LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, MAY 14, 2018

What can schools do about cyberbullying?

By Gregory J. Rolen

Many parents understandably feel as though they face a world descending into madness. In an era where school shootings, teen suicide, morose cyberbullying and a general coarsening of discourse appear commonplace, cocktail party conversations inevitably explore whether our children are different than we were, or simply have more harmful tools at their disposal. Regardless of the outcome of this debate, we inevitably turn to schools, and school administrators, when those whose care is our greatest concern have been hurt by a posting, video or message.

Schools face an interwoven tapestry of conflicting legal responsibilities and obligations to the students they serve. Such a legal maze appears difficult for Harvard Law School professor Laurence Tribe to navigate in a discourse on constitutional law, let alone a beleaguered high school principal who must act quickly in the heat of the moment.

This article will identify some of the constitutional pitfalls and provide a roadmap to help schools stem the rising tide of cyberbullying while protecting student speech.

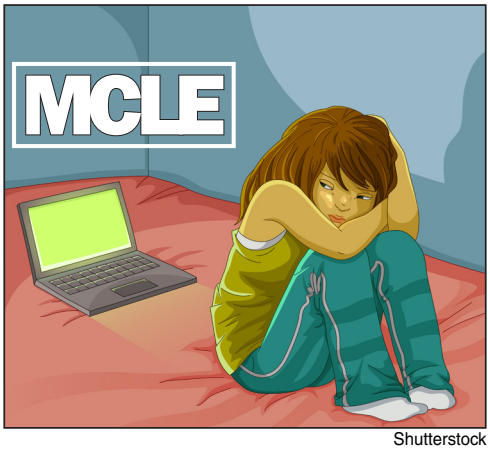
Education Code Provisions

The California Legislature has passed circumspect laws in an attempt to curtail the cyberbullying epidemic. California Education Code Section 48900(r) prohibits bullying, including bullying by way of an electronic act. An "electronic act" means the creation or transmission originated on or off the school site, by means of an electronic device, including, but not limited to a telephone, wireless phone, or other wireless communication device, computer or pager, of a communication including a message, text, sound, video, image, "burn page," "false profile" or cybersexual bullying. *See* Section 48900(r)(2)(A)(ii) (I).

The statute prohibits physical threats, race, religion, or gender-based intimidation, abusive epithets, harassment, defamation, vulgarity, obscenity, hate speech or pornography.

However, Section 48900(s) limits a school district's authority to impose discipline for school-related conduct — that is, conduct that occurs "within a school." Also, Section 48950(a) provides that the free expression rights of high school students are coextensive with the rights of adults in other settings.

The apparent inconsistency in the Education Code is reflective of an important sociological and constitutional issue: Can school districts regulate off-campus speech generated from private



Shutterstock

social media accounts directed to a limited audience… or, to use the vernacular, directed to the speaker's "homies"?

The answer, as often occurs in the law, is "probably." As we shall see, the discipline limitations of the Education Code to activity "within a school" have been expanded by courts to outside activities that have a potential impact at the school site.

Speech or Expression

The first level of analysis is whether social media interactions even constitute speech or expression in the era of ubiquitous electronic communication. In the context of adolescent social media activities there are differing levels of participation, including, but not limited to "posting," "chatting," "liking" and "following." It appears clear that original posts and comments are within the scope of the First Amendment. Additionally, "liking" or otherwise indicating the user's agreement, approval, or enjoyment of a related post is also speech protected by the First Amendment. *See Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).

It is less clear whether the passive consumption of content (i.e., by a "follower") is expressive conduct. Recently, in *Shen v. Albany Unified School District*, 17-cv-02478-JD (N.D. Cal., filed May 26, 2017) the court approached passive users as speech recipients, holding the First Amendment protects readers as well as speakers. *See id.*; *see also Griswold v. Connecticut*, 381 U.S. 479, 482 (1975); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Accordingly, it appears that the full ambit of social media involvement is protected by the First Amendment.

Ability to Regulate Speech

Under many circumstances, schools can impose greater limitations on speech than in the general public. "Schools must achieve a balance between protecting the safety and well-being of their students and respecting those same students' constitutional rights." *C.R. v. Eugene School District 4 J*, 835 F.3d 1142, 1148 (9th Cir. 2016). C.R. addressed whether harassing speech which occurred on an off-campus field could be regulated. The court in C.R. drew on past U.S. Supreme Court precedent that has outlined four types of student speech that schools may restrict (1) vulgar, lewd, obscene and plainly offensive speech (*see Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)); (2) school-sponsored speech (*see Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); (3) speech promoting illegal drug use (*see Morse v. Frederick*, 551 U.S. 393 (2007)); and (4) speech that falls into none of the first three categories(*see generally Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969); *see also Wynar v. Douglas City School District*, 728 F.3d 1062, 1067 (9th Cir. 2013).)

The fourth category is commonly referred to as "school speech" and is the subject of the vast majority of litigation in this area. School speech case law offers guidance on schools' jurisdiction to discipline under the Education Code and under what circumstances they can impose discipline generally.

School Speech

The U.S. Supreme Court held in *Tinker* that a school may regulate a student's speech or expression if it causes or is reasonably likely to cause a "material and substantial" disruption to school activities or to the work of the school.

In *Tinker*, three students wore black armbands to protest the Vietnam War. Over the years, courts have developed two tests to determine the existence of school speech that creates the prerequisite disruption: the foreseeability test and the nexus test.

Each test has been adopted by the 9th U.S. Circuit Court of Appeals (*see Wynar*, 728 F.3d at 1069), and each has been applied to more contemporary fact patterns involving remote internet speech in order to determine not only whether off-campus speech can be regulated, but also, what type of speech can sustain discipline.

The Foreseeability Test

Courts have used the foreseeability test to extend the bounds of traditional public school disciplinary jurisdiction. Traditionally, schools can only impose discipline for conduct at school or at school functions (i.e. sporting events).

The foreseeability test, articulated by the 8th

Circuit in *S.J.W. v. Lee's Summit* R-7 School District, 696 F.3d 771 (8th Cir. 2012), asks whether it was "reasonably foreseeable" that off-campus speech would reach the school. In that case, two students used a Dutch domain to create a secret blog containing racist content and sexually degrading comments. Similarly, in *Wynar*, a student sent messages threatening to commit a school shooting to friends using the social networking website MySpace.

Although both communications were intended to be secret, the courts in *S.J.W.* and *Wynar* each sustained the discipline because the speech targeted the school it was reasonably foreseeable it would eventually reach and disrupt the school environment.

In 2010, a student was disciplined for posting a mean-spirited, humiliating YouTube video on the internet. The subject of the video was another student at the school. The disciplined student then sued the school district for violating her First Amendment rights.

Lawyers for the disciplined student argued that the posting could not be regulated since it was on the World Wide Web, and posted off-campus without using any school equipment. The court found that regardless of its geographic origin, it was foreseeably likely that the content would find its way to campus. *See J.C. v. Beverly Hills Unified School District*, 711 F.Supp.2d 1094, 1107 (C.D. Cal. 2010).

The *J.C.* court focused on the unique nature of the internet noting that "[s]everal cases have applied *Tinker* where speech published or transmitted via the Internet subsequently comes to the attention of school administrators, even where there is no evidence that students accessed the speech while at school."

So, essentially, any communication on the internet, by students or about students, can potentially be the subject of discipline, regardless of its intent or origin.

The Nexus Test

Similarly, courts have employed the "nexus test" to extend discipline beyond "school or school related" activity. This test looks for a sufficient nexus between the speech and the school. *See Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011).

In *Kowalski*, a student created a MySpace page that ridiculed a fellow student as a "whore" infected with herpes. Even though the speech took place at home after school, there was a sufficient nexus between the speech and the school because the topics and recipients were school-related.

Most recently, in *Shen*, the court applied the nexus test to conclude that racist and derogatory comments on an Instagram account, that originally had only nine students with access, subjected not only the original posters, but also those who "liked" the content, to discipline. Again, the court discounted that the participants intended the speech to be private and the account was deleted the same day.

The Founding Fathers could not possibly have anticipated bullying in cyberspace. But they did appreciate, and protected, the right of individuals to say what they think, no matter how offensive, without interference from government.

It is important to note the courts' appreciation of the internet's boundless reach. In *J.C.,* the opinion discussed *Thomas v. Board of Education*, 607 F.2d 1043 (2d Cir. 1979), in which a non-school sponsored satirical newspaper was inadvertently discovered on campus. Since the newspaper was printed and stored off-campus, included a disclaimer, and was deliberately designed for consumption beyond the schoolhouse gate, the court found no nexus. However, the *J.C.* court distinguished *Thomas* noting that it was "decided in 1979, before schools were confronted by the unique problems presented by student expression conducted over the Internet."

The *J.C.* court went on to say: "Subsequent cases interpreting *Thomas* find that 'territoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority.' ... This is especially true today where students routinely "participate in ... expressive activity ... via blog postings, instant messaging, and other forms of electronic communication."

Consequently, since Al Gore invented the internet, speech thereon about students or staff will satisfy the nexus test.

Substantial Disruption

If the speech meets the threshold test for either "foreseeability" or "nexus," the final element in the *Tinker* analysis is to determine whether there is a possibility of a substantial disruption to the work and discipline of the school.

Bear in mind that this does not require an actual disruption, but instead school officials may "reasonably portend disruption" in light of the evidence or facts presented to them. *Levine v. Blaine School District*, 257 F.3d 981, 989 (9th Cir 2001). Courts have found the possibility of substantial disruption in varied contexts.

In *Levine*, a student showed a teacher a poem he had written about a mass shooting and suicide. In another case, a student created an off-campus video, during spring break, that depicted the graphic dramatization of a teacher's murder. *See O.Z. v. Board of Trustees of Long Beach Unified School District*, 2:08-cv-05671-ODW-AJW (C.D. Cal. 2008). In neither of these cases did the threatened conduct actually occur. The mere speech itself was sufficient to justify discipline. *See also C.R.* (sexually harassing speech); *Kowalski* (intimidating speech)

However, it is important to note, that merely offensive speech without disruption is decidedly more difficult to regulate. In *J.C.*, the court curiously found that posting a video clip that made derogatory sexual and defamatory statements about a 13-year-old student did not substantially disrupt school activities.

Nevertheless, the substantial disruption analysis came full circle in *Shen*. U.S. District Judge James Donato distinguished between active participants, approvers/endorsers, and ambiguous commenters. Many plaintiffs argued that they unknowingly and/or reflexively "liked" or "commented" on the posting. Judge Donato found both the original speech and the cyber-bystanders' endorsement of the racially demeaning commentary was both offensive and potentially disruptive. However, he found neutral commentary and observation merely offensive and the students who participated in that speech saw their discipline overturned.

There is an important lesson there.

Another important lesson is to keep in mind that the U.S. Supreme Court has yet to weigh in directly on the issue of cyberbullying. The foregoing authority is nevertheless powerful as it is based on the extrapolation of the Supreme Court's precedential free speech rulings. However, until the high court speaks for itself with respect to cyberbullying, and local educators' capacity to impose discipline based upon it, the door is, technically, still ajar.

Does the End Justify the Means or Vice Versa?

Legal scholars and laypersons alike often contemplate whether horrible conduct causes the constitutional machinations, or whether precedent and stare decisis are what really govern judicial decisions. In the final analysis, it is probably a little of both. The foregoing illustrates that the First Amendment, like much of the Constitution itself, is a living, breathing ideal. The Founding Fathers could not possibly have anticipated bullying in cyberspace. But they did appreciate, and protected, the right of individuals to say what they think, no matter how offensive, without interference from government.

However, the courts have evolved to use the First Amendment not just as a shield against government censorship, but also as a sword to protect vulnerable, growing psyches victimized by online cruelty. The Education Code and the First Amendment allow latitude to protect against disruptive and dangerous speech and conduct. That said, having virulent thoughts, prejudiced ideology or hate in your heart, while offensive, is beyond the reach of the free speech clause.

The Education Code and First Amendment can only do so much.

Gregory J. Rolen *is a member of the Public Entity, Employment & Labor, Workers' Compensation Law and Appellate Practice Groups at Haight Bonesteel in San Francisco.*


ROLEN

MCLE Self-Assessment Test

Test prepared by the Daily Journal. Questions do not reflect the opinions of Mr. Rolen

Take this and other MCLE tests online at www.dailyjournal.com/mcle.

Earn one hour of MCLE credit by reading the article and answering the questions that follow. Mail your answers with a check for $36 to the address on the answer form. You will receive the correct answers with explanations and an MCLE certificate within six weeks. Price subject to change without notice. CERTIFICATION: This self-study activity has been approved by the State Bar of California toward Minimum Continuing Legal Education Credit in the amount of one hour of general credit.

1. A public school can regulate any student speech.
True ❑ False ❑

2. A school can always discipline a student for hate speech on the internet.
True ❑ False ❑

3. A student who publishes statements after school, from home, to only their friends, can be disciplined by a public school.
True ❑ False ❑

4. A student who merely "likes" another's posting has not engaged in speech that will subject him/her to discipline.
True ❑ False ❑

5. School authorities can regulate vulgar, lewd, obscene or plainly offensive speech
True ❑ False ❑

6. School authorities cannot regulate off-campus speech promoting drug use.
True ❑ False ❑

7. The California Education Code prohibits bullying by an "electronic act."
True ❑ False ❑

8. The California Education Code expressly allows public school districts to monitor/regulate off-campus speech.
True ❑ False ❑

9. The act of "following" expression on the Internet is not protected by the First Amendment.
True ❑ False ❑

10. School sponsored speech can be regulated by a public school district.
True ❑ False ❑

11.School authorities can only regulate speech if it actually causes campus disruption.
True ❑ False ❑

12. School authorities can regulate speech if there is a nexus to the school environment.
True ❑ False ❑

13. A 1970s non-school sponsored newspaper that satirized events could be regulated.
True ❑ False ❑

14. School authorities can impose discipline based on a reasonable prediction that disruption may occur.
True ❑ False ❑

15. Even the passive "following" of school-based hate speech will always justify discipline.
True ❑ False ❑

16. The California Education Code provides a measure of protection for student free-speech rights.
True ❑ False ❑

17. School authorities can discipline students for off-campus sexual harassment.
True ❑ False ❑

18. The U.S. Supreme Court has clearly ruled on cyberbullying.
True ❑ False ❑

19. AA student's subjective intent to keep hate speech limited to a private group prevents a school from imposing discipline.
True ❑ False ❑

20. A video created off-campus during spring break cannot be subject to school authorities' regulation.
True ❑ False ❑

HOW TO RECEIVE ONE HOUR OF MCLE CREDIT

Answer the test questions, choosing the best answer. For timely processing, print or type your name/address/bar number below. Mail this page and a $36 check made payable to Daily Journal to:

Daily Journal • P.O. Box 54026 • Los Angeles, CA 90054–0026

Name (required)

Date (required)

Law Firm, Company, Organization

Practice Area

State Bar Number (required)

What can schools do about cyberbullying? (May 14, 2018)
Title and Date of Test Publication (required)

Address

Phone

email

Please check here if this is a new address ❑