



Legal Liability Reporter



also distributed to Super Staff Winter 2010

Controlling exposures arising from managerial decisions made by school board members and district administrators

CYBERBULLYING: THE ROLE OF SCHOOL DISTRICTS ANTI-CYBERBULLYING MEASURES

The legal landscape of cyberbullying and schools is complex and deals with the precarious relationship between the First Amendment and state statutory laws. The gray area lies in what a school can do to discipline the offender, versus what the school must do to educate its students and protect the victim.

NEW YORK LEGISLATION

The issues with respect to what schools must do to protect cyberbullying victims are largely dependent on state statutory and common law. Trends have emerged, however, and most states now treat cyberbullying as a form of criminal harassment or require schools to proactively adopt anti-cyberbullying measures.

In line with these national trends, Governor David Patterson recently signed into law the *Dignity for All Students Act*, which is not specifically directed at cyberbullying but rather at bullying in general. When this law goes into effect in July 2012, public schools in New York will be required to create guidelines and policies "intended to create a school environment that is free from discrimination or harassment." These guidelines shall be designed to raise employee awareness and sensitivity to discrimination and harassment, and enable them to effectively prevent and respond to such conduct. Moreover, schools are to use these guidelines in anti-harassment training programs, and

each school will be required to have at least one staff member that is "thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex."

The *Dignity for All Students Act* also provides that the Commissioner of Education shall develop model guidelines and policies, and provide grants to schools to assist them in implementing their own guidelines. The Commissioner also must promulgate regulations to assist schools in developing "measured, balanced, and age-appropriate" responses to violations, with remedies and procedures "focusing on intervention and education." Furthermore, the Commissioner will establish a procedure whereby "material" incidents of discrimination and harassment are reported to the Commissioner's office at least annually.

Common Law Exposures

The off-campus nature of cyberbullying affects a school's potential exposure if a victim commences a lawsuit, as a school's duty to its students generally is limited both in time and place to acts that occur on school grounds during the school day. Although the *Dignity for all Students Act* does not establish a private right of action, it is at least potentially conceivable that a bullied student could seek to hold a

"Cyberbullying" is 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. Schools can be very effective brokers in working with the parents to stop and remedy cyberbullying situations. They can also educate the students on cyberethics and the law. The *Dignity for All Students Act* is intended to help reduce the incidences of bullying and work towards eliminating the many negative consequences bullying can have on victims.

Resources for further information:
US Department of Health and Human Services' National Bullying Prevention Campaign <http://www.stopbullyingnow.hrsa.gov/adults/cyber-bullying.aspx>

US Department of Education
<http://www.ed.gov>

New York State Education Department
http://www.p12.nysed.gov/technology/internet_safety/documents/cyberbullying.html

Stop Cyberbullying: A program of Parry Aftab and the Wired Safety Group <http://stopcyberbullying.org/>
Cyberbullying Research Center
<http://www.cyberbullying.us/>

school liable for off-campus cyberbullying if it fails to adopt state mandated anti-bullying measures.

Moreover, if off-campus cyberbullying escalates to on-campus physical bullying, a school's awareness of the cyberbullying could be used to establish that the school was aware of the problem, and therefore obligated to provide the victim with protection. Depending on the circumstances, this may be enough to force a trial and find liability.

CONSTITUTIONAL CONCERNS

Since most cyberbullying occurs after school hours, the First Amendment limits a public school's ability to formally discipline an offender for what is essentially a form of off-campus speech. Typically this legal issue arises when a

Schools are to use these guidelines in anti-harassment training programs, and each school will be required to have at least one staff member that is "thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex."

school suspends or expels a bully who in turn files a federal civil rights claim arguing that his or her First Amendment rights were violated.

Schools have some power to restrict speech given their unique role in society; however it is not unlimited. If the school cannot show that the offensive off-campus speech had a sufficient relationship to the school, or that it could potentially cause an in-school disruption, suspension or expulsion would be a violation of the offender's First Amendment rights. To date, federal court rulings on this subject have been inconsistent in defining exactly what these standards require, unfortunately creating uncertainty for schools.

While the damages awarded to the offending student(s) will likely be minimal, a school will be responsible for

both its own attorney fees and for those of the bully, under federal fee shifting statutes. The First Amendment would not limit more informal discipline, such as parent conferences, and indeed New York's *Dignity for All Students Act* envisions remedies and procedures focusing on intervention and education.

FEDERAL ISSUES

To date, there is no federal law specifically designed to address cyberbullying, and proposed laws such as the Megan Meier *Cyberbullying Prevention Act* face an uncertain future in light of the shift of congressional power following the 2010 election. Additionally, there are concerns that such laws illegally limit Constitutionally protected speech. Notwithstanding, the United States Department of Education has recently stated its opinion that

harassment, including harassment through the use of electronic means, violates the civil rights of the victim. The Department has also taken the view that the school itself can be held liable for such violations "when peer harassment based on race, color, national origin, sex or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed or ignored by school employees."

RISK CONTROL

In general, educators and state education commissioners have recommended a multi-tiered approach to preventing incidents of traditional bullying and cyberbullying. They include:

- Developing a safe school climate for students.
- Educators, parents, and school boards

must establish and maintain an environment that establishes value and respect for all members of the school community – not just the students. Multiple examples of culturally sensitive behavioral interactions (that go beyond race, ethnic background and religion, for example, and include students with disabilities) that occur throughout the day, demonstrating that no tolerance exists for unacceptable behaviors, foster the most positive school climates.

- Developing and enforcing a code of conduct or policy.
New York requires schools to enact anti-bullying policies and provide anti-bullying education. In addition to identifying prohibited behavior, these measures establish expectations and consequences for conduct regarding bullying and the use of technology. The code of conduct should be distributed or posted as required by law or as needed in order to advise all members of a school community.
- Responding to incidents of bullying.
School administrators may incur liability if they fail to promptly and reasonably respond to notification of bullying that occurs.

*by Gregory Cascino, Esq.
Congdon, Flaherty, O'Callaghan, Reid,
Donlon, Travis & Fishlinger*

The NYSIR School Board *Legal Liability Reporter* is published for the member districts of the New York Schools Insurance Reciprocal. It is not intended to provide legal advice or address every aspect of SBLL exposures. Hon. Lawrence J. Brennan, Associate General Counsel, Bob Bambino, CPCU, Director of Risk Management, and Joe Goncalves, Executive Director, edit the NYSIR School Board *Legal Liability Reporter*.

NYSIR
333 Earl Ovington Blvd., Suite 1030
Uniondale, NY 11553
