of Adolescent Health summarizes the data and recommendations from this expert panel meeting.\textsuperscript{11} The research studies in this journal establish that depending on how the questions were asked, between 9\% and 35\% of middle and high school students reported being victimized by cyberbullying.

The research also demonstrated that youth involved in cyberbullying, as targets or perpetrators, also demonstrate other significant psychosocial concerns. Perpetrators were significantly more likely to report beliefs endorsing bullying behavior, a negative perception of the school climate, and a negative perception of their peer social support.\textsuperscript{12} Targets of cyberbullying were significantly more likely to also report two or more detentions or suspensions and skipping school in the previous year, eight times more likely to report carrying a weapon to school in the past thirty days, poorer parental monitoring and caregiver–child emotional bond, and increased alcohol use and other drug use.\textsuperscript{13} Perpetrators and targets report a high degree of involvement in offline relational aggression, physical aggression, and sexual aggression.\textsuperscript{14} In a more recent study that focused issues related to suicide, researchers found that youth who experienced traditional bullying or cyberbullying, as either an offender or a victim, had more suicidal thoughts and were more likely to attempt suicide than those who had not experienced such forms of peer aggression.\textsuperscript{15}

\begin{thebibliography}{9}
\bibitem{13} Ybarra ML, Espelage DL, Mitchell KJ. \textit{The co-occurrence of Internet harassment and unwanted sexual solicitation victimization and perpetration: associations with psychosocial indicators}. JOURNAL OF ADOLESCENT HEALTH. 41:S31-S41 (2007).
\bibitem{14} Sameer Hinduja & Justin Patchin. \textit{Bullying, Cyberbullying, and Suicide}. ARCHIVES OF SUICIDE RESEARCH, 14(3), 206-221 (2010).
\end{thebibliography}
The Federal Government has recognized the close connection between bullying and school violence, as well as the other negative effects on young people. The Office of Safe and Drug-Free Schools administers, coordinates, and recommends policy for improving quality and excellence of programs and activities. The Office provides funding for drug and violence prevention activities and activities, as well as character and civics education. Since 1999, the U.S. Departments of Education, Health and Human Services, and Justice have collaborated on the Safe Schools/Healthy Students (SS/HS) Initiative, a discretionary grant program that provides students, schools, and communities with federal funding to implement an enhanced, coordinated, comprehensive plan of activities, programs, and services that focus on promoting healthy childhood development and preventing violence and alcohol and other drug abuse. Both of these programs provide financial support for bullying prevention programs in schools.

On August 11 and 12, 2010, the U.S. Department of Education hosted the first ever Bullying Prevention Summit.\textsuperscript{16} As noted by Secretary Duncan, “When children feel threatened, they cannot learn.” Notably, this summit included participants from the U. S. Department of Justice, Health and Human Services, Department of Agriculture, Department of Defense, and Department of Interior. Assistant Deputy Secretary Jennings added, “Bullying behavior is not only troubling in and of itself but if left unaddressed, can quickly escalate into harassment, violence and tragedies.”

Currently, it appears that 42 states have laws addressing bullying in schools.\textsuperscript{17} These laws typically require that state or local officials establish and enforce policies against student

bullying of other students, require or recommend procedures for reporting of bullying incidents that include information about proper investigations of bullying incidents, and most highlight the importance of discipline for students who bully.\textsuperscript{18} Many statutes require the state department of education to publish model bullying policies. These state statutes frequently contain findings about the seriousness of bullying. New Jersey states: “Bullying, like other disruptive or violent behaviors...disrupts both a student’s ability to learn and a school’s ability to educate its students in a safe environment.”\textsuperscript{19} Vermont’s statutes indicates “Students who are continually filled with apprehension and anxiety are unable to learn and unlikely to succeed.”\textsuperscript{20} Even without such legislation, schools understand the importance of addressing this problem. A 2007 study demonstrated that 95\% of school districts in the United States have anti-bullying policies.\textsuperscript{21} As of July, 2010, it appears that 34 states have proposals for or have amended their bullying prevention laws to incorporate provisions addressing cyberbullying or electronic harassment.\textsuperscript{22}

   The medical community has also taken note of the serious health concerns associated with bullying. The American Medical Association advised physicians to be vigilant for signs and symptoms of bullying and other psychosocial trauma and distress in children and adolescents and recommends that physicians enhance their awareness of the social and mental health consequences of bullying and other aggressive behaviors and advocate for family, school, and community programs to prevent bullying.\textsuperscript{23} The American Academy of Pediatrics has

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\textsuperscript{18} Susan Limber. \textit{Bullying Laws, Policies and Prevention Efforts}. Materials provided to the U.S. Department of Education Bullying Prevention Summit. (2010)  \\
\textsuperscript{20} Vermont V.S.A. 16 § 565 (2001).  \\
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recommended that pediatricians should advocate for bullying awareness by teachers, educational administrators, parents and children coupled with adoption of evidence-based programs. The Commission for the Prevention of Youth Violence, consisting nine of the leading medical and mental health organizations, issued a report in 2000 entitled, *Youth and Violence: Medicine, Nursing, and Public Health: Connecting the dots to prevent violence.* This report reviewed the successful violence prevention programs and noted key commonalities of successful programs, one of which was a positive climate that does not tolerate aggression or bullying.

In sum, there is extensive and incontrovertible evidence that the prevention of bullying behavior, among students, including now cyberbullying, is an exceptionally compelling concern. This has led to strong support from policy makers, educators, and the medical community for initiatives to prevent and respond to the harms.

**Historical Framework of Free Speech**

When addressing issues of bullying and cyberbullying, it is necessary to consider student’s rights of free speech. It is helpful to frame the discussion of student free speech rights with an analysis of the historical underpinnings of the free speech provision in the First Amendment. According to Levy, in his excellent book, *The Emergence of a Free Press,* it is generally accepted that the framers of the First Amendment were thinking in terms of the English common-law notion of freedom of speech when they adopted language that prohibited laws "abridging the freedom of speech, or of the press." The English common-law notion of freedom

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24 *The Role of the Pediatrician in Youth Violence Prevention in Clinical Practice and at the Community Level. PEDIATRICS* (Volume 103, Number 1, p 173-181, 1999).
26 *Id.* at 17.
of speech prohibited prior restraints on the press, but did not preclude civil or criminal prosecution, after the fact, for obscene, blasphemous, libelous, or seditious speech.

(W)here blasphemous, immoral, treasonable, schismatical, seditious or scandalous libels are punished by the English law … the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: … but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity…. Thus the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment…. So true will it be found, that to censure the licentiousness, is to maintain the liberty of the press. 28

Levy noted that there is an alternative perspective on the historical basis for freedom of speech. This is the natural rights philosophy advocated by John Locke, who was revered by many of the early leaders. John Trenchard and Thomas Gordon writing under the nom de plume "Cato" addressed the issue of freedom of speech as follows:

Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech; Which is the Right of every Man, as far as by it does not hurt and controul the Right of another; and this is the only Check which it ought to suffer, the only Bounds which it ought to know. 29

The essential difference in these two philosophies is that under the English common law approach, government has the authority to determine what speech is contrary to the public good, including such social values as order, morality, and religion. Whereas under the natural rights philosophy, the role of government is to enforce the fundamental rights of other individuals, if those rights are injured by the exercise of speech by another.

Supreme Court Student Free Speech Cases

While neither the Supreme Court, nor lower Federal Courts, have referenced this historical basis in cases addressing school authority in the context of student speech, it appears that the courts have created standards that are grounded in both of these philosophies. Understanding this distinction can assist in gaining a better understanding of the situations under which school officials have the constitutional authority to formally respond, including imposing a disciplinary consequence, to off-campus student speech.

The landmark case involving student free speech rights is the case of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* Tinker involved a group of high school students who decided to wear black armbands to school to protest the Vietnam War. The Court began its opinion by stating that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” However, the Court acknowledged “the special characteristics of the school environment” by permitting school officials to prohibit student speech if that speech “would substantially interfere with the work of the school or impinge upon the rights of other students,” including the right “to be secure.”

The decision in *Tinker* appears to be grounded in the natural rights analysis, balancing student right to speech against the rights of other students to receive an education and be safe.

The Supreme Court’s next student speech case was *Bethel School District No. 403 v. Fraser.* Fraser made a speech before a high school assembly that presented “an elaborate, graphic, and explicit sexual metaphor” and was suspended. The Supreme Court held that the

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31 Id. at 506.
32 Id. at 508 and 509.
34 Id. at 678.
school district acted “entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.”\(^{35}\) The Court stressed that the purpose of public education was to “prepare pupils for citizenship in the Republic” and indicated that to do so it “must inculcate the habits and manners of civility.”\(^{36}\) The Court further noted that schools may punish student speech that “would undermine the school’s basic educational mission.”\(^{37}\) However, it is important to note that the boundaries of this standard. In a concurring opinion, Justice Brennan stated: “(I)f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”\(^{38}\)

The case of *Hazelwood Sch. Dist. v. Kuhlmeier* involved student speech in articles that were to appear in a school newspaper. The Supreme Court held that schools are able to exercise editorial control over student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns.\(^{39}\) It is important to note that some states have enacted student free press laws that have pulled back on school district authority.\(^{40}\)

Thus, in *Fraser* and *Hazelwood*, the Court appears to have followed the common law standard indicating that when students are in school, officials have the authority to determine what student speech was contrary to the public good, including such social values as order and morality, as well as to ensure that student speech is in accord with the educational mission of the

\(^{35}\) *Id.* at 685.
\(^{36}\) *Id.* at 681 (citations omitted).
\(^{37}\) *Id.* at 685.
\(^{38}\) *Id.* at 688 (Brennan, W.J. concurring) (citations omitted.)
schools. Under *Hazelwood*, school officials have even greater authority over student speech in
school-sponsored publications.

The *Morse* decision, discussed above, appears to be grounded more in the English
common law, primarily because while the case was decided based on student safety grounds, the
speech in question did not raise concerns that were directly related to such safety; rather the
focus was on limiting speech that was contrary to the educational mission of the school with
respect to the drug abuse issue.

Summing this up, when students are on-campus, school officials can impose restrictions
on speech: Consistent with pedagogical purposes if such speech is in a school-sponsored
publication; That is inconsistent with the educational mission of the school because it is lewd,
vulgar, profane or plainly offensive; Advocates the illegal use of drugs and presumably other
restrictions grounded in the interest of protecting students from receiving messages that are
contrary to their safety; Otherwise, if the speech has or could cause a substantial and material
disruption or interference with the rights of students to be secure. Thus, when students are on-
campus, it appears that school officials may respond to student speech based both on common
law and natural rights philosophies.

**Free Speech Standards for Student Off-Campus Speech**

But when students are off-campus, school officials no longer appear to have the authority
to act in accord with the common law philosophy that allows them to seek to inculcate habits and
manners of civility and prepare students for citizenship. The purpose of this boundary on school
authority was explained in *Thomas v. Board of Education, Granville Central School District*:

When school officials are authorized only to punish speech on school property, the
student is free to speak his mind when the school day ends. In this manner, the
community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.  

The *Morse* case also raised, but did not determine applicable, the question of a school response to off-campus student speech. The Court noted at the outset that the case involved speech conducted during a school activity because the students were on what was essentially a school “field trip.” The Court did not address the issue of the standards with respect to off-campus student speech beyond one sentence: “There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, see Porter v. Ascension Parish School Bd., 393 F. 3d 608, 615, n. 22 (CA5 2004), but not on these facts.”

Footnote 22, from the *Porter* case contains helpful insight:

We are aware of the difficulties posed by state regulation of student speech that takes place off-campus and is later brought on-campus either by communicating student or others to whom the message was communicated. Refusing to differentiate between student speech taking place on-campus and speech taking place off-campus, a number of courts have applied the test in *Tinker* analyzing off-campus speech brought onto the school campus.

The lower Federal Courts have consistently maintained that school officials may respond to off-campus student speech if it has or reasonably could cause a substantial disruption on
Thus, when students are off-campus, the authority of school officials to formally respond to student speech appears to be grounded solely in natural rights. As well as legal sense, this makes practical and logical sense. Regardless of the geographic origin of any speech, school officials are responsible for ensuring the delivery of instruction and the well-being of all of the students under their custodial care.

School officials must recognize that when students are off-campus, they are beyond the “schoolhouse gate” when it comes to any effort to inculcate values. When students are off-campus, parents are responsible for imparting values. It is only when the impact of the student’s speech has or could come back through that “schoolhouse gate” and has or could significantly interfere with the rights of other students that school officials have the authority to formally respond.

**Applying Tinker to Student Speech**

Because the *Tinker* decision relates most closely to the concerns of the security of students, it is appropriate to consider cases where courts have applied the *Tinker* standard to

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44 In *Scoville v. Board of Education of Joliet Township High School District 204*, 425 F.2d 10 (7th Cir. 1970), the situation involved two public high school students who had published an underground paper, which was distributed on-campus. The paper criticized school policies and contained language that school officials considered inappropriate and indecent. However, there was no evidence of disruption on campus and the school officials could not reasonably forecast such disruption, and the court determined the discipline was inappropriate. In *Shanley v. Northeast Independent School District*, 462 F.2d 960, 964 (5th Cir. 1972), students published an underground newspaper. The court noted: “(T)he activity punished here does not even approach the "material and substantial" disruption that must accompany an exercise of expression, either in fact or in reasonable forecast.” *Id.* at *. In *Klein v. Smith*, 635 F. Supp. 1440 (Dist. Me. 1986), a high school student made a vulgar gesture with his middle finger to a teacher when in a parking lot of a restaurant. The court agreed that such behavior would be unacceptable on campus. However, despite the fact that sixty-two school employees had signed a letter indicating that the boy’s actions had sapped their resolve to enforce proper discipline,” the court ruled that their “professional integrity, personal mental resolve, and individual character [were not] going to dissolve, willy-nilly, in the face of the digital posturing of the splenetic bad-mannered boy.” *Id.* at 1442. *Boucher v. School Board of the School District of Greenfield*, 134 F.3d 821 (7th Cir. 1998) addressed the situation of a high school student, who wrote and distributed an off-campus newspaper that provided guidance on how to hack the school computer. The court ruled that it was reasonable for school officials to foresee that the article would cause a substantial disruption of school operations. *Pangle v. Bend-Lapine School District*, 10 P. 3d 275 (Or. App. 2000) involved an off-campus newspaper, where the student advocated specific methods for causing personal injury, property damage and the disruption of school activities. He also described where to obtain the necessary materials to engage in some of the acts that he advocated. The court held that the “school district reasonably could have believed that (the newspaper) would “substantially interfere with the work of the school or impinge upon the rights of other students.” *Id.* at *.
student speech, both on and off-campus, to determine what kinds of situations have been found to meet this standard.

_Saxe v. State College Area School District_ was written by then-Judge Alito whose language from the Supreme Court decision on _Morse_ was quoted above. The State College Area School District’s anti-harassment policy had been challenged on the basis that it was overbroad and could impact speech that someone might find merely offensive. In discussing various provisions of the policy, the court noted:

We agree that the Policy's first prong, which prohibits speech that would "substantially interfer[e] with a student's educational performance," may satisfy the _Tinker_ standard. The primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment.

Note specifically the use of the term “a” student which leads to the presumption that speech that interferes with the rights of any student, not the school or school activities, can be restricted. Further, the court appeared to be drawing a close connection between the two prongs of _Tinker_, essentially stating that speech that substantially interferes with a student’s education constitutes a substantial disruption. Another part of the school district’s policy was found to be overbroad and potentially interfering with protected speech that some might find to be offensive.

In a subsequent Third Circuit case, _Sypniewski v. Warren Hills Regional Board of Education_, which also addressed the constitutionality of another district’s anti-harassment policy, the court quoted with approval the new policy language adopted by the State College Area School District subsequent to the prior decision:

The term "harassment" as used in the Policy means verbal, written, graphic or physical conduct which does or is reasonably believed under the totality of the

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45 240 F.3d 200 (3rd Cir. 2001).
46 _Id._ at 217.
circumstances to 1. substantially or materially interfere with a student’s or students’ educational performance; and/or 2. deny any student or students the benefits or opportunities offered by the School District; and/or 3. substantially disrupt school operations or activities; and/or 4. contain lewd, vulgar or profane expression; and/or 5. create a hostile or abusive environment which is of such pervasiveness and severity that it materially and adversely alters the condition of a student’s or students’ educational environment, from both an objective viewpoint and the subjective viewpoint of the student at whom the harassment is directed. The term "harassment" for purposes of this Policy does not mean merely offensive expression, rudeness or discourtesy; nor does the term "harassment" mean the legitimate exercise of constitutional rights within the school setting. The School District recognizes there is a right to express opinion, ideas and beliefs so long as such expression is not lewd or profane or materially disruptive of school operations or the rights of others.47

The court in Sypniewski also affirmed the rights of students to attend school in an environment free from abuse, stating: “Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to prevent. There is no constitutional right to be a bully. ... Schools are generally permitted to step in and protect students from abuse.”48

Another line of lower court cases has focused on school dress code issues, such as T-shirts or other items worn by students in school. The courts have followed a consistent approach to analysis of these cases.49 If the material is considered offensively lewd, or indecent, the courts generally apply the Fraser standard. Otherwise, the courts have applied Tinker. The decision in these latter cases has been dependent on the ability of the district to present facts that establish a

47 307 F.3d 243, * (3rd Cir. 2002). Note: the “subjective” and “objective” language in the new State College School District policy relates to an additional discussion in the Saxe case where the Court noted: "(1)n order for conduct to constitute harassment under a "hostile environment" theory, it must both: (1) be viewed subjectively as harassment by the victim and (2) be objectively severe or pervasive enough that a reasonable person would agree that it is harassment. ... The Court emphasized that the objective prong of this inquiry must be evaluated by looking at the "totality of the circumstances." "These may include," the Court observed, "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Saxe at * (citation omitted)
48 Id. at 264.
past history of discord related to the symbol or slogan that could portend the potential of school violence.50

Two off-campus newspaper cases are also instructive. In these cases, the courts rejected the use of Fraser and applied Tinker. In Boucher v. School Board of the School District of Greenfield, a high school student wrote and distributed an off-campus newspaper that provided instructions on how to hack the school’s computers.51 The Seventh Circuit ruled that it was reasonable for school officials to foresee that the article would cause a substantial disruption of school operations by disrupting the functions of the school computer. In Pangle v. Bend-Lapine School District, the student advocated specific methods for causing personal injury, property damage and the disruption of school activities.52 The court held that the school district reasonably could have believed that the newspaper would substantially interfere with the work of the school or impinge upon the rights of other students.

Thus, under Saxe and Sypniewski, school officials appear to have the authority to respond to student speech that has, or foreseeably could, significantly interfere with the ability of a student to feel safe at school and receive an education. This is a conclusion strengthened by Justice Alito’s concurring opinion in Morse. Under a long line of dress code cases, school officials appear to have the authority to respond to speech that has or foreseeably could trigger violence at school, which is obviously a safety issue. Under cases related to off-campus newspapers, school officials appear to have the authority to respond to student speech that could

50 For example, in West v. Derby Unified Sch. Dist. 206 F.3d 1358 (10th Cir. 2000), the district’s restriction against wearing Confederate symbols was upheld because the district was able to demonstrate that there had been actual fights at school involving racial symbols, particularly the Confederate flag. In Scott v. Sch. Bd. of Alachua County 324 F.3d 1246 (11th Cir. 2003), cert. denied, 540 U.S. 824 (2003), the Court held that restrictions on Confederate symbols were justified because of the school’s history of racial tensions including racially based altercations. 51 134 F.3d 821, * (7th Cir. 1998). 52 10 P.3d 275 (Or. App. 2000).
cause a substantial disruption in school operations which could likely to interfere with the delivery of instruction.

**Off-Campus Online Speech Cases**

So far, Federal Court decisions related to a school disciplinary consequence imposed on a student related to off-campus online speech have been decided under the *Tinker* standard, and have rejected the *Fraser* standard. It should be noted that all but one of these cases, which will be discussed below, have involved student speech directed at a school staff member. This is a significant consideration. Note from the above discussion that the courts have always focused on the potential impact on students--disruption of operations, activities or instruction, violence, interference with a student's educational performance. Thus far, no court has upheld the discipline of a student where the only disruption or interference has been of a school staff member.

In these cases, school districts have set forth arguments that school officials should have the authority to respond to student off-campus speech grounded in the objective of serving their educational mission, a *Fraser*-based, common law-grounded argument, or that there was a substantial disruption at school, a *Tinker*-based, natural rights-grounded argument. Organizations such as the American Civil Liberties Union argue that school officials have no authority to respond to off-campus student speech whatsoever. In early online speech cases, the courts discussed whether the *Fraser* or *Tinker* standard was appropriate, declined to apply *Fraser* because the student was off-campus, and applied the *Tinker* standard--but did not find the requisite substantial disruption.

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53 The briefs submitted in the *Layshock* case that can be found on this page demonstrate the manner in this these cases are argued by the various parties: [http://www.aclu.org/legal/legaldocket/studentsuspendedforinterne.htm](http://www.aclu.org/legal/legaldocket/studentsuspendedforinterne.htm)

In two recent cases in the Second Circuit, the courts applied the *Tinker* standard and found there to be substantial disruption. In *Wisniewski v. Bd. of Educ.*, the Second Circuit upheld the suspension of a student who created an instant messaging icon depicting his teacher being shot.\(^{55}\) Using this icon he had sent messages to some 15 people, none of whom was a school official but some of whom were classmates. One classmate showed the icon to the teacher, who found it distressing and brought it to the attention of school officials. The student expressed regret, was initially suspended for five days, and allowed to return to school pending a hearing on further action. The teacher was permitted to stop teaching his English class.

The Second Circuit applied the *Tinker* standard in a unique manner. The court determined that school officials can impose discipline if off-campus conduct, “poses a reasonably foreseeable risk that (it) would come to the attention of school authorities” and that it would “materially and substantially disrupt the work and discipline of the school.”\(^{56}\) The court then held: “(T)here can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment.”\(^{57}\)

The first half of the standard “reasonably foreseeable risk that it would come to the attention of school authorities” is not grounded in any prior case law. Virtually all material posted online could foreseeably come to the attention of school authorities. Under *Tinker*, the focus must be on the impact of the speech at school, for it is the prevention of a harmful impact at school that provides school officials with the authority to respond.

\(^{55}\) 494 F.3d 34, 38–39 (2d Cir. 2007), cert. denied, ___ U.S. ___ (2008)

\(^{56}\) *Id.* at *.

\(^{57}\) *Id.* at *.
The court’s application this standard also raised reasons for concern. The initial reaction of the school, to suspend the student upon notice of his off-campus speech that depicted violence against a school staff member was entirely appropriate and legally justified. Further, it appears that the district followed excellent threat assessment process to determine the credibility of this perceived threat. A police investigator found that the icon was meant as a joke and that the student was not dangerous and a psychologist agreed. After this determination was made, the school hearing officer imposed a six-month suspension concluding that the icon was threatening. Given the findings of the policy officer and psychologist, there is a question regarding whether the shift in teaching assignments of the teacher was justified under an objective reasonable person perspective.

The Second Circuit continued to use the standard enunciated in Wisniewski in the case of Doninger v. Neihoff. Doninger was a junior class student body officer. Four days before a student council planned-event, called Jamfest, the student body leaders were informed that it could not be held because a staff member who handled the technical services in the auditorium had a scheduling conflict. This was the third postponement. The students tried to communicate with the principal, who was not available. The school staff advisor for the student government suggested they contact members of the community to generate support for holding the event on the day scheduled. Doninger and three other members of the student council sent out a mass e-mail, encouraging recipients to contact the school officials and urge the district to hold the event as scheduled. Both the principal and the superintendent were inundated with e-mails and phone calls.

There is contention about what happened next. Doninger claims that the principal told her that the event would be cancelled because of the students’ actions. The principal disputed this, indicating that she expressed disappointment with the students because they resorted to a mass e-mail rather than coming to her or the superintendent to resolve the issue. That evening, Doninger posted the following announcement to her personal blog, which clearly set forth her understanding that the event had likely been cancelled:

jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, [superintendent] is getting a TON of phone calls and emails and such. we have so much support and we really appreciate it. however, she got pissed off and decided to just cancel the whole thing all together. and so basically we aren’t going to have it, but in the slightest chance we do it is going to after the talent show on may 18th. … And here is a letter my mom sent to [superintendent] and cc’d [principal] to get an idea of what to write if you want to write something or call her to piss her off more. im down.59

Shortly thereafter Jamfest was rescheduled. Much later, the superintendent became aware of Doninger’s blog post. The principal barred her from running for senior class secretary. Doninger sought a preliminary injunction to hold a new election allowing her to run for class secretary or to install her as an additional senior class secretary, which the District Court denied.

The Second Circuit affirmed. However, the manner in which the court applied the foreseeable risk of substantial disruption standard presents concerns. While denying that it was applying Fraser, the court clearly focused on the nature of Doninger’s language, referring to the language is “plainly offensive” and “potentially incendiary.” Stripped of the language the court considered offensive, Doninger merely urged her readers to write or call the superintendent to express their displeasure that this very popular event had been cancelled. She did not advocate

59 Id. at 45.
any form of disruption other than the expression of an objection to what the school officials had
done.

Of greater concern is the approach the court took to the application of the “reasonably
foreseeable” portion of the Tinker standard. The reason for this portion of the standard is to
ensure that school officials can act in advance of any actual disruption to prevent it.60 The
superintendent only discovered Doninger’s post after the overall situation had been resolved.

The causation factor should have presented even greater concerns. There were many
potential causes of any actual disruption around the time Doninger’s comments were posted. A
school staff member, who was scheduled to manage the technical aspects of a scheduled event
that was obviously important to the students and the community, backed out four days before the
event, thus requiring the event to be cancelled or postponed for the third time. In the context of
this situation Doninger’s post, which reportedly received a total of three comments, was clearly
not a significant cause of any disruption.61

Currently, the question of a school response to speech directed at staff is under review by
the full Third Circuit Court of Appeals in two cases: Layshock v. Hermitage School District and

60 See: LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) (“Tinker does not require school officials to wait
until disruption actually occurs before they may act.”). Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007) “School
officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from
happening in the first place.”
61 The situation in the Doninger case also raises another matter for consideration. Closely related to the right of free
speech, there is another principle that is even more at the foundation of the U.S. democracy: the right to petition.
“Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of
grievances.” Our students study the right to petition in action. In the Declaration of Independence, our founders
stated: “A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a
free people.” It is highly likely that King George found both the language and ideas presented in this document to be
highly offensive, similar to the district Superintendent. The Boston Tea Party was likely considered by the British as to
be a material and substantial disruption. Martin Luther King, who has had a day set aside in his honor, clearly relied
on the right to petition to force government to right the wrongs of how African-American people were treated in this
country. King’s words and actions were considered by some to be highly offensive and frequently caused a
substantial and material disruption. What is the right of students, who are on a day-to-day basis subjected to the
impact of policies and actions of representatives of the state—principals and teachers—to petition those state officials
to right a wrong or correct a problem—even if that petition does cause a substantial disruption?
Snyder v. Blue Mountain School District.62 Two separate three-judge panels of the Third Circuit Court of Appeals issued conflicting opinions in these cases.63 Both cases involved the creation of an offensive profile on a social networking site that was directed at the school principal. The losing parties in both cases asked the full court to rehear the cases. (An update to this article will be provided on the BYU Education and Law Journal web site after release of this decision.)

In Layshock, the student created a profile that was a parody of his principal on MySpace while at home. As word of the profile spread throughout school, students were accessing it from school computers. Despite the presence of filtering software, the school had a very difficult time blocking access.

The District Court decision in this case was exceptionally helpful in outlining the specific evidentiary elements necessary to create the conditions where school official’s response to off-campus speech is justified under Tinker.64 The court found that the school failed to establish a sufficient nexus between Layshock’s profile and substantial disruption of the school environment.65 The court also noted that even if it had found a sufficient nexus that no reasonable jury would find that a substantial disruption occurred, indicating that the actual disruption here was minimal. The court noted that the school failed to demonstrate that the profile, rather than the investigation and reaction of school administrators, caused any disruption.67 Thus under this decision, there is a requirement to establish a school nexus,

64 496 F. Supp. 2d 587 (W.D. Pa. 2007)
65 Id. at 600.
66 Id.
67 Id.
substantial disruption or reasonable fear of future disruptions, and a causal connection between the off-campus speech and any on-campus disruptions.

At the Circuit Court level, the school district conceded that there was not a sufficient nexus between the profile and any disruption on campus. The school district argued that because the speech was aimed at the school community, Layshock took a photograph from the district site, he accessed the profile from school, and it was foreseeable that the speech would come to the attention of the school community, that the case should be evaluated under the Fraser standard. The three-judge panel rejected this argument.

In Synder, the three-judge panel relied on Tinker, but did not find any actual disruption. However, because the profile featuring the principal and alluded to his engagement in sexually inappropriate behavior and illegal conduct, two judges determined that it was reasonably foreseeable that the profile threatened to substantially disrupt the school because other students and parents might question the principal’s conduct and his fitness to serve as a principal.

In a dissenting opinion, the third judge argued that the facts did not support the conclusion that a forecast of substantial disruption was reasonable. This judge compared the foreseeable impact of the student’s private profile that set forth allegations that were not credible to the potential disruption in the Tinker case related to wearing of armbands at school to protest an unpopular war. This judge indicated that if the apprehension of disruption related to the armbands was not sufficient to overcome the students’ rights of freedom of speech, any apprehension related to the impact of this profile certainly was not sufficient.

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68 593 F.3d at ___.

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The full court decision in these two cases will be helpful, but will only impact the guidance set forth in this article if the court adopts the argument set forth by the ACLU, that the school district has no authority whatsoever to respond to student off-campus speech. This is considered unlikely.

Note, the fact that a school official might not be able to formally respond to a student’s offensive or harmful speech directed at a staff member does not mean that nothing can be done. A school official can certainly meet with the parents and perhaps discuss the fact that if their child persists in this kind of action this does not bode well for his or her success in the future. In some situations, a civil law suits based on a claim of defamation, invasion of personal privacy, false light, or intentional infliction of emotional distress might be appropriate. Sometimes, the speech may have criminal ramifications, such as a threat or hate speech. School officials also must know how to rapidly get the speech taken down, which is accomplished by filing an abuse report with the site.

Off-Campus Online Speech Targeting a Student

Unfortunately, there has been one case involving online hurtful speech directed at a student where the court an opinion that was clearly not well-founded. This is the case of J.C. v. Beverly Hills Unified School District. J.C. created a video depicting several other students disparaging C.C. and posted this video on YouTube. C.C. and her mother raised this video to the attention of the school. J.C. was suspended. In this case, the court decided to apply the Tinker standard, but struggled with how to apply this standard to a situation where speech was directed at a student.

69 aclu brief
The lack of case law related to a school response to student speech that harmfully targets another student was evident in how the case was analyzed by the court. The court stated: “Tinker establishes that a material and substantial disruption is one that affects ‘the work of the school’ or ‘school activities’ in general.” 71 The court did reference the other important language in Tinker, regarding rights of students to be secure, but stated: “(T)he Court is not aware of any authority ... that extends the Tinker rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student. This court declines to be the first.” 72

In this discussion, the court failed to reference the decisions and language in Saxe and Sypniewski.

After thus narrowing the analysis of Tinker to an assessment of the impact on the school environment, the court assessed a variety of issues that were not relevant to the harmful impact on C.C., including: Whether there was a ripple effect in the classroom that disturbed instruction. Whether students were planning to physically assault C.C. or any evidence that C.C. intended to engage in physical violence. The demand on staff time to address the situation. The potential that students could take sides and this could lead to violence. Whether there was any history of a prior video posted on YouTube that led to violence. None of these factors, in the court’s opinion, provided sufficient evidence of substantial disruption of school activities.

The court further appeared to discount the emotional harm inflicted on C.C. The court indicating that after meeting with the principal C.C. was willing to go to class, but failed to note that her willingness to go to class was predicated on her knowledge of the forthcoming discipline of the students who had attacked her. The court’s abject lack of insight into the problems of

71 Id. at ___.
72 Id. at ___.

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bullying and the serious consequences of bullying on the emotional well-being and educational success of students was evident:

The Court does not take issue with Defendants’ argument that young students often say hurtful things to each other, and that students with limited maturity may have emotional conflicts over even minor comments. However, to allow the School to cast this wide a net and suspend a student simply because another student takes offense to their speech, without any evidence that such speech caused a substantial disruption of the school’s activities, runs afoul of Tinker. ...

(T)he School’s decision must be anchored in something greater than one individual student’s difficult day (or hour) on campus. ...

(N)o one could seriously challenge that thirteen-year-olds often say mean-spirited things about one another, or that a teenager likely will weather a verbal attack less ably than an adult. The Court accepts that C.C. was upset, even hysterical, about the YouTube video, and that the School’s only goal was to console C.C. and to resolve the situation as quickly as possible. ...

The Court cannot uphold school discipline of student speech simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments.73

Unfortunately, this case was not appealed. The court’s comments and interpretation of the situation fly in the face of bullying research and prevention insight. While it appears that the school principal provided excellent testimony about issues related to the harms caused by bullying, school attorneys are likely well-advised to ensure that expert testimony is provided regarding these concerns. As noted in footnote *, in Saxe, Judge Alito referenced the need to focus on both subjective and objective perspectives in establishing a hostile environment. From an evidentiary perspective, school attorneys would be well advised to recognize that some judges may lack a sophisticated understanding of the harms caused by bullying and ensure the presentation of evidence regarding the target’s subjective reaction to the situation, backed up by expert testimony that provides an objective, research-based perspective. This evidence, in

73 Id. at ___.
combination with reference to language in *Saxe* and *Sypniewski*, as well as Justice Alito’s language in *Morse*, should ward off a similar erroneous decision in the future.

An additional factor that school officials and attorneys should recognize is that in the vast majority of these situations, the aggression directed at a student is not solely occurring off-campus. These hurtful situations most often involve both off-campus and on-campus altercations. The on-campus actions could include sending hurtful text messages via cell phone and a range of harmful in-person interactions, including offensive comments and “mean-mugging” (nasty looks). Further, if hurtful material has been posted on a commercial site, such as Facebook, school officials must be aware that many students now have Internet access through their cell phones or I-Pods, or they can easily bypass the school’s filter to access these sites through the district’s Internet system. What might appear at first to be off-campus speech, might actually have been posted while the aggressor was at school.

Thus, even if the majority of the most offensive speech may have been posted or appear to have been posted from off-campus, there are generally many indications of an ongoing pattern of harmful interactions are also occurring on-campus. A full investigation of these incidents should specifically document all on-campus actions and interactions that are related to the overall situation. A record of these on-campus interactions will also support the student’s subjective perspective, as well as an objective perspective, that the combination of off-campus electronic speech with the on-campus interactions have or could result in a significant disruption of the ability of a student to receive an education and fully participate in school activities.
Notice and Due Process

In a separate opinion in the *J.C.* case, the court also found a lack of appropriate due process. The court determined that neither the district policy nor the state statute provided notice to J.C. that the school would impose discipline in response to off-campus speech. Therefore, due to the failure to provide notice, there was a lack of due process. If a district decides that the *Tinker* standard does apply to off-campus student speech, which is advised, it is very important to include language in the district policy making it clear to students and their parents regarding when the school will assert its authority to respond to off-campus student speech. A situation is present in some states and districts that raises concerns with respect to notice.

In some states, legislation has passed to address cyberbullying. An example of statutory language is the language in Oregon:

As used in ORS 339.351 to 339.364:

(1) “Cyberbullying” means the use of any electronic communication device to harass, intimidate or bully.

(2) “Harassment, intimidation or bullying” means any act that substantially interferes with a student’s educational benefits, opportunities or performance, that takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop, and that has the effect of:

(a) Physically harming a student or damaging a student’s property;

(b) Knowingly placing a student in reasonable fear of physical harm to the student or damage to the student’s property; or

(c) Creating a hostile educational environment.

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75 OREGON REVISED STATUTES, 339.351
The problem with this language is that this appears to create a statutory limitation that would prevent school officials from responding to cyberbullying that occurs off-campus. If districts adopt a policy grounded in this language, which many districts will do, their policy will fail to provide appropriate notice to students that the district may also impose discipline for off-campus speech that causes an impact at school that meets the *Tinker* standard.

The failure to provide appropriate notice to students is also evident in a new bullying prevention policy provided by the Florida Department of Education. This policy specifically states:

> The school district upholds that bullying or harassment of any student or school employee is prohibited:
> 
> a) During any education program or activity conducted by a public K-12 educational institution;
> 
> b) During any school-related or school-sponsored program or activity;
> 
> c) On a school bus of a public K-12 educational institution; or
> 
> d) Through the use of data or computer software that is accessed through a computer, computer system, or computer network of a public K-12 education institution.  

The failure to provide effective notice of the school official’s authority to also respond to off-campus online speech that has or could cause a substantial disruption at school or interference with the rights of students to be secure presents a “no-win” situation for principals. If the principal feels it necessary to impose a suspension upon a student to get a situation where that student has been attacking another student online, that student or his or her parents will likely argue that based on the language of the policy, such disciplinary response is not justified.

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If students who are targeted do not feel there are any options available to stop the harm they could take matters into their own hands and engage in a violent act at school against the aggressor. Alternatively, a student could not feel safe coming to school and thus be denied the right to receive an education. Thus, this statutory and policy language, that appears to encourage districts and schools to respond effectively to the concerns of cyberbullying is actually causing significant concerns--which could lead to school violence or student failure.

Additionally, if school officials take the perspective that the hurtful material is on an off-campus web site and fails to fully investigate, this could result in a failure to detect that material is being posted while the aggressor is at school either using a personal digital device or bypassing the district filter or that the off-campus harm is combining with on-campus negative interactions that have created a hostile environment. The failure to fully investigate and respond to on-campus harm, based on the misperception that it is not possible to respond to off-campus student speech, could potentially be considered deliberate indifference and lead to liability.

The statutory language of the recently passes New Hampshire bullying prevention statute, HR 1523 provides school authorities with greater authority:


I. Bullying or cyberbullying shall occur 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.77

Likewise, the new policy of the Chicago Public Schools effectively addresses off-campus harmful activities:

The SCC applies to actions of students during school hours, before and after school, while on school property, while traveling on vehicles funded by the Board, at all school-sponsored events, and while using the CPS Network or any computer or Information Technology Devices, when the actions affect the mission or operation of the Chicago Public Schools. Students may also be subject to discipline for Group 5 or 6 Inappropriate Behaviors that occur either off campus or during non-school hours when the misconduct disrupts or may disrupt the orderly educational process in the Chicago Public Schools.\(^{78}\)

If a state has includes language such as that in the Oregon statute, in consultation with local counsel, school districts could conclude that the statutory requirements constitute the base requirements for what their policy should provide. Districts should be free to adopt policies that are grounded in appropriate constitutional standards to address off-campus harmful speech. Thus, even with these statutory provisions in place, districts can, and arguably should, adopt policies that are in accord with the *Tinker* standard with respect to off-campus speech.

**Suggested Approach to Respond to Off-Campus Speech**

The following is a recommended approach for school officials to respond to off-campus speech:

- **Notice.** While this requirement may not be required by all courts, it is prudent for districts to ensure that their disciplinary policy provides clear notice to students and parents that the school intends to discipline students for off-campus speech that causes or threatens a substantial disruption at school or interference with rights of students to be secure.

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• School “nexus.” A nexus between the off-campus online speech and the school community. The speech involves students or staff or is in some other manner connected to the school community.

• Impact at school. The impact has, or it is reasonably foreseeable it will be, at school. “School” includes school-sponsored field trips, extracurricular activities, sporting events, and transit to and from school or such activities.

• Impact has occurred or is reasonably foreseeable. School officials must be able to point to specific and particularized facts that support why they foresee a substantial disruption or interference—not mere apprehension of the possibility of a disruption. Timing is also an issue. The response should be for the purpose of preventing an imminent foreseeable substantial disruption or interference—not after the fact because a disruption could possibly have occurred, but did not.

• Impact is material and substantial. The impact has, or it is reasonably foreseeable it will be, significant. Not anger or annoyance. Not disapproval of the expression of a controversial opinion. Not simply a situation that requires a school official to investigate.

• The disruption has negatively impacted, or is reasonably predicted it will negatively impact, the rights of students. The speech has caused, or it is reasonably foreseeable it will, cause:

  - Significant interference with instructional activities, school activities, or school operations. (If speech is directed at staff, a significant interference with instruction, school activities, or school operations likely must be demonstrated.)
- Physical or verbal violent altercations.
- A hostile environment or substantial interference with a student’s ability to participate in educational programs or school activities. Establish such interference based on the target’s subjective response and a reasonable observer perspective.

• Causal relationship. The speech has, or it is reasonably foreseeable it will, be the actual cause of the disruption. Not some other factor, such as administrator actions or student responses to administrator actions.

**On-Campus Speech and Policies Regarding Personal Digital Devices**

As noted in the above discussion about school dress codes, the courts normally approach these cases by first determining whether the speech can be addressed under the *Fraser* standard. If not, the student speech is analyzed under *Tinker*. The same approach can be applied to situations where student electronic speech originates on campus.

School officials should have the authority and responsibility to respond to any harmful or inappropriate speech through the District Internet system and by students using personal digital devices at school. This authority can be grounded in *Hazelwood*, for any student speech appearing in school-sponsored online publications, under *Fraser*, if the speech is lewd and offensive or are inconsistent with the school’s educational mission, or under *Tinker*, if the speech has created, or threatens, a substantial disruption at school or interference with the rights of students to be secure. However, in states with student free speech statutes, the ability to rely on *Hazelwood* is a question that will have to be answered by local counsel.
Districts are advised to exercise care in policies related to student personal digital devices. Many districts have policies forbidding the use of cell phones during the school day. Many students do not abide by this policy and it is exceptionally hard to enforce the policy during class breaks. If students are being cyberbullied via a personal digital device while at school, they may fear reporting this because this would implicate them in a violation of the policy. If a policy provides that possession of a nude image on a cell phone at school is a violation and a student receives such an image, this student would have significant concerns about reporting. Lack of reporting could lead to altercations at school or the further dissemination of a nude image. Thus districts may want to carve out an exception in their policy covering personal digital devices to encourage students to report concerns without fear of discipline.

**School Discipline for Sexting**

Districts will need to consider how these on-campus speech standards may apply to handle situations involving student sexting. In some situations, generally where the dissemination of images could be considered bullying or harassment, school officials should have the authority to impose discipline for on- or off-campus sexting acts that are directed at harming a student’s reputation or causing a hostile environment at school for that student. This could include situations where the act of sending the image to a recipient who does not want to receive it constitutes harassment, distributing an image to others, or maliciously soliciting the image.

In a situation where a student created an image and sent it privately to someone in a non-harassing manner and that person has disseminated the image is likely not to meet these standards with respect to the student depicted. The fact that a student may have engaged in an
action that is now causing him or her to be ridiculed does not mean that this student has caused
the substantial disruption. It is the students who are distributing the image who are causing the
harm and disruption.

In situations where the images have been retained privately and there is no apparent
intent to distribute, but for some reason such images have been reported to or their existence has
been discovered by a school official, it may be difficult to justify a school response. School
officials may argue that they have a responsibility to inculcate values or the possession of these
images are a violation of the law. But if the images are not significantly impacting the school or
other students, school officials likely have no authority to seek to usurp the role of parents in
inculcating values. Even the possibility that a student might have committed a criminal offense,
if not committed at school, likely does not provide the justification for a school disciplinary
response. Certainly, the school official will want to alert parents and make sure the images are
destroyed so that distribution is not possible.

It is also exceptionally important that the responses to these situations be based on who
actually has caused the harm and that the disciplinary responses are applied in a manner that is
gender neutral. A district in Washington was sued because it allegedly banned a cheerleader from
the squad for sending an image, but did not ban the football players who were distributing her
image without her consent.79

A situation that must be handled very delicately is when a student has been pressured to
provide an image, or has sent an image with the expectation that it would remain private, and
that image has been disseminated. The student or students who are at fault in this situation and

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should receive discipline are the one(s) who provided the coercion to produce the image or are
distributing the image. Imposing a disciplinary consequence on the student who is depicted can
contribute to profound harm.\textsuperscript{80}

**Potential of Liability for Hostile Environment - Student’s Right to Feel Safe at School**

School officials must also be mindful of potential liability for failure to respond to
situations involving cyberbullying or sexting. Although there are no cases directly on point, the
combination of off- and on-campus harmful actions can contribute to the creation of a hostile
environment at school for the student targeted. As noted above, the vast majority of these
situations do involve both off- and on-campus harmful interactions. If these interactions have
created a hostile environment for a student, there appears to be a potential for district liability.

It is important to consider these issues in the context of students’ rights to receive an
education. As the Court said in *Brown v. Board of Education*:

> Today, education is perhaps the most important function of state and local
governments. Compulsory school attendance laws and the great expenditures for
education both demonstrate our recognition of the importance of education to our
democratic society. It is required in the performance of our most basic public
responsibilities, even service in the armed forces. It is the very foundation of good
citizenship. Today it is a principal instrument in awakening the child to cultural
values, in preparing him for later professional training, and in helping him to adjust
normally to his environment. In these days, it is doubtful that any child may
reasonably be expected to succeed in life if he is denied the opportunity of an
education.\textsuperscript{81}

\textsuperscript{80} The situation of Hope Witsell provides vitally important guidance on the sensitivities in this matter. Inbar, M. (December 2, 2009) ‘Sexting’ bullying cited in teen’s suicide TODAYshow. http://today.msnbc.msn.com/id/34236377/ns/today-today_people/. On one occasion she sent a nude image to a boy she liked. Another girl found the image on
the boy’s phone and sent it throughout the school. Later, on a school field trip, she was coerced by a group of boys to
provide an image, which was then disseminated. The result of these actions was intense bullying at school. When the
school officials found out, they suspended Hope for a week and refused to allow her to be a leader in the
extracurricular organization that she was very active in. Shortly after the school imposed this discipline, Hope
committed suicide.

\textsuperscript{81} 347 U.S. 483 (1954).
The importance of ensuring that students feel safe at school was recently emphasized in comments made by the U.S. Secretary of Education Duncan at a Bullying Prevention Summit:

For the record, let me state my basic, operating premise, both in Chicago and Washington DC: No student should feel unsafe in school. Take that as your starting point, and then it becomes inescapable that school safety is both a moral issue, and a practical one.

The moral issue is plain. Every child is entitled to feel safe in the classroom, in the hallways of school, and on the playground. Children go to school to learn, and educational opportunity must be the great equalizer in America. No matter what your race, sex, or zip code, every child is entitled to a quality education and no child can get a quality education if they don't first feel safe at school.

It is an absolute travesty of our educational system when students fear for their safety at school, worry about being bullied, or suffer discrimination and taunts because of their ethnicity, religion, sexual orientation, disability, or a host of other reasons.

The job of teachers and principals is to help students learn and grow—and they can't do that job in schools where safety is not assured.

The practical import of school safety is just as plain as the moral side of the equation. A school where children don't feel safe is a school where children struggle to learn. It is a school where kids drop out, tune out, and get depressed. Not just violence but bullying, verbal harassment, substance abuse, cyber-bullying, and disruptive classrooms all interfere with a student's ability to learn.82

Students receive important protections from discrimination and harassment. Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs and activities that receive federal financial assistance.83 Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in programs or activities receiving federal financial assistance.84 Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on disability in programs or activities receiving federal financial assistance.

Title II of the Americans with Disabilities Act of 1990 prohibits discrimination based on

83 20 U.S.C 1681.
disability in public entities, including educational institutions. Some state statutes offer even greater protection against discrimination.

Schools have a legal responsibility to prevent student-on-student harassment. In *Davis v. Monroe Bd. of Educ.* the Supreme Court allowing a private Title IX damages action against a school board in cases of student-on-student harassment. To establish a prima facie case of student-on-student harassment, the student must demonstrate each of the following elements:

The harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school.

The school had actual knowledge of the harassment. The school was deliberately indifferent to the harassment.

The Davis Court engaged in a significant discussion about when it might be found that a school was deliberately indifferent to student-on-student harassment. Ultimately, the Court concluded:

> It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

The lower courts have struggled to apply this standard. As noted in the Sixth Circuit, in *Vance v. Spencer County Public School District*:

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87 Based on language from *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999), citing *Davis*, 526 U.S. at 633.
88 *Id.* at 651-2.
Where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.89

A somewhat contradictory opinion was enunciated in the First Circuit in *Fitzgerald v. Barnstable School Committee*:

But Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by parents. The test is objective — whether the institution's response, evaluated in light of the known circumstances, is so deficient as to be clearly unreasonable. ...

We have recognized that if an institution learns that its initial response is inadequate, it may be required to take further steps to prevent harassment. Here, however, the school responded reasonably each time the Fitzgeralds notified it of new developments. ...

The fact that subsequent interactions between (the two students) occurred does not render the School Committee deliberately indifferent. To avoid Title IX liability, an educational institution must act reasonably to prevent future harassment; it need not succeed in doing so.90

However, the civil rights laws are not the only laws upon which claims can be filed in cases involving bullying and harassment. The *Fitzgerald* Circuit Court opinion was appealed to the Supreme Court, but on a different issue--whether Title IX precludes use of 42 U.S.C. § 1983 to redress unconstitutional gender discrimination in schools.91 This was an issue that was in conflict in various Circuits. The Court noted that Title IX was modeled after Title VI of the Civil Rights Act of 1964 and passed Title IX with the explicit understanding that it would be

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90 504 F. 3d 165, 174-75 (1st Cir. 2007).
interpreted as Title VI. When Title IX was enacted, “Title VI was routinely interpreted to allow for parallel and concurrent § 1983 claims.” 92

Additionally, in Davis, the Court noted:

The common law, too, has put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties. See Restatement (Second) of Torts § 320, and Comment a (1965). In fact, state courts routinely uphold claims alleging that schools have been negligent in failing to protect their students from the torts of their peers. 93

Thus there are a number of legal avenues that can be pursued if schools do not respond, or do not respond effectively, to bullying or cyberbullying. The issue of the effectiveness of the school response is likely to become far more relevant with the emergence of recent research that documents that the lack of school effectiveness in responding to student reports of bullying is a significant concern.

A recent study was issued by the Youth Voice Project, the first known large-scale research project that solicits students’ perceptions about strategy effectiveness to reduce peer mistreatment in schools. 94 This study surveyed 11,893 students in grades 5 – 12, representing 25 schools in 12 states. Only 42% of moderately to very severely affected youth reported that they told an adult at school. In 34% of the situations where the students reported to an adult at school, the situation improved. But in 37% of the cases, the situation remained the same, and in 29% of the cases, the peer aggression got worse. Thus, failure to effectively respond in 66% of the cases of peer aggression reported.

Another recent study focused on the differences in perspectives between students and teachers with respect to bullying:

92 Id. at 797.
93 Id. at 643.
The vast majority of students felt their school was not doing enough to prevent bullying (67.3% MS: 60.0% HS), whereas most staff members believed their prevention efforts were adequate (81.7% ES; 52.8% MS; 65.0% HS). Compared to staff, students were less likely to think adults at their school were doing enough to prevent bullying ... and were more likely to report having "seen adults in the school watching bullying and doing nothing" (51.7% MS and HS students; 18.1% all staff). ... In fact, most students reported believing school staff made the situation worse when they intervened (61.5% MS; 57.0% HS).\(^95\)

However, this perspective did not seem to be shared by staff members. Of significant concern, this study also found:

Fewer than 7% of all staff surveyed (4.8% ES; 9.7% MS; 10.0% HS) believed that things got worse when they tried to intervene in a bullying situation. In fact, over 86% of all staff surveyed (89.2% ES; 84.4% MS; 77.8% HS) endorsed the statement "I have effective strategies for handling a bullying situation." thereby indicating their perceived efficacy for handing such situations.\(^96\)

This does not mean that schools should be implement Zero Tolerance policies or become more aggressive in suspending students. The APA Task Force on Zero Tolerance carefully reviewed the research literature and concluded:

...(S)chools with higher rates of school suspension and expulsion appear to have less satisfactory ratings of school climate, less satisfactory school governance structures, and to spend a disproportionate amount of time on disciplinary matters. Perhaps more importantly, recent research indicates a negative relationship between the use of school suspension and expulsion and school-wide academic achievement.\(^97\)

Given such a stark differences in perspective and reality of the effectiveness of the school intervention response, school districts should not be surprised to find students and parents continuing to seek judicial remedies in situations where the harm was not stopped--or has gotten worse. Studies of bullying prevention have demonstrated that school-wide programs that address bullying by implementing interventions at multiple levels, school, classroom, individual, and

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95 Bradshaw, supra. at 374-5. (MS is middle school, HS is high school, ES is elementary school.)
96 Supra.
community) and by engaging parents at all levels are the only programs that demonstrate effectiveness.98

**Hostile Environment and Sexting**

It is imperative that school officials recognize the concern of the potential of sexual harassment in the context of sexting. The fact that a student has done something incredibly “stupid,” like provide a nude or semi-nude image that has now “gone viral” (been widely disseminated) and has led to sexual harassment, likely does not absolve school officials of their responsibility to prevent a hostile environment and stop the sexual harassment.

School officials must be exceptionally careful in how they handle these situations at the outset so as to ward off, as best as possible, subsequent sexual harassment of the students. Further, such harassment must be predicted. Efforts to stop the harassment must be implemented, with ongoing consultation with the students involved, to ensure success of these efforts.

The situation of Jessica Logan is instructive.99 Jessica Logan, a senior at an Ohio high school, had sent nude photos of herself to a boyfriend. After the relationship ended, her ex-boyfriend sent the photos to other female students at Logan’s school, after which the image went “viral” and was distributed to many students. This resulted in months of harassment and teasing for Logan, to which the school allegedly did not respond. Logan hung herself one month after

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her graduation. Logan’s parents filed suit against the high school and several other defendants, alleging that the school and the local police did not do enough to protect their daughter from harassment.

A very significant challenge in this regard is what has been happening in some schools when police officers overreact. Reports of students involved in sexting who have been hauled from school in handcuffs are exceptionally disturbing. The highly predictable consequence of this police overreaction is to place the student depicted at exceptionally high risk of intense harassment by peers. This could even place the student at high risk of suicide. Such actions will also make it exceptionally difficult for school officials to prevent sexual harassment--for which schools could be held liable.

School officials must assert authority over actions that might take place on their campus that could cause emotional harm to students. It is entirely unnecessary, even if a law enforcement response might be appropriate, to have students hauled from school in handcuffs. As described below, it is recommended that school districts work with their local district attorney, as well as with their legal counsel, to develop an approved protocol to follow in these situations. This protocol should ensure that to the greatest degree possible students are protected from emotional harm. It is essential that the provisions of this protocol be effectively communicated to all school officials and police officers. More recommendations for a protocol are below.

**Search and Seizure**

In 1985, the U.S. Supreme Court, in *New Jersey v. T.L.O.*, held that the Fourth Amendment prohibition on unreasonable search and seizures applies to searches by public school
officials of students and their possessions. The Court held that student searches must be reasonable--a balance between students’ privacy rights and the school’s need to maintain order.

To determine the reasonableness, two questions must be asked: 1) whether the action was justified at its beginning, and 2) whether the extent of the search as conducted was reasonably related to the circumstances which justified the search in the first place. To justify a student search, reasonable grounds must exist for suspecting that the search will turn up evidence that the student has violated or is violating either the law or school policy.

The T.L.O. standard will likely apply to school official searches of a student’s cell phone or other digital device. However, in some states, the state constitutional interpretation of search and seizure may be more restrictive. Also there appear to be variations related to whether the school search is accomplished by a school official or a law enforcement officer at school.

In 2006, a Federal Court in Pennsylvania applied the T.L.O. reasonableness standard in the context of a search of cell phone records in the case of Klump v. Nazareth Area School District. In Klump, a teacher had confiscated a student’s cell phone because it was visible in class, violation of a school policy that prohibited the display or use of cell phones during instructional time. An administrator then searched through the student’s stored text messages, voicemail, and phone number directory. The student filed suit, asserting that these actions constituted an unreasonable search.

The court determined that the district had reasonable suspicion that the display/use policy was violated, but did not have reasonable suspicion that any other law or policy had been violated. Thus, the confiscation of the cell phone was justified, but the search of the phone

100 469 U.S. 325 (1985).
101 Id. at 341.
records violated the student’s Fourth Amendment rights. In addition, the court found that the district violated the Pennsylvania Wiretap Act by accessing stored voicemail and text messages.

The issue of school official review of cell phone records when the cell phone was merely visible or used at school is also under litigation in Mississippi in the case of *J.W. v. Desoto County School District*.103

The issue of consent to search is likely to become more relevant, especially if there is the potential for any significant criminal charges that might be associated with sexting. Consent must be voluntary and knowing.104 Important factors to consider include the age, education, intelligence, physical and mental condition of the person giving consent, whether the person was under arrest, and whether the person had been advised of his right to refuse consent. The government carries the burden of proving that consent was voluntary. If a police officer asks for consent to look at images on a student’s cell phone while the student is sitting in the school office, how many students or parents will know that they have the right to refuse consent and require the officer to obtain a search warrant? Likely not many. Considering the potential seriousness of the situation, likely they should be informed.

Confiscation of cell phones suspected of having images and search of the call records of those phones to facilitate confiscation of other phones may qualify as exigent circumstances. But this should be determined by local counsel based on relevant state law.

Thus, it is very important that school officials have a clear understanding of what they can and cannot do in the context of cell phone searches in the context of *T.L.O.*, as well as state wire-tapping laws, state search and seizure standards, and the potential nature of images they

might suspect are present. The fact that a cell phone is visible, which may be in violation of a
district policy, does not, in and of itself, appear to provide the authority to search the records on
that phone other than perhaps a search of “recent call records.” In situations of suspected sexting,
it will be important for school officials to check recent call records so they can identify other
numbers to which images might have been sent.

The presence of state and federal wire-tapping laws further complicates the matter. How
these laws might impact searches is not clear. The state statutes vary from state to state, making
the provision of general guidance impossible. This is an issue school officials must review with
local counsel.

Searching for Nude Images

If a school official is faced with a situation where there has been a report of nude images
of a student presents even greater concerns both with respect to searches and criminal
ramifications.

It is necessary to consider the implications of the recent U.S. Supreme Court decision in
Safford Unified School District v. Redding. The Supreme Court referred to a strip search of a
student as “categorically extreme intrusiveness” and indicated that the barrier for justification for
such a search was extremely high.

School officials in the Tunkhannock Area School District in Pennsylvania are currently
facing litigation for violating a student’s privacy by viewing nude images. A commentary that
appeared in the Times Tribune entitled Electronic Peeping Toms, stated:

106 See also, Beard v. Whitmore Lake School District 402 F.3d 598, 604 (6th Cir. 2005), where the Circuit Court
stated, “(s)tudents have a significant privacy interest in their unclothed bodies.”
107 American Civil Liberties Union. ACLU of PA Sues School District For Illegally Searching Student's Cell Phone
School Turned Over Girl's Private Nude Photos to Law Enforcement (May 20, 2010).
It's one thing for school officials to confiscate a phone in order to enforce policy. It's quite another to search its memory as part of a fishing expedition. ... As lawmakers, the courts and schools figure out how to deal with sexting, they should pay equal attention to protecting the privacy rights of students.108

The other issue that school officials must pay scrupulous attention to is that these are nude images of minors. Possession or distribution by an adult constitutes a federal and state felony. At present, there are currently no statutory “exceptions” for school officials to possess or distribute these images. This is an issue that should likely be addressed through legislation.

Both through news reports and privately reported situations, it appears that some administrators are not handling these images properly. The author heard of one incident where an overreacting principal sent the nude image of a minor student to a dozen other administrators asking for guidance on what to do. School administrators in Pennsylvania were under criminal investigation for how they handled student images, although it does not appear that charges are forthcoming.109 In another incident, an assistant principal was prosecuted for possession of child pornography, although ultimately the charges were dismissed because the image itself was not deemed to be pornographic.110

109 Elias, J. & Victor, D. *Susquenita High School officials being investigated for handling of images in ‘sexting’ case*. THE PATRIOT NEWS. http://www.pennlive.com/midstate/index.ssf/2010/04/susquenita_high_school_officia.html. “The youths involved in a sexting case at Susquentia High School last year are facing felony charges. Now, based on parents’ complaints, the administrators who caught them might face their own consequences, creating another murky legal issue in the largely untested intersection of children, technology and pornography. Susquenita High School officials are being investigated after parents claimed pornographic images and videos from cell phones confiscated from students were “passed around” and viewed by more than just those administrators who investigated the incident. “Of course, one or two people had to see the images to determine what they were,” Perry County District Attorney Charles Chenot said. “But if more than one or two top administrators saw them, there better be a good reason why.” School employees could be charged with displaying child pornography—the same charges the students involved face—if they showed the images to people not involved in the investigation, Chenot said.”
Sexting Protocol

It is imperative that school districts have a clear protocol for reporting and investigating these incidents that has been approved by their local district attorney and school district counsel. Ideally, the development of this protocol will be under the auspices of the regional Multidisciplinary Team (MDT). This will ensure involvement of school officials, law enforcement, and mental health, including organizations that address sexual violence.

The following protocol can serve as a model, but obviously must be approved locally.

- Establish an investigation team within the school includes the principal, counselor/psychologist and school resource officer--with back-up from district legal and risk prevention services.

  - Make sure all school staff know who they should report situations to and how images and cell phones should be handled.

  - Make sure all principals have a clear understanding of the search and seizure standards that have been approved by the local district attorney and school district legal counsel. It may be safest for school officials that the only actions they take with respect to the cell phones that might contain such images is to confiscate the cell phones, check the call records to identify other cell phones that might have images, and provide the cell phones to the police. Outline how students and their parents will be informed of their right consent rights with respect to a search.

- Once reported, strive to stop further dissemination of the images.
- Make sure students know that cell phone distribution paths can be traced and if they are found to have distributed an image, this will result in a disciplinary consequence.

- Promise confidentiality for student reports about such distribution and assure students that if they report receipt of an image, they will not be disciplined for possessing the image on their cell phone or using their cell phone at school. (This will still allow discipline if they have engaged in other hurtful actions.)

- Establish parameters for how and when incidents should be reported to the MDT or law enforcement and investigated. Recommendations are as follows:
  - Immediately report situation to MDT and based on what is known at the time, make a decision about who will take the initial lead in conducting an investigation.
  - Recognize that the student(s) depicted could potentially be in a situation of severe emotional distress. Insist that whoever interviews a depicted student has professional training in mental health, especially working with sex abuse victims.
  - In consultation with the MDT, determine how and when to contact parents. Most district policies require contacting a parent prior to any investigation, unless there are family-related sexual abuse concerns.
  - As names of participants are identified, immediately transmit these to the MDT to determine whether there are any prior records.

- Discuss findings and propose plan for further investigation or intervention.

  Intervention should be addressed in a manner that relates to the type of situation.
- Developmentally normative. Not intended to cause harm, but mistakes have lead to distribution.Impose mild level school discipline for any students who violated trust—if there has been a substantial disruption at school or creation of a hostile environment for any student(s) depicted. Consider juvenile court review in some situations leading to informal disposition, deferred prosecution, or diversion for anyone violated trust and distributed image outside of relationship or group.

- Harassment. Intended to cause harm to person depicted or that constitutes harassment. Impose more significant school discipline for any students who engaged in harassment activities. Implement juvenile court review of circumstances—which could lead to informal disposition, deferred prosecution, diversion, or detention—depending on egregiousness of situation. Possible charges include: Harassment. Invasion of privacy. Disorderly conduct. Malicious acquisition or distribution. False light. The reason for juvenile jurisdiction is to ensure a disciplinary consequence, as well as supervision and rehabilitation.

- At-Risk. Teen depicted is engaging in at-risk behavior by sending images for the purpose of soliciting sexual activity.\textsuperscript{111} Impose school discipline only appropriate if at-risk behavior constituted sexual harassment of other students. Implement juvenile court review of circumstances—which could lead to informal disposition, diversion, status offense, or detention—depending on degree/manner of risky behavior. Possible charges include: Harassment. Indecent exposure. Solicitation.

\textsuperscript{111} Recognize that this student is likely at higher risk of being contacted by someone with abusive intentions and may be lured into sexual trafficking. It is notoriously difficult to help young people remove themselves from the trafficking industry. Responding with intensive intervention if a teen has created and distributed images in a self-exploitive manner could help to prevent greater problems in the future.
Prostitution. The reason for juvenile jurisdiction is to ensure counseling, supervision, and rehabilitation.

- Exploitive. The situation involves sexual abuse or other significant harm. Impose significant school discipline for any students who engaged in harassment activities that have impacted a student or students at school. Implement juvenile court review of circumstances--which could lead to informal disposition, diversion, status offense, or detention, depending on degree/manner of harmful behavior. Possible charges include: Harassment. Malicious acquisition or distribution. Stalking. Blackmail. Solicitation or exploitation. Child pornography.

The reason for juvenile jurisdiction is to ensure a disciplinary consequence, as well as counseling, supervision, and rehabilitation.

- Young Adult Students. How law enforcement will handle situations of over-18 year old students engaged in unlawful behavior is out of the hands of the MDT or school officials. Hopefully, school officials will strongly encourage a balanced approach. Most often, these are teens in a peer environment who simply do not understand the implications of their actions. Encourage use of lowest level of criminal charges and avoidance of any charges that could result in required registration as a sex offender. Given the degree of normality of these incidents, registration as a sex offender will rarely be justified, would destroy the future of this student, and provide no community protection against future sexual abuse whatsoever.
• Prevent Sexual Harassment. Articulate a plan to stop anticipated sexual harassment of the student(s) depicted. Implement a plan to provide emotional support. The student depicted is likely at risk for severe emotional distress and may need to be on “suicide watch.” Ensure regular check-ins with the student to allow for continued monitoring of this student’s emotional well-being.

• Strive to keep these incidents out of the news. If news coverage does occur, ensure statements made will minimize the emotional harm to the teens depicted. Talk with media about concerns related to such harm.

- News of these situations could lead to further dissemination of the images. This will likely increase the emotional harm to the students depicted and the sexual harassment they will receive on campus. School officials and law enforcement officials should avoid making any statements that other students might use against the students involved, especially any student who was depicted.

• Routinely evaluate the report, investigate, and intervene protocol as applied to situations to determine effectiveness of the protocol and develop better prevention initiatives.

Conclusion

State laws addressing bullying in schools did not exist until 1999, when the Georgia legislature became the first to codify requirements for school districts to address bullying between students in public schools.112 But this first statute only addressed physical bullying. It was amended this year to more fully address other folks of bullying.113

112 Limber, Supra.
113 Official Code of Georgia. O.C.G.A. 20-2-751.4
There continues to be additional research on factors related to bullying and peer aggression, as well as effective prevention and intervention approaches.

This author’s first published materials addressing cyberbullying were posted online in the fall of 2004. These materials did not include the term “social networking site.” Her book, *Cyberbullying and Cyberthreats: Responding to the Challenge of Online Social Cruelty, Threats and Distress*, was published in 2007. At the time of publication, there had been no academic research published on cyberbullying. The sexting concern exploded into public awareness in 2008 with the publication of a study conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy. But this phenomenon is far from well-understood.

Most school leaders received their professional training well before the emergence of any level of insight and information related to these issues. Further, during the last decade, the primary focus in schools has been on achieving Annual Yearly Progress under the No Child Left Behind Act.

Despite the challenges, one factor remains crystal clear: The cruelty that some young people inflict on others can cause significant harm. It is imperative that school leaders focus attention on this concern, proactively implement effective school-wide prevention and intervention initiatives, and engage in ongoing solicitation of feedback from students and their parents to evaluate the effectiveness of their initiatives.

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About the Author

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Nancy is author of two books. *Cyberbullying and Cyberthreats: Responding to the Challenge of Online Social Cruelty, Threats, and Distress* (Research Press) and *Cyber-Safe Kids, Cyber-Savvy Teens, Helping Young People Use the Internet Safety and Responsibly* (Jossey Bass). She is currently writing a book for teachers on teaching Internet safety. Her self-published book, *Cyber Secure Schools in a Web 2.0 World*, which addresses effective Internet use management and legal issues related to Web 2.0 in schools is available on her site. A 2-hour video presentation for educators on *Cyberbullying, Cyberthreats, and Sexting* is available on her web site.

Nancy is available to provide presentations, both in person and online webinars, on all of these issues. She is also available to provide legal consultation services to district legal counsel.

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