

Cyberbullying: Challenging Legal Issues for Schools

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All 50 states and the District of Columbia have enacted laws that prohibit bullying in school settings, provide legal recourse to victims of bullying in schools, and impose duties on schools regarding the development and implementation of anti-bullying policies. With only one exception, all of those state statutes explicitly cover cyberbullying, and the one outlier – Alaska – so broadly defines bullying that an argument can be made that cyberbullying is impliedly covered by its state law. And although no federal statute directly addresses the issue, bullying and cyberbullying often occur in contexts where the harassment is covered by federal civil rights laws governing discrimination based on race, ethnic origin, color, gender, sexual orientation or other forms of protected class status.

The challenge for educational institutions in attempting to address the problem of cyberbullying is that the conduct explicitly prohibited by school anti-bullying policies often takes place off school property through digital media such as email and texts or via postings on social media and websites, resulting in the sanctions that are levied by schools against the perpetrators being challenged in court as free speech violations.

The decisions in several recent lawsuits provide insights regarding the legal authority of schools to impose sanctions on students who engage in cyberbullying and provide guidance for the development and implementation of school anti-cyberbullying policies.

Recent Cyberbullying Cases

In *Bell v. Itawamba County School Board*, an August 2015 decision by the U.S. Fifth Circuit Court of Appeals, an en banc rehearing (all 16 circuit judges participating) of a December 2014 ruling by a three-judge panel of the Fifth Circuit, the court ruled in favor of the school district and held that sanctions imposed by a high school on a student who engaged in off-campus cyberbullying of two teacher-coaches did not violate the free speech rights of the student because such harassment satisfied the “substantial disruption” standard for restricting student speech established by the U.S. Supreme Court in its 1969 decision *Tinker v. Des Moines Independent Community School District*.

At home, using his own computer hardware and software, Taylor Bell, a student at Itawamba Agricultural High School (Mississippi) posted for public viewing on Facebook and YouTube a rap

song that he had recorded containing offensive, lewd and profane language, and that was designed to bully, harass and intimidate two teacher-coaches by alleging in the lyrics that the two were engaged in inappropriate sexual relationships with female students at the school. In its 1986 decision in *Bethel School District v. Fraser*, the U.S. Supreme Court held that although schools have the authority to sanction students for *on-campus* offensive, lewd or profane language, schools are prohibited from punishing students for the use of *off-campus* inappropriate language unless the *Tinker* legal standard is satisfied.

Specifically, the standard established by the U.S. Supreme Court in *Tinker* is that schools can limit student speech that “materially and substantially interferes with the requirements of appropriate discipline in the operation of the school” and the standard can be satisfied either by “showing a disruption has occurred or showing that the speech gave rise to a reasonable forecast by the school administration of substantial disruption.” The Fifth Circuit, in its en banc decision in *Bell*, found that the severity of the bullying behavior reflected in the lyrics of the recording both created an actual disruption and gave rise at the time of its posting on social media to a reasonable forecast of substantial disruption. The written opinion in the case, including the lyrics held by the court to constitute cyberbullying, is available at <http://www.ca5.uscourts.gov/opinions%5Cpub%5C12112-60264-CV2.pdf>.

In *Rosario v. Clark County School District*, a July 2013 U.S. District Court decision, Juliano Rosario, a basketball player at Desert Oasis High School (Nevada), used Twitter off-campus to post eight offensive, lewd and profane “tweets” cyberbullying various school officials, including his coach. After his dismissal from the team and disciplinary reassignment to an alternative school, Rosario sued the school district, school administrators, two athletic directors and two coaches, asserting numerous causes of action including violation of his free speech rights. The court dismissed all of the claims except those related to Rosario’s First Amendment rights and ruled that a full trial should take place to evaluate whether, in the context of the Nevada state anti-bullying law (which explicitly prohibits cyberbullying), Rosario’s tweets either caused a substantial disruption on-campus or could have been reasonably forecast at the time of their posting to reach the campus and foreseeably cause a substantial disruption. The full-text of the case is available