



# New Jersey School Boards Association

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## **NEW JERSEY SCHOOL BOARDS ASSOCIATION 2007 ANNUAL WORKSHOP Atlantic City Convention Center Atlantic City, New Jersey October 24, 2007**

### **CYBERBULLYING AFTER THE BELL**

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#### **LEGAL FRAMEWORK**

##### **I. General Principles:**

The public school setting demands a special approach to free speech issues. School administrators must have the authority to provide and facilitate education and to maintain order. On the other hand, students do not “shed their constitutional rights to freedom of speech at the schoolhouse gate.” Student speech is entitled to Constitutional protection, especially where it expresses a viewpoint. This is true even on contentious issues. Policy that restricts and disciplines for student viewpoint speech, is unconstitutional, with several exceptions:

- A. A school may prohibit lewd, vulgar or profane language on school property.
- B. A school may regulate school-sponsored speech (speech that may be viewed as the school's own speech) on the basis of any legitimate pedagogical concern.
- C. Other student speech occurring in school (but not school-sponsored), may be regulated only if it would substantially disrupt school operations or interfere with the rights of others. See, Tinker v. Des Moines Indep.

Cnty. Sch. Dist., 393 U.S. 503 (1969). The expression itself, and not the official's response to it must cause the disruption.

D. All school districts are required to adopt a policy prohibiting the harassment, intimidation or bullying of students. A new law requires school districts to include threatening electronic communications -- including e-mail and text messaging via cell phone, among others -- in the definition of harassment, intimidation or bullying. N.J.S.A. 18A:37-13 et. seq. (copy of the law is attached.)

- Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001) When crafting anti-harassment/ bullying policy, districts should be mindful of a case where the Third Circuit Court of Appeals found that the district's anti-harassment policy was overly broad and therefore violated their Constitutional guarantee of freedom of speech. A policy must not prohibit negative pupil speech about contentious issues such as racial customs or religious tradition, language, sexual orientation and values, unless that speech poses a realistic threat of substantial disruption or interference with the work of the school or the rights of other students.

The Court went on to explain that government may not prohibit student speech based solely on the emotive impact that its offensive content may have on a listener. Id. Rather, a school must point to a "well-founded expectation of disruption," such as past incidents arising out of similar speech. This ruling is binding in New Jersey, Delaware, Pennsylvania and the Virgin Islands.

Sypniewski v. Warren Hills Regional Bd. of Educ., 307 F.3d 243, 252 (3d Cir. 2002) (enjoining enforcement of a school anti-harassment policy to student wearing Jeff Foxworthy t-shirt) When policies focus broadly on listeners' reactions, without providing a basis for limiting application to disruptive expression, they are likely to cover a substantial amount of protected speech.

E. School officials' authority over off-campus expression is much more limited than expression on school grounds.

## **II. OFF CAMPUS SPEECH/BEHAVIOR**

A. Case law has evolved that instructs administrators that district policy may permit student discipline for off-campus/after-hours speech/behavior but only if there is a nexus between the speech/behavior and the school.

- B. Courts look for the following kind of nexus between the behavior and the school:
1. behavior poses a threat to safety and welfare of other students, or
  2. behavior substantially disrupts school operations or interfere with the right of others, or
  3. a part of the conduct occurred on school premises during school hours

### **III. OTHER STRATEGIES TO CURB UNDESIRABLE SPEECH**

- A. Policy requiring sensitivity training and education can curb undesirable speech even if that speech cannot be prohibited.
- B. Where speech from home computers may be protected, administrators can call parents to let them know about the behavior; even if the administrators themselves can't discipline, the parents may decide to punish.
- C. Adopt "good citizenship" rules or behavior contracts: Policy must be clear so student knows what conduct is prohibited and what punishment to expect, and there is some due process prior to discipline.

### **IV. RECENT CASE LAW – OFF-CAMPUS CYBER SPEECH**

#### **District wins:**

- A. Student created an icon and attached it to his instant messaging so that when he I.M.'d his friends they saw depiction of gun pointing at a head, bullet traveling, blood spurting from head and words, "Kill Mr. VanderMolen." (the student's English teacher) . The icon was available for viewing by Aaron's "buddies" for three weeks, at least some of whom were Aaron's classmates. One classmate informed teacher of icon and later supplied him with a copy of the icon. The teacher was upset. The Court upheld suspension of student based on finding that it was reasonably foreseeable that the IM icon would come to the attention of school authorities and to the teacher whom the icon depicted being shot. Although a police investigator who interviewed Aaron concluded that the icon was meant as a joke, that Aaron fully understood the severity of what he had done, and that Aaron posed no real threat to VanderMolen or to any other school official the Court found that it was in violation of school rules and disrupted school operations by requiring special attention from school officials, replacement of the threatened teacher, and interviewing pupils during class time. The Court found no need to decide whether it constituted a true threat. Wisniewski v. Weedsport Central School District, (2d. Cir.2007) (July 5, 2007) affirming ruling of U.S. Dist. Court for the Northern District of New York.

- B. A student created a website "Teacher Sux" from home about school staff. The Pa. Supreme Court held that where the originator of off-campus speech that is directed at specific school or its personnel, accesses the speech on campus, it becomes on-campus speech. It then found the speech substantially disrupted school (finding that "complete chaos" is not required although it must be more than mild distraction.) The Court rejected the argument that it was the faculty's reaction, rather than the site itself, that caused the disruption. In this case, teacher was very affected and had to take medical leave and ultimately won a substantial settlement. Website was completely created at home and particularly directed at algebra teacher and principal. Included pictures in which teacher's face morphed into Hitler and page soliciting money to hire a hit man to kill her. The student accessed the site at school and showed it to another student. Students began accessing it at school. NOTE: Know that the ACLU disagrees with this case and is likely to support a challenge to a similar ruling. ACLU says it is problematic to say a district can discipline for viewpoint-based criticism of teacher. [J.S. v. Bethlehem Area School District, 569 Pa. 638, 807 A.2d 847 \(Pa. 2002\).](#)

### **District Loses.**

- A. On his grandmother's computer, a senior created fake *MySpace* profile for a high school principal that was an offensive (but not obscene) parody. Students continuously accessed Layshock's site, as well as three other profiles of the principal, from the school computers. Ultimately, school computers were shut down and computer classes cancelled; computers were unavailable for use. He was suspended and banned from all senior year activities. District claimed the internet speech caused the disruption, but the appellate court found that the school district was unable to connect the alleged disruption to the student's conduct because three other profiles of the principal were posted and available online at *MySpace*. It also found that the evidence was unclear as to whether the "buzz" resulted from the profile or the reaction of school officials. In addition, the court noted "[t]he actual disruption was rather minimal," i.e. no classes were cancelled, and no widespread disorder, violence, or student disciplinary action occurred. This case began with purely out-of-school conduct which subsequently carried over into the school setting. Court stated, "The mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web." The Court noted that the only "in-school" conduct in which Justin engaged was showing the profile to other students in the Spanish classroom. While this itself might have warranted punishment, the districted had only punished him for the off-campus conduct. [Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d. 587 \(U.S. Dist. W.D.Pa. July 10, 2007\)](#)

- B. Students were suspended for websites created at home which the principal characterized to staff as threatening. The online journal, "F-ck Greenwood," referred to the recent student orientation as "dreadfully boring." Neal posted a comic strip on his Web site that depicted a school authority figure who shoots students at an assembly. A Federal district judge decided that the students' First Amendment rights had been violated. The school officials testified that the Web sites created a "buzz" at school and were disruptive, but the court ruled that the testimony "establishes neither that the speech of Neal and Kuhl was the cause of those disruptions, nor that the disruptions were substantial within the meaning of Tinker." Instead, the court said, the disruptions were caused by school officials' investigations into the students' Web sites and their decision to suspend the students. [Neal, et al. v. Efurd](#), No. 04-2195 (W.D. Ark. Feb 18, 2005)
- C. A student was suspended for co-creating a Web site entitled "Satan's web page." The site contained a list of "people I wish would die," "music I hate," and "movies that rock." School officials learned of the Web site from the local police who were contacted by the parent of another student. Applying the Tinker standard, a federal district court found "no evidence that the website interfered with the work of the school or that any other student's rights were impinged." The court concluded: "Defendant's regulation of Plaintiff's speech on the website without any proof of disruption to the school or campus activity in the creation of the website was a violation of Plaintiff's First Amendment rights." The court also rejected any notion that the Mahaffey Web site was a true threat. The court cited a disclaimer on the site that said: "PS: Now That You've read my Web page please don't go killing people and stuff then blaming it on me. OK?" [Mahaffey v. Aldrich](#), 236 F. Supp. 2d 779 (E.D. Mich. 2002).
- D. A student created a website from home containing a section entitled "losers." This section contained a picture of one student with a caption saying his mother had sexually molested him. The site also contained some profanity. School officials punished the student after observing that he had accessed his Web site in the school's computer lab, (He had not shown it to anyone else.) They claimed that they had the right to punish the student for his vulgar and lewd speech in school. He countered that the speech was off-campus speech over which the school had no jurisdiction and was not obscene. The court ruled that the question was whether school officials punished the student for the content of his Web site or for accessing the Web site at school in violation of the school district's Internet policy. [Coy v. Board of Education of the North Canton City Schools](#), 2002 U.S. Dist. LEXIS 7713 (N.D. Ohio April 29, 2002).

- E. On his home computer, a student wrote an offensive top ten list about the athletic director and emailed it to friends. Someone else brought it to school and he was suspended for verbal/written abuse of a staff member. The suspension was overturned. The court ruled that the district had not established that there had been any disruption caused by the list, since it had circulated in the school several days before administrators were aware of it. Disruption was not reasonably foreseeable. Also, the policy that imposed punishment for “abuse” of a staff member without defining “abuse” was unconstitutionally overbroad, vague, and subjective and could reach protected speech. [Killion v. Franklin Regional School Dist.](#), 136 F. Supp. 2d 446 (W.D. Pa. 2001)
  
- F. Student was suspended for his website that was completely created off-campus and contained mock obituaries of friends inspired by creative writing assignment to write own obituary and asked who should die next, meaning, whose mock obituary should he write. Local TV station picked up and described as a hit list. Even though the intended audience was undoubtedly the students at his school, the student never brought it to school. Court ruled that there was no true threat or disruption; prelim injunction granted. [Emmett v. Kent School District No. 415](#), 92 F. Supp. 2d 1088 (W.D. Wa. 2000)
  
- G. Court restrained district from suspending a student who created a website completely from home that was critical of school and administrators, and was accessed at school by a classmate without student’s knowledge. The classmate showed teacher. Decision to discipline was completely based on fact that principal found content upsetting and offensive. No evidence of substantial disruption. The court enjoined the school district from restricting the plaintiff's use of his home computer to repost the homepage. [Beussink v. Woodland R-IV School District](#), 30 F. Supp. 2d 1175 (E.D. Mo. 1998)

## V. New Jersey Harassment Law

### **N.J.S.A. 18A:37-13 Findings, declarations relative to adoption of harassment and bullying prevention policies.**

The Legislature finds and declares that: a safe and civil environment in school is necessary for students to learn and achieve high academic standards; harassment, intimidation or bullying, like other disruptive or violent behaviors, is conduct that disrupts both a student's ability to learn and a school's ability to educate its students in a safe environment; and since students learn by example, school administrators, faculty, staff, and volunteers should be commended for demonstrating appropriate behavior, treating others with civility and respect, and refusing to tolerate harassment, intimidation or bullying.

**18A:37-14 Definitions relative to adoption of harassment and bullying prevention policies.**

As used in this act:

"Electronic communication" means a communication transmitted by means of an electronic device, including, but not limited to, a telephone, cellular phone, computer, or pager;

"Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory handicap, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function or on a school bus and that:

- a. a reasonable person should know, under the circumstances, will have the effect of harming a student or damaging the student's property, or placing a student in reasonable fear of harm to his person or damage to his property; or
- b. has the effect of insulting or demeaning any student or group of students in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of the school.

**18A:37-15 Adoption of policy by each school district.**

a. Each school district shall adopt a policy prohibiting harassment, intimidation or bullying on school property, at a school-sponsored function or on a school bus. The school district shall attempt to adopt the policy through a process that includes representation of parents or guardians, school employees, volunteers, students, administrators, and community representatives.

b. A school district shall have local control over the content of the policy, except that the policy shall contain, at a minimum, the following components:

- (1) a statement prohibiting harassment, intimidation or bullying of a student;
- (2) a definition of harassment, intimidation or bullying no less inclusive than that set forth in section 2 of this act;
- (3) a description of the type of behavior expected from each student;
- (4) consequences and appropriate remedial action for a person who commits an act of harassment, intimidation or bullying;
- (5) a procedure for reporting an act of harassment, intimidation or bullying, including a provision that permits a person to report an act of harassment, intimidation or bullying anonymously; however, this shall not be construed to permit formal disciplinary action solely on the basis of an anonymous report;
- (6) a procedure for prompt investigation of reports of violations and complaints, identifying either the principal or the principal's designee as the person responsible for the investigation;
- (7) the range of ways in which a school will respond once an incident of harassment, intimidation or bullying is identified;
- (8) a statement that prohibits reprisal or retaliation against any person who reports an act of harassment, intimidation or bullying and the consequence and appropriate remedial action for a person who engages in reprisal or retaliation;

(9) consequences and appropriate remedial action for a person found to have falsely accused another as a means of retaliation or as a means of harassment, intimidation or bullying; and

(10) a statement of how the policy is to be publicized, including notice that the policy applies to participation in school-sponsored functions.

c. A school district shall adopt a policy and transmit a copy of its policy to the appropriate county superintendent of schools by September 1, 2003.

d. To assist school districts in developing policies for the prevention of harassment, intimidation or bullying, the Commissioner of Education shall develop a model policy applicable to grades kindergarten through 12. This model policy shall be issued no later than December 1, 2002.

e. Notice of the school district's policy shall appear in any publication of the school district that sets forth the comprehensive rules, procedures and standards of conduct for schools within the school district, and in any student handbook.

**18A:37-15.1 "Electronic communication" included in school districts' harassment and bullying prevention policy.**

a. A school district's policy on prohibiting harassment, intimidation or bullying adopted pursuant to section 3 of P.L.2002, c.83 (C.18A:37-15), shall be amended, if necessary, to reflect the provisions of P.L.2007, c.129 (C.18A:37-15.1 et al.). The district shall transmit a copy of the amended policy to the appropriate county superintendent of schools. Notice of the amended policy shall appear in any publication of the school district that sets forth the comprehensive rules, procedures and standards of conduct for schools within the school district, and in any student handbook.

b. In the event that a school district's policy on prohibiting harassment, intimidation or bullying adopted pursuant to section 3 of P.L.2002, c.83 (C.18A:37-15) does not accord with the provisions of subsection a. of this section by the 90th day following the effective date of this act, the district's existing policy prohibiting harassment, intimidation or bullying shall be deemed to include an "electronic communication" as defined in section 2 of P.L.2002, c.83 (C.18A:37-14) as amended by section 1 of P.L.2007, c.129.

**18A:37-16 Reprisal, retaliation, false accusation prohibited.**

a. A school employee, student or volunteer shall not engage in reprisal, retaliation or false accusation against a victim, witness or one with reliable information about an act of harassment, intimidation or bullying.

b. A school employee, student or volunteer who has witnessed, or has reliable information that a student has been subject to, harassment, intimidation or bullying shall report the incident to the appropriate school official designated by the school district's policy.

c. A school employee who promptly reports an incident of harassment, intimidation or bullying, to the appropriate school official designated by the school district's policy, and who makes this report in compliance with the procedures in the district's policy, is immune from a cause of action for damages arising from any failure to remedy the reported incident.

**18A:37-17 Establishment of bullying prevention programs.**

a. Schools and school districts are encouraged to establish bullying prevention programs, and other initiatives involving school staff, students, administrators, volunteers, parents, law enforcement and community members.

b. To the extent funds are appropriated for these purposes, a school district shall: (1) provide training on the school district's harassment, intimidation or bullying policies to school employees and volunteers who have significant contact with students; and (2) develop a process for discussing the district's harassment, intimidation or bullying policy with students.

c. Information regarding the school district policy against harassment, intimidation or bullying shall be incorporated into a school's employee training program.

**18A:37-18 Other remedies unaffected.**

This act shall not be interpreted to prevent a victim from seeking redress under any other available law either civil or criminal. This act does not create or alter any tort liability.

**18A:37-19 Application by school district for reimbursement.**

A school district that incurs additional costs due to the implementation of the provisions of this act shall apply to the Commissioner of Education for reimbursement.

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