

# CYBERBULLYING AND THE LAW

To Discipline or Not to Discipline...

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# Utah Code Ann. 53A-11a-102: Definition

- “Cyberbullying” means:
  - using the Internet, a cell phone, or another device to
  - send or post text, video, or an image
  - with the intent or knowledge, or with reckless disregard,
  - that the text, video, or image will hurt, embarrass, or threaten an individual,
  - regardless of whether the individual directed, consented to, or acquiesced in the conduct, or voluntarily accessed the electronic communication.

# Utah code 53a-11a-201: Prohibitions

- 53A-11a-201(1): Prohibits bullying or harassing:
  - (a) on school property
  - (b) at a school related or sponsored event;
  - (c) on a school bus;
  - (d) at a school bus stop; or
  - (e) while the school employee or student is traveling to or from a location or event described in Subsections (1)(a) through (d).
- 53A-11a-201(2): Prohibits **cyber-bullying** and **hazing at all times and at all locations**

# Unique Challenges Related to Cyberbullying

- Some students think they can handle the ridicule themselves and are reluctant to tell an adult
- Some are too embarrassed to speak up
- Some feel their parents will overreact or underreact
- **Students' speech is protected by the First Amendment**

# Student speech precedent

- Tinker v. Des Moines (1969): students don't shed their constitutional rights at the school house gates.
  - A student can express his opinion, even on controversial subjects, *so long as doing so does not materially and substantially disrupt or interfere with the requirements of appropriate discipline in the operation of the school*
  - School discipline is appropriate where the facts *reasonably lead school authorities to forecast substantial disruption of or material interference with school activities as a result of the student's speech*

# Legal analysis for cyberbullying:

1. Does Tinker apply to the off-campus speech?
  - a. Majority of courts say Tinker applies where off-campus speech is brought to school or to the attention of school authorities.
  - b. In unique cases where students took specific efforts to keep speech off campus, Tinker should not apply.

# Legal analysis, cont.

2. Did the speech create, or was reasonably likely to create a substantial disruption of school activities?
  - a. Actual disruption is NOT required, but school officials must have more than an “undifferentiated fear or apprehension of disturbance.” Must be supported by **specific facts** that could reasonably lead school officials to forecast disruption.
  - b. Highly fact-intensive: there is no magic # of students or classrooms that must be affected by the speech

# Substantial Disruption Analysis Factors

1. Is the disruption more than student discussion?
  - Mere “buzz” about the speech is insufficient to determine substantial disruption
2. Is the speech violent or threatening?
  - NOTE: True threats are not protected by the First Amendment if it advocates “imminent” violent or unlawful conduct. Thus, a message that threatens physical harm, even if it wasn’t meant to be serious, may lose First Amendment protection.

# More relevant factors

3. Were school administrators pulled away from their ordinary tasks to respond to or mitigate the effects of a student's speech?
4. Was the school's decision to discipline based on evidence/facts indicating a foreseeable risk of disruption, rather than an undifferentiated fear or mere disapproval of the speech?

# J.C. v. Beverly hills unified sch. Dist. (C.D. Cal. 2009)

- Facts: Plaintiff, a 13 year old girl, and her friends recorded a 4:36 video of her friends talking in a derogatory way about a classmate and then posted it on YouTube from her home computer. Plaintiff contacted 5-10 students from the school, including the victim, and told them to look at the video. That evening, the video received about 90 hits.
- Holding: Court found that while Tinker applied, there was insufficient evidence to show a substantial disruption had occurred at school.

# Factors considered by the J.C. Court:

- The speech was not violent and there was no history of violence from the students who posted the video
- It took the school counselor 25 minutes to calm the victim down and convince her to go to class
- Other students who were pulled out of class left class quietly when asked and without incident
- There was no confrontation at school about the video
- The entire incident was resolved before lunch that day
- There was no effect on classroom activities
- There was no widespread whispering campaign that was sparked by the video
- Not a single student watched the video while at school

- There was no evidence that discussion of the video occurred during class or that it otherwise disrupted school work
- The administrators who dealt with the incident were not doing anything highly out of the ordinary course of daily tasks: they disciplined students, counseled the victim, and dealt with upset parents
- Administrators were not late to or didn't miss any school activities
- No evidence of prior relationship between victim and student involved that supported a prediction that a verbal or physical confrontation was likely
- No evidence of victim's social history
- No evidence that speech similar to the YouTube video had resulted in violence or near violence at school in the past

# Preventing cyberbullying

- Suspension/Expulsion IF there is a material and substantial disruption or interference with educational process
  - NOTE: True threats are not protected speech
- Extracurricular punishment under “good conduct” policy
  - Utah law holds that a students who participate in “student government and extracurricular activities” do not have a constitutional right to participate in these activities (53A-11-908)
  - Punishment could include being banned from school dances, prom, being a member of student council, or being elected to class office, as well as suspended from interscholastic activities

# (preventing cyberbullying, cont.)

- Protecting the target
  - Notify the perpetrator and perpetrator's parents of the allegation
  - Keep an extra eye on the perpetrator, and let the perpetrator and his/her family know that you will be doing so/
  - Give target's family option of notifying law enforcement
    - If the cyberbullying involves a threat, notify law enforcement directly and inform the families of both students that you have done so.
    - Cooperate fully with law enforcement.

# Protecting the target, cont.

- Do not discourage target's family from exploring civil actions (defamation, invasion of privacy, intentional infliction of emotional distress)
- Gather evidence and investigate
  - Confiscate the electronic device in question for as long as you need to investigate
  - Document, document, document!!!
  - Keep the target and target's family posted as to progress made during an investigation
- Check with the target often to make sure he/she is not suffering any retaliation from the perpetrator or friends of the perpetrator
- Offer counseling/mental health support to the target

# Phone searches—must be reasonably justified

1. Was the search justified in its inception?
  - Consider: what is the basis for conducting the search?
2. Was the search itself reasonable?
  - What was the allegation and what was searched?

# Other actions to consider

- Professional development for staff
- Parent/community outreach
- Filter and monitor, but DO NOT rely on filtering software to control Internet activity of students
- Update and post school rules and policies
- Implement a prevention-intervention curriculum