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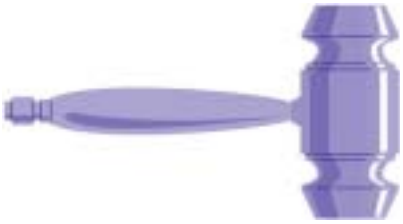

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Cyber-bullying: An Old Problem Disguised in New Clothes

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Once upon a time, the school-yard bully was believed to be exactly that: a problem that, from a school administration perspective, confined itself to school property at times when teacher supervision was lax or non-existent. If the child bullied other children in the neighborhood after school time and not on school property – well, that was a problem for the children's parents and the community to handle, not the school. School administrators did what they could to maintain basic order in the classroom and on school grounds, but bullying – and being bullied – were viewed by many as unavoidable parts of the socialization process for children.

Bullying, of course, is not new, but modern technology provides tools to the bully that were not available 40 years ago when bullying involved face-to-face physical or verbal encounters on school grounds. Web pages, text messages, cell phones with cameras, instant messages, Internet "chat" rooms and the "blogosphere" all provide means for students to tease, humiliate, embarrass and, in some cases, threaten other students in ways that can be difficult for school administrators to monitor. "Cyber-bullying" is a term which describes this modern, high-tech method of engaging in what is fundamentally old-fashioned, antisocial behavior. But cyber-bullying presents novel problems of "policing" for school administrators from a legal standpoint. What if the cyber-bullying is perpetrated from the bully's home, and not during school time or on any school-related computer network or equipment? Do school officials have the authority to punish this conduct in that instance? Assuming that school officials have the authority to punish cyber-bullying in certain instances, does the First Amendment place limits on what is punishable? These questions illustrate the two basic legal concerns implicated by the phenomenon of cyber-bullying: **(1)** How far does the school's authority extend to punish cyber-bullying? **(2)** Do constitutional considerations limit school officials' powers to punish cyber-bullying?

The Scope of School District Authority

Cyber-bullying poses a "jurisdictional" problem that is unique from a legal standpoint. The jurisdictional problem arises because school districts do not have unlimited power to punish students' misconduct without reference to when and where this misconduct occurs. As a general rule, a school district's rulemaking authority is limited to that which is either expressly or by necessary implication granted by the Pennsylvania legislature. Under Section 510 of the Public School Code,[1] the board of school directors has the authority to adopt reasonable rules and regulations regarding the "conduct and deportment" of "all pupils attending the public schools in the district, during such time as they are under the supervision of the board of school directors and teachers, including the time necessarily spent coming to and returning from school." Under Section 1317 of the Public School Code, "every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them."[2] Additionally, Section 1318 of the Public School Code provides that "every principal or teacher in charge of a public school may temporarily suspend any pupil on account of disobedience or misconduct…."[3] These provisions of the Public School Code give school boards considerable discretion in adopting rules and regulations (subject only to a minimal standard of "reasonableness") governing student conduct and give teachers and principals power to act in accordance with those school board rules and regulations, so long as those rules and regulations punish misconduct that is within the scope of the school district's statutory authority, or what I have referred to as its "jurisdiction."

So, how far does this jurisdiction extend? Pennsylvania courts have read these provisions of the Public School Code as requiring a "sufficient nexus" that ties the misconduct to a school-sponsored activity, to school property during school-related events or to transportation to and from school or a

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school-sponsored activity. To use the words of the Pennsylvania Commonwealth Court in a 2003 decision that summarizes the scope of this jurisdiction, "school districts can discipline only those students who are enrolled in the district and under the district's supervision at the time of the incident."[4]

Obviously, these traditional judicial concepts of the school district's jurisdiction to punish certain student misconduct present difficulties to school officials when faced with cyber-bullying situations. The student engaged in the cyber-bullying may be using his or her home computer or cell phone, and although targeting another student with teasing, harassing or threatening emails or text messages, may be sending these messages to the victim's private email address or cell phone. Although these emails or text messages originated outside of the school environment, the ease with which such information can be electronically disseminated means that it is probable that they would make their way into the school environment. What if a student establishes a web page – on his home computer equipment after school time – that degrades, demeans or, worse still, threatens the safety of another student? Schools being what they are,[5] it is likely that other students would learn about this web site and may try to access it from school computers. Is it within the school district's jurisdiction to punish the cyber-bully for this conduct?

The Pennsylvania Supreme Court provided some guidance on these issues in its 2002 decision, *J.S. v. Bethlehem Area School District.*[6] In *J.S.,* the school district expelled a student who created a web site called "Teacher Sux." The student created the web site on his home computer, on his own time, and not as part of a school project or other school-sponsored activity. The web page contained "derogatory, profane, offensive and threatening comments, primarily about the student's algebra teacher...." The student, J.S., told other students about the web site and showed it to another student at school. Ultimately, students, faculty and administrators viewed the web site. The algebra teacher who was the primary subject matter of the web site viewed it and suffered "stress, anxiety, loss of appetite, loss of sleep, loss of weight and a general sense of loss of well being as a result of viewing the web site." The student challenged his expulsion on the grounds that the school district lacked the authority to punish him for what he contended was purely "off campus" conduct, and also claimed that his web site was protected speech under the First Amendment.

Setting aside for the moment the First Amendment issue, the court's conclusion that punishing the student for the web site's content came within the school district's jurisdiction is worth repeating:

> We find that there is a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus. While there is no dispute that the web site was created off-campus, the record clearly reflects that the off-campus web site was accessed by J.S. at school and was shown to a fellow student. While it is less certain exactly what portions of the web site the student viewed, J.S., nevertheless, facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing the site to another student and by informing other students at school of the existence of the web site. Related thereto, faculty members and the school administration also accessed the web site at the school. Importantly, the web site was aimed not at a random audience, but at the specific audience of students and others connected with this particular school district. [The algebra teacher and the high school principal] were the subjects of the site. Thus, it was inevitable that the contents of the web site would pass from students to teachers, inspiring circulation of the web page on school property. We hold that where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or is accessed at school by its originator, the speech will be considered on-campus speech.[7]

In a footnote following this discussion, the court suggested that the fact that the student, J.S., accessed his web site and showed it to another student while at school did not control the question of whether the school district had authority to punish him for the web site:

> While the fact that J.S. personally accessed his web site on school grounds is a strong factor in our assessment, we do not discount that one who posts school-targeted material in a manner known to be freely accessible from school grounds may run the risk of being deemed to have engaged in on-campus speech, where actual accessing by others in fact occurs, depending upon the totality of the circumstances involved.[8]

From the perspective of school district efforts to punish cyber-bullying, the *J.S.* decision sets a flexible approach to determining school officials' jurisdiction: the courts will examine the "totality of the circumstances" to decide whether there is a "sufficient nexus" between misconduct in a particular case and the school environment. There must, of course, be proof that something happened at school or a school-related activity to warrant punishment by school officials, but the *J.S.* decision recognizes that the misconduct can originate outside of the school environment entirely and still be within the school's authority to punish if it is directed at a school-specific audience and if the student's email, web page or text message will be disseminated or

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viewed by students during school time. School officials who are drafting disciplinary policies to include acts of cyber-bullying, or who intend to punish cyber-bullying under existing disciplinary policies, should consider these points:

- Did the offending email, text message, web blog, web page, (in other words, the cyber-bullying act), originate from school equipment? If so, then it comes within the school's jurisdiction to punish.
- Did the cyber-bullying act originate during school time, such as while a student was in study hall, during lunch or recess, or some other point in the school day? If so, then it comes within the school's jurisdiction.
- Was the cyber-bullying act done in such a way that the student intended other students to view the material while they are at school? If the circumstances demonstrate that the student intended for his conduct to be viewed by other students at school, and students actually viewed it at school, then it probably comes within the school's jurisdiction.

We have so far focused on school officials' jurisdiction to punish acts of cyber-bullying. Another significant concern is whether the First Amendment protects certain cyber-bullying conduct from punishment. This is an extremely difficult inquiry, because we certainly would not ordinarily think that web content, text messages, emails or other electronic communications intended to tease, embarrass or humiliate other students deserve protection under the same constitutional right that safeguards the editorial content of the *New York Times*. However, as we will see, the First Amendment implications of punishing cyber-bullying cannot be ignored.

The First Amendment Implications.

The fundamental principle from the United States Supreme Court's landmark decision in *Tinker v. Des Moines Independent Community School District*[9] is that although students do not enjoy the protection of the First Amendment for speech that occurs in a school setting to the same degree as adults who engage in speech in a non-school setting, nevertheless students do have some level of First Amendment protection, even for speech that occurs on school property or during school-related activities. School administrators have the authority to limit the speech of public school students, but only where the speech would "substantially disrupt or interfere with the work of the school or the rights of other students."[10]

Since the court's decision in *Tinker,* however, the court has recognized certain exceptions that have upheld the authority of school administrators to regulate student speech without the need to demonstrate that the speech caused a "substantial disruption or interference" with the work of the school or the rights of other students. In *Bethel School District No. 403 v. Fraser,*[11] the court upheld the suspension of a high school student who, during a nomination speech at a student assembly, engaged in "an elaborate, graphic and explicit sexual metaphor." The court held that there is no First Amendment protection for student speech that is "lewd," "vulgar," "indecent" or "plainly offensive," i.e., speech that offends for the same reason that obscenity offends; therefore, school administrators may discipline students for engaging in obscene speech without implicating First Amendment concerns. In *Hazelwood School District v. Kuhlmeier,*[12] the court upheld the authority of a school principal to delete portions of a student's article from the school's newspaper. The court held that because the school had not opened up the school newspaper as a public forum, it was within the school administration's authority to exercise editorial control over the content of the newspaper, as "long as [the administration's] actions are reasonably related to legitimate pedagogical concerns." Therefore, school administrators have the authority to regulate school-sponsored speech, that is, speech that a reasonable observer would view as the school's own speech, on the basis of any legitimate pedagogical concerns. Aside from the two categories identified in *Fraser* and *Kuhlmeier*, however, the general rule is that student speech may be regulated only if it would substantially disrupt the school operations or interfere with the right of others.

Federal court decisions since *Tinker* – in particular, decisions by the United States Court of Appeals for the Third Circuit, which reviews appeals from all decisions by Pennsylvania federal district courts – have refined the contours of student First Amendment rights as they relate to public school disciplinary actions. In *Saxe v. State College Area School District,* the court held that the school district's anti-harassment policy was unconstitutionally vague and overbroad because the policy, on its face, made punishable conduct that the court concluded was protected by the First Amendment. The court found the policy to be unconstitutional even though the school district adopted it in furtherance of its statutory obligations under Title VI and Title IX regarding nondiscrimination in educational programs, in part because the policy went beyond the categories protected by Title VI, Title IX and other federal anti-discrimination laws (i.e., race, sex, color, national origin and disability) in its prohibition of "harassment." Furthermore, the anti-harassment policy purported to punish speech engaged in for the "purpose" of harassment, without reference to whether the purported harassment actually had an "effect" of substantially interfering with another student's educational opportunities. The court in *Saxe* refined the concept from *Tinker* that school administrators could punish speech that would cause a "substantial disruption or interference" with the school's educational program by requiring that the school administrators have "a specific and significant fear of disruption, not just some remote apprehension of disturbance."

A year following the *Saxe* decision, the Third Circuit revisited the issue of student conduct codes in *Sypniewski v. Warren Hills Regional Board of Education.*[13] In *Sypniewski,* the Warren Hills School District adopted a policy that prohibited racial harassment or intimidation of other students or employees "by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying

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racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting that is racially divisive or creates ill will or hatred." The school board adopted this policy in response to a growing climate of racial tension in the high school that had resulted in conflicts between groups of students. Following the adoption of the board policy, a high school student came to school wearing a T-shirt that contained the term "redneck," which the school administration claimed was a word associated with the group of students whom they claimed were responsible for the harassment of minority students in the high school. The court disagreed:

> Where a school seeks to suppress a term merely related to an expression that has proven to be disruptive, it must do more than simply point to a general association. It must point to a particular and concrete basis for concluding that the association is strong enough to give rise to well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others. In other words, it is not enough that speech is generally similar to speech involved in past incidents of disruption, it must be similar in the right way.[14]

Although the court found that the use of the term "redneck" could not be punished under the district's anti-harassment policy, the court upheld most of the policy itself as justified by the school district's history of racial conflicts.The only part of the policy that the court found to be facially unconstitutional was the language prohibiting speech that fostered "ill will."

Though the *Saxe* and *Sypniewski* decisions limited the permissible scope of school disciplinary policies that regulated student speech by refining the *Tinker* decision's language concerning "substantial disruption and interference," the Third Circuit in a decision issued a year after *Sypniewski* indicated that the scale of First Amendment considerations varies depending on the age of the students. In *S.G. v. Sayreville Board of Education,*[15] the court upheld the disciplining of an elementary school student who said "I'm going to shoot you" to another student on the playground. The court noted that "a school's authority to control student speech in an elementary school setting is undoubtedly greater than in a high school setting." The court suggested a lower standard to justify discipline of student speech in an elementary school setting, stating that "the school's prohibition of speech threatening violence and the use of firearms was a legitimate decision related to reasonable pedagogical concerns and therefore did not violate [the student's] First Amendment rights."

Federal district courts in Pennsylvania have addressed student discipline cases involving First Amendment claims in a variety of contexts. In *Killion v. Franklin Regional School District,*[16] a student wrote a "top 10" list that was derogatory of a school faculty member. The student wrote the list on his home computer and emailed it to his friends, but did not bring the list to school. Copies of the list did appear in the school. The court found that the student's preparation of the list at home did not "substantially disrupt" the school's educational program. Furthermore, the court found that the school district's policy providing that "if a student verbally or otherwise abuses a staff member, he or she will be immediately suspended from school" was unconstitutionally overbroad because it contained no definitions of what the policy meant by "abuse."

In *Flaherty v. Keystone Oaks School District,*[17] the school district disciplined a student for comments the student posted on an internet web site message board that were derogatory of a teacher. The student had posted one of the comments from a school computer. The court found that the student's First Amendment rights were violated because there was no evidence that the student's message-posting substantially disrupted school operations. The court further held that the school district's policies in its student handbook, which prohibited "abuse," "harassment" and "inappropriate" conduct were unconstitutionally vague because none of those terms were defined. Furthermore, the court found the student handbook's failure to contain provisions "that would require school officials to make an assessment of whether the speech is substantially disruptive so as to justify employing the policies that would curtail speech," made the student handbook constitutionally defective.

However, a more recent federal court decision suggests that where the school can demonstrate that the student's speech actually causes a disruption by causing teachers to have to spend time dealing with the effects of the student speech, the discipline may be upheld against the student's First Amendment claims. In *Layshock v. Hermitage School District,*[18] the court refused a temporary restraining order ("TRO") to a student who was disciplined for creating an

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Internet parody profile of the high school principal. The student created the website from his grandmother's computer during non-school hours, and the only school resource the student used in the website was a photograph copied from the school's web site. The school district claimed that the student's conduct violated policies prohibiting: disruption of the normal school process; disrespect; harassment of a school administrator via remarks that have demeaning implications; gross misbehavior; obscene, vulgar and profane language; and misuses of school computers. The court refused to grant the student a TRO, finding that the student's web site had, in fact, substantially disrupted the school's operations by: causing the school to shut down its computer system for a week because students incessantly used the school's computers to access the web site; causing the school's technology coordinator to have to devote 25 percent of his time to address the problems created by the website; and, causing the principal to spend about 25 to 30 percent of his time addressing problems created by the web site. The *Layshock* decision stands in contrast with the *Killion* decision primarily because the school administration in *Layshock* had come forward with evidence of how the student's conduct actually caused a "substantial disruption" of the educational program sufficient to justify discipline, whereas the administration in *Killion* failed to produce this evidence.

How do these First Amendment standards apply to the problem of cyber-bullying? Well, in order to answer that question, it is necessary to look at the nature of the cyber-bullying act: how it is communicated; to whom it is communicated; what is the content of the communication?; and how does the communication affect the victim? There is absolutely no First Amendment protection for cyber-bullying that involves vulgar, obscene or lewd content. Many acts of cyber-bullying involve vulgar, obscene or lewd content that implicates no First Amendment concerns. There is also no First Amendment protection for speech that constitutes a "true threat." A "true threat" occurs if "the communication is a serious expression of intent to inflict harm."[19] Whether a communication involves a serious expression of intent to inflict harm is determined by examining its content, the context in which it was made, the reaction of the listener and others to it, and the nature of the communication. The more serious acts of cyber-bullying may, indeed, meet the definition of a "true threat" to the victim and will, therefore, not be protected from punishment by the First Amendment.

In many instances, cyber-bullying will involve conduct that is neither obscene nor a "true threat," but nevertheless not be protected by the First Amendment from school discipline. For example, web pages, emails or text messages that humiliate, demean, or embarrass another student — even to an especially vicious degree — may not involve obscenity or true threats. Following the *Tinker* standards, however, the school district may punish cyber-bullying where: **(1)** there is a substantial disruption of the school's educational programs; or, **(2)** there is substantial interference with the rights of other students. It may be possible in some situations for school officials to show that acts of cyber-bullying have substantially disrupted the school's educational programs in a concrete and material way, where school officials can show that a substantial amount of administrative time and school resources are expended in addressing disruptions caused by the conduct, as the school administrators demonstrated in the *Layshock* case. But the far more frequent justification for punishing acts of cyber-bullying will be under the second of *Tinker's* criteria: that cyber-bullying substantially interferes with the educational rights of the student who is the subject of the cyber-bully's conduct. In the vast majority of cyber-bullying cases, it is this second part of the *Tinker* standard that will uphold school officials' discipline in the face of any First Amendment challenge.

As a final point, I have analyzed the questions of jurisdiction and First Amendment as separate issues, but it is perhaps better to view them as related. From a practical standpoint, courts reviewing challenges to discipline imposed for cyber-bullying acts will likely find the First Amendment arguments to be more compelling where the connection to the school district's jurisdiction is more attenuated, and less compelling where the conduct clearly falls within the school district's jurisdiction. Cyber-bullying may be an age-old problem of anti-social behavior expressed through modern technology, but school officials – and the courts that ultimately review their actions – must be flexible in their approaches to addressing the problem.

Footnotes

[1] Act 14 of March 10, 1949, P.L. 30, *as amended*, 24 P.S. § 5-510.
[2] 24 P.S. § 13-1317.
[3] 24 P.S. § 13-1318.
[4] *Hoke v. Elizabethtown Area School District,* 833 A.2d 304, 313 (Pa. Cmwlth. 2003). Indeed, one recent Commonwealth Court decision, *D.O.F. v. Lewisburg Area School District,* 868 A.2d 28 (Pa. Cmwlth. 2005), held that a school could not expel a student who smoked marijuana on the school playground, because this misconduct occurred late at night well after normal school hours or any after-school activities. The court concluded that the school district exceeded its authority in expelling the student because there was an insufficient nexus between the student's misconduct and any school-related activity or school operations.
[5] The late Chief Judge Edward Becker of the United States Court of Appeals for the Third Circuit once characterized the high school setting as "notoriously rife with adolescent gossip." *Johnson v. Elk Lake School District,* 283 F.3d 138, 144 n. 1 (3d Cir. 2002).
[6] 807 A.2d 847 (Pa. 2002).
[7] 807 A.2d at 865.
[8] 807 A.2d at 865 n. 12.
[9] 393 U.S. 503 (1969).
[10] *Saxe v. State College Area School District,* 240 F.3d 200, 211 (3d. Cir. 2001).
[11] 478 U.S. 675 (1986).
[12] 484 U.S. 260 (1988).
[13] 307 F.3d 243 (3d. Cir. 2002).
[14] *Sypniewski,* 307 F.3d at 257.
[15] 333 F.3d 417 (3d. Cir. 2003).
[16] 136 F. Supp. 2d 446 (W.D. Pa. 2001).
[17] 247 F. Supp. 2d 698 (W.D. Pa. 2003).
[18] 2006 WL 240655 (W.D. Pa. January 31, 2006).
[19] *J.S.,* 807 A.2d at 858.