Published on *The National Law Review* https://natlawreview.com

The Bully on the Virtual Playground

Article By:

Michael M. Hirn

With thousands of kids spending countless hours texting on their phones and frolicking on the virtual playground created by Facebook and other social media sites, it was inevitable that the same bad behaviors affecting the real world would carry over into cyberspace. The press has labeled the use of electronic media to criticize, threaten, embarrass or intimidate as “cyberbullying,” and recent incidents of “cyberbullying” by teens, in some cases leading to the suicide of the victim, have received a significant amount of attention. As society tends to do with an array of social ills affecting our youth, we have looked to the public school system to address the issue. Although efforts by school officials and politicians to curb harmful behavior are laudable, because cyberbullying involves the use of words and expression, efforts by state and federal legislatures, city councils and schools to limit such behavior necessarily bring into question constitutionally protected free speech rights. Before we even reach the constitutional issues, however, we should first consider whether the schools have the same authority to patrol the ethereal cyber playground comprised of bits and bytes as they do to oversee the physical playground comprised of swings and jungle gyms.

“Cyber Bullying” Defined

The National Crime Prevention Council defines cyberbullying as the use of “the Internet, cell phones or other devices to send or post text or images intended to hurt or embarrass another person."[1] Wired Kids, Inc. an organization dedicated to Internet safety, security and privacy, defines cyberbullying as: "a situation when a child, tween or teen is repeatedly 'tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted' by another child or teenager using text messaging, email, instant messaging or any other type of digital technology."[2]

Is This Really an Issue for the Schools?

With recent incidents of cyberbullying leading to tragic results for teen victims, looking to the schools to address the behavior at least arguably makes some logical sense. When the bullying behavior involves actions by students outside the school, using their own computers, however, two distinct legal issues necessarily arise. First, does the school even have authority to address the situation? And second, does the action by the school constitute an impermissible restraint on free speech?

In Kentucky the state legislature has given the schools, acting through their site based decision making councils (“SBDMs”) and principals, the broad authority to protect their students.

Specifically, KRS 160.345 (2)(i)(7) provides:

> (i) The school council shall adopt a policy to be implemented by the principal in the following additional areas.
>
> > 7. Selection and implementation of discipline and classroom management techniques as a part of a comprehensive school safety plan, including responsibilities of the student, parent, teacher, counselor, and principal;

In addition, KRS 525.080 specifically makes “harassing communications” a class B misdemeanor and provides in pertinent part,

> (1) A person is guilty of harassing communications when, with intent to intimidate, harass, annoy, or alarm another person, he or she:
>
> > (c) Communicates, **while enrolled as a student in a local school district**, with or about another school student, anonymously or otherwise, by telephone, the Internet, telegraph, mail, or any other form of electronic or written communication in a manner which a reasonable person under the circumstances should know would cause the other student to suffer fear of physical harm, intimidation, humiliation, or embarrassment and which serves no purpose of legitimate communication.

Although the breadth of Kentucky’s “harassing communication” statute will no doubt give free speech advocates considerable pause, the SBDM law plainly gives Kentucky schools the authority to develop a comprehensive plan to promote school safety. In light of KRS 525.080, the authority granted to SBDMs could reasonably be interpreted to include some prohibition against acts of cyberbullying so long as those acts had some affect a student’s perception of safety within the school or had some adverse impact on the school’s environment or educational mission. This logic could apply even if the computers or phones used to commit the acts of bullying were not the property of the school and even if the acts themselves were committed after school and off school grounds.

Free Speech vs. Cyber Bullying

Even if school officials have the authority to regulate behavior constituting cyberbullying, actions by those officials that curtail students’ freedom of speech are nonetheless subject to First Amendment scrutiny. Courts have ruled, however, that free speech rights in the school context are more limited than they would be in other venues. The Supreme Court most recently explained the standard in *Morse v. Frederick*, 551 U.S. 393 (2007):

> Our cases make clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969). At the same time, we have held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986), and that the rights of students "must be 'applied in light of the special characteristics of the school environment.'" Hazelwood School Dist. V. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Tinker, supra, at 506).

For example a student's personal Facebook page or website that included rude or obnoxious comments about a fellow student or a teacher would likely fall into a different category and be subject to a different level of scrutiny than would a site including an express or even an implied threat. The U.S. Supreme Court has held that "true threats" are not protected speech and have defined such threats as "states where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals...." *Virginia v. Black*, 538 U.S. 343 (2003).

A recent case in California involved a situation in which a student had posted a comment to a website making a specific threat about putting an ice pick through a fellow student's head. The court found that such overt threats of physical violence were not protected speech.[3]

In Indiana, a student, using repeated profanity, had posted comments criticizing an educator for imposing a policy against body piercings. The student was subject to punishment through the courts rather than the school system and had been convicted by the trial court under the state "harassment statute," Indiana Code § 35-45-2-2(a)(4). The Court of Appeals, however, overturned the conviction on the grounds that the expression in question was protected under the state constitution (which the court held to be at least as broad as that afforded by the First Amendment).[4]

The most difficult cases will come in dealing with cases in which a school official takes action to address statements that are made using non-school phones or computers. Further difficulty will arise if the victim of the cyber bullying attends a different school than the bully. The picture gets murkier still if the statements offend or embarrass or merely imply a threat while expressing an opinion. Comments made on a website that a student is not fit to serve as class president are almost certainly protected speech. Comments that a candidate is going to have a terrible accident if she does not drop out of the election, likely are not.

_____

(1) http://www.ncpc.org/cyberbullying
(2) http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html
(3) 182 Cal. App. 4th 1190; 106 Cal. Rptr. 3d 399; 2010 Cal. App. LEXIS 340
(4) *A.B. v. State*, 885 N.E. 2d 1223 (Ind. Ct. App. 2008)

As seen in the January issue of Louisville *Bar Briefs*.

National Law Review, Volume I, Number 15