

The Virtual Schoolyard



Curbing Cyberbullying at School and on the Web

BY MAY MON POST AND MARK FRANEK

Like most high-school bullies, Jack is relentless. He calls Jill, his ex-girlfriend, a “2 bit whore” on his MySpace page and lists the names of several male classmates with whom she allegedly had sex. He also claims that Jill has had sex with a teacher, although he does not leave a name. Jack also posts a digital image of Jill’s face on top of a baboon that is moving its arms up and down (in real time). When a visitor clicks on the image, a song by Eminem begins to play — the one where Slim Shady raps about murdering his pregnant girlfriend and committing suicide.

Jill fights back on Jack’s site, insulting him with profanity. Soon, other classmates join the online debate. Some comments support Jack; others support Jill. The comments on both sides are rude and crass, but they are not physical threats. The school’s name does not appear anywhere on the site, nor do any teachers’ names, and the site cannot be accessed on the school’s computer network (it’s blocked). Some students, however, view the site at school with their iPhones, Blackberries and Sidekicks. Meanwhile, Jill’s self-confidence is shaken and her grades begin to plummet. Eventually, the MySpace page is brought to the school’s attention.

This is a case study about the intersection between free speech, cyberbullying, and schools. According to WiredSafety.org, cyberbullying occurs when “a child, preteen or teen is tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen or teen using the Internet, interactive and digital technologies, or mobile phones. It has to have a minor on both sides, or at least have been instigated by a minor against another minor. Once adults become involved, it is plain and simple cyber-harassment or cyberstalking. Adult cyber-harassment or cyberstalking is never called cyberbullying.”

Such electronic communication between young persons often appears in the form of e-mail, instant-text messages, Web site posts or blog comments. Unlike conventional face-to-face bullying, cyberbullying can happen anywhere and at anytime. It also can be anonymous and incredibly hard to spot. Victims of cyberbullying are unlikely to come forward, fearing that adults will limit access to computers or take away their

mobile phones, their virtual lifelines to the social world.

Most school administrators have more than one story to tell about cyberbullying. They report that victims of cyberbullying experience low self-esteem, peer isolation, anxiety and a drop in their grades. They note that victims may miss class or other school-related activities. Principals also point to recent high-profile cases where cyberbullying, left unchecked, led to suicide. In response, some schools have created new policies and curbed free speech on the school’s computer network and on all electronic devices used during school hours. In some cases, school administrators are even tackling behaviors on the wider Internet, monitoring and sometimes disciplining students for what they post on their own time.

Many of the most egregious acts of cyberbullying do not take place during school hours or on school networks, a situation that presents a dilemma for public school administrators: If they punish a student for off-campus behavior, they could get hit with a freedom of speech suit. If they do nothing, students may continue to suffer and school officials theoretically could get hit with failure to act litigation. For school administrators, it appears to be an unfortunate catch-22. For lawyers, it’s a “perfect storm,” pitting freedom of speech advocates against the victims of cyberbullying and schools that try to intervene. There are no easy answers in this arena, few laws and no well-established precedents that specifically deal with cyberbullying.

“Free speech is generally protected by the First Amendment, but student speech can be more restricted,” says Leonard Deutchman, general counsel and administrative

partner at LDiscovery and a former chief of the Philadelphia District Attorney’s Office’s Economic & Cyber Crime Unit. “School administrators can intervene in cyberbullying incidents, even if the incidents do not take place on school grounds, if they can demonstrate that the electronic speech resulted in a substantial disruption to the educational environment. The question is whether the off-campus student speech materially disrupts class work, school attendance or performance or other components of the educational environment,” Deutchman says.

Dorothy M. Bollinger, an attorney with Fox Rothschild, LLP, whose practice focuses on Internet, computer, information technology and intellectual property law, says that whether the off-campus speech and activities have caused a material or substantial disruption is not a bright-line decision for school administrators to make. According to Bollinger, the courts likely will not uphold an administrator’s censoring of a student’s speech just because the school does not agree with the off-campus statements. The speech must be materially disruptive.

This “material disruption” standard was established by the United States Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Even though the *Tinker* case dealt with on-campus student speech, a few cases have adopted the *Tinker* test to address off-campus student speech in the context of the First Amendment. For example, in *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (2002), the Supreme Court of Pennsylvania upheld the expulsion of a student, J.S. In doing so, it ruled that schools can discipline students for certain off-campus speech as long as school officials can point to a clear disruption of the classroom environment. On his home computer, J.S. created a Web page titled “Teacher Sux” that included derogatory remarks about specific teachers and the principal. Among various lewd and threatening statements, the site contained digital images and text directing users to donate funds to hire a hitman to kill J.S.’s math teacher. The teacher experienced severe anxiety and was unable to complete the school year, causing the school to hire a series of substitute teachers.

Even though the court did not consider J.S.’s Web site a “true threat” because the Web site, taken as a whole, “did not reflect a serious expression of intent to inflict harm,” it ultimately affirmed the school’s actions. The court concluded that J.S.’s site clearly disrupted the learning environment

because it affected the teacher's physical and mental health, which necessitated the use of substitute teachers. Furthermore, certain students expressed anxiety about the Web site and concern for their safety. Finally, certain parents voiced concerns for school safety and questioned the delivery of instruction by substitute teachers.

In *Emmett v. Kent School District*, 92 F. Supp. 2d 1088 (2000), the U.S. District Court for the Western District of Washington enjoined the school district from enforcing a five-day suspension imposed on a student, Nick Emmett. On his home computer, Emmett created a Web site called "Unofficial Kentlake High Home Page." The page listed mock "obituaries" of at least two of Emmett's friends and allowed visitors to the Web site to vote on who should "die" next, that is, who should be the subject of the next mock obituary. The court noted that the school district presented no evidence of a true threat because the obituaries and voting on the Web site were not intended to threaten anyone, nor did they actually threaten anyone. The court also noted that Emmett's speech was outside the school's supervision or control.

These cases illustrate not only a lack of precedent on cyberbullying cases, but also

a dilemma for school administrators on how to handle cyberbullying. "There are few laws that address how to handle cyberbullying, and many schools don't have an internal policy to deal with cyberbullying that takes place off-campus," offers Deutchman. "It may take an unfortunate and tragic event on school property to get more schools to consider tackling electronic behavior that originates off-campus. It's only a matter of time before a cyberbully, or the victim of cyberbullying, uses deadly force during school hours."

Bollinger agrees that few laws specifically address cyberbullying, but adds that there are some existing statutes that provide a basis to "attack" or respond to cyberbullying. Examples include, depending on the severity of the situation, terroristic threats, assault, extortion, stalking, harassment and discrimination statutes, as well as the Computer Crimes Act and Juvenile Act. According to Bollinger, Pennsylvania's Legislature is currently considering a law that includes mandating cyberbullying policies for schools.

So, what should schools do in the meantime? First, school officials should establish a consistent internal policy (much like a crisis plan) and a team (minimally

made up of the principal, school counselor, and technology director) to deal with cyber-misconduct. This team should fully document disruptive incidents and the degree to which the learning environment is affected. The principal should invite the cyberbully's parents to review the offending material before considering disciplinary action. Most parents at this point will do the right thing.

Second, schools should educate children, starting in elementary school, about the importance of cyber-safety and the consequences of cyberbullying, especially on the school's own network. These rules should be posted clearly in computer labs and written in age-appropriate language. The rules should be sent home to parents each year — and they should be posted prominently on the school's Web site.

Third, teachers should continue incorporating in their curriculum projects that utilize the Web and other powerful new technologies. This probably won't help schools avoid lawsuits; it's just good pedagogy. It's not surprising that schools that keep up with the latest technology and software — and employ teachers who care about the quality of online communication — report lower incidents of cyber-misconduct.

In addition, schools should update their codes of conduct to include rules that can legally govern off-campus electronic communication that significantly disrupts the learning environment. They should also assign enough resources and administrative talent to deal with students who engage in cyber-misconduct. One very big caveat: Disciplining a student for off-campus electronic speech should be done only as a last resort, and certainly not before seeking legal counsel.

Finally, schools should realize that not all cyberbullies need to be disciplined. Schools should act reasonably, responsibly and consistently — so as to avoid the very bullying behavior they are trying to curb. Until the courts provide clear standards in the area of off-campus electronic speech for young people, these recommendations will go a long way in making schools a safer learning environment for everyone. ■

May Mon Post, an editorial board member of The Philadelphia Lawyer, is an associate with Cohen, Fluhr & Gonzalez, P.C., and executive committee member of the Association's Young Lawyers Division. Mark Franek, Ed.D., is an adjunct professor of writing instruction at Philadelphia University and former dean of students at the William Penn Charter School in Philadelphia.

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