

Cyberbullying: Balancing the Rights of Student Victims and Bullies

By Alexis I. Snyder

June 03, 2011

Educators at all levels have long been aware of the harm that bullying can cause. With the explosive growth of social networking sites and instant messaging, however, today's bullies have many more opportunities to act. What once took place in school hallways and cafeterias can now occur at any time and in any place. The internet allows bullies to reach their victims even when they are at home.

There have been a number of recent tragic stories of students who have committed suicide or violence against others as a result of cyberbullying. Even where cyberbullying does not lead to those kinds of consequences, it can significantly interfere with a student's ability to learn and to participate fully in school activities.

Unfortunately, schools that seek to prevent and punish cyberbullying often encounter legal challenges. Pennsylvania law requires all elementary and secondary schools to have anti-bullying policies and defines "bullying" to include electronic acts. In addition, Pennsylvania's statute on bullying policies expressly permits schools to enact policies that prohibit bullying which occurs outside of the school setting as long as the out-of-school acts (1) are directed at another student or students, (2) are severe, persistent, and pervasive, and (3) have the effect of substantially interfering with a student's education, creating a threatening environment, or substantially disrupting the orderly operation of the school.

Nevertheless, when crafting cyberbullying policies, schools must be careful not to violate students' Free Speech rights under the First Amendment. Regrettably, the case law regarding cyberbullying and free speech does not provide schools with clear guidance. Courts disagree as to whether the standards that typically apply to free speech in schools should govern students' "cyberspeech." The Third Circuit, whose decisions apply to Pennsylvania schools, has been particularly unclear about whether schools may discipline a student for speech that occurs on-line. In February 2010, the Third Circuit issued opinions in two cases involving disciplinary actions taken against students for cyberspeech that occurred off-campus. The facts of the two cases were remarkably similar—both of the plaintiffs were students who had created parody MySpace profiles of school officials—yet the decisions issued reached opposite conclusions. In one case the Court ruled that the school had the right to discipline the student, and in the other case, the Court ruled that the school had violated the student's free speech rights by disciplining the student. In April 2010, the Third Circuit vacated both of those opinions and granted a rehearing of both cases. The cases, which had previously been heard by separate small panels of judges, will now be considered by all

of the Third Circuit judges. The Court has not yet issued new opinions following the rehearings.

Attempts to predict how the courts will rule on these issues are further complicated by the fact that the highest courts for Pennsylvania have only considered cases in which students were punished for online speech that was directed at teachers and administrators. Neither the Pennsylvania appellate courts nor the Third Circuit has ruled on a case in which a student was punished for the online bullying of another student. Decisions from other states are of little help because cases across the country have resulted in inconsistent decisions.

Despite the uncertainty surrounding the First Amendment and cyberbullying, schools should take action when they discover that cyberbullying by a student has had an impact on the educational experience of another student. Several legal scholars have suggested that schools could be held responsible under a variety of laws if they fail to take action to protect students from cyberbullying. Additionally, the U.S. Department of Education's Office of Civil Rights recently issued a Dear Colleague Letter asserting that a school's failure to curb bullying based on a student's race, color, national origin, sex, or disability can constitute a violation of various anti-discrimination laws, such as Title VI, Title IX, and Section 504.

The Education Law attorneys at McNees Wallace & Nurick stand ready to help you navigate this uncertain area of the law. If you are considering promulgating or amending a cyberbullying policy, or if you are faced with the need to discipline a student for cyberbullying, please contact us for guidance.

© 2011 McNees Wallace & Nurick LLC

This document is presented with the understanding that the publisher does not render specific legal, accounting or other professional service to the reader. Due to the rapidly changing nature of the law, information contained in this publication may become outdated. Anyone using this material must always research original sources of authority and update this information to ensure accuracy and applicability to specific legal matters. In no event will the authors, the reviewers or the publisher be liable for any damage, whether direct, indirect or consequential, claimed to result from the use of this material.