

Yes, You Can ...

Do Something about Cyberbullying

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Note to educators: The materials in this document are not legal advice to the educator, but have been prepared as a courtesy to and for the use of educators as general guidelines.

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I. INTRODUCTION

What is cyberbullying? Why has it become such a pervasive problem, and not just in schools?

Cyberbullying is the intentional infliction of harm by the use of one or more media of electronic technologies. Electronic media include computers, Instant Messaging, social networking Web sites, handheld communication devices, cell phones, and the two dozen other media that were just invented as this sentence was typed. Cyberbullies use technology to flame, out, phish, bash, spam, impersonate, threaten, etc.²

The “traditional” school bully, as we have learned the hard way, is an unhappy youth who feels disenfranchised, and chooses to take drastic, even tragic steps to get

¹ It is the policy of the Iowa Department of Education not to discriminate on the basis of race, creed, color, sex, sexual orientation, gender identity, national origin, gender, disability, religion, age, political party affiliation, or actual or potential parental, family or marital status in its programs, activities, or employment practices as required by the Iowa Code sections 216.9 and 256.10(2), Titles VI and VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000d and 2000e), the Equal Pay Act of 1973 (29 U.S.C. § 206, *et seq.*), Title IX (Educational Amendments, 20 U.S.C. §§ 1681 – 1688), Section 504 (Rehabilitation Act of 1973, 29 U.S.C. § 794), and the Americans with Disabilities Act (42 U.S.C. § 12101, *et seq.*).

² These terms may have more than one definition. Some of the more commonly understood definitions are included here.

Flame: to post an extremely critical or abuse message.

Out: to trick the target into revealing sensitive or confidential information and then to forward that information to others as a “joke.”

Phish: same as out.

Bash: to post racist or other extremely offensive remarks online.

Spam: to flood the Internet with multiple copies of the same message.

attention.³ The anonymity of electronic communications has deepened the pool from which cyberbullies emerge. The lack of the face-to-face element emboldens adults and children alike to communicate in a way in which they would not dream of doing otherwise.

Let's take a moment to hold up a mirror to ourselves. Who among us has not regretted hitting the “send” key on an outgoing email, wishing that we had let more time pass to cool off before replying in the manner in which we replied? The sad truth is that technological advances have far outraced attempts to retain a modicum of civility in all of us. At all cyberbullying conferences I have attended that have included students, one student always asks of the adults, “What are you doing to cut back on your own misuse of electronic technology?” It’s a valid question, and one that every educator needs to resolve before confronting a student accused of cyberbullying.

Cyberbullying is an issue that is exacerbated among the young because targets often are reluctant to break a perceived code of silence by complaining, because they fear that adults will take away their own access to electronic communication devices, and because we adults just have a lack of understanding of the nature of cybercommunications. When targeted students do complain, an additional challenge lies in trying to corral the information, because one click of the mouse can send the information literally around the globe. Finally, when confronted with evidence of cyberbullying, the student suspected of the same may loudly proclaim that s/he is just exercising his/her free speech rights.

So what’s an educator to do?

As with any form of student misconduct in which other students (or staff) are harmed, the worst thing to do is nothing.

“Awareness without Action is Useless.” D. Olweus.

“Awareness without Action is a Successful Lawsuit.” C. Greta

Just because it may be more difficult to gather evidence does not excuse school officials from taking some kind of action. The remainder of this document discusses what steps educators may – and in some cases, must – take in the face of cyberbullying and other forms of electronic misconduct by students.

II. STATUTES, RULE, AND POLICY

In 2007, the Iowa Legislature enacted legislation requiring all school districts and accredited nonpublic schools in Iowa to have anti-harassment/anti-bullying board policies, to make complaint forms available to targets of bullying and harassment, to put investigative procedures into place, and to collect and report data regarding incidents of

³ Please forgive the gross over-simplification. It is included merely to demonstrate the difference between cyberbullies and non-cyberbullies.

bullying and harassment. The new law includes electronic means of bullying and harassment. (See 2.a. in box below.)

Iowa Code section 280.28

1. Purpose - findings - policy. The state of Iowa is committed to providing all students with a safe and civil school environment in which all members of the school community are treated with dignity and respect. The general assembly finds that a safe and civil school environment is necessary for students to learn and achieve at high academic levels. Harassing and bullying behavior can seriously disrupt the ability of school employees to maintain a safe and civil environment, and the ability of students to learn and succeed. Therefore, it is the policy of the state of Iowa that school employees, volunteers, and students in Iowa schools shall not engage in harassing or bullying behavior.

2. Definitions. For purposes of this section, unless the context otherwise requires:

a. "Electronic" means any communication involving the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. "Electronic" includes but is not limited to communication via electronic mail, internet-based communications, pager service, cell phones, and electronic text messaging.

b. "Harassment" and "bullying" shall be construed to mean any electronic, written, verbal, or physical act or conduct toward a student which is based on any actual or perceived trait or characteristic of the student and which creates an objectively hostile school environment that meets one or more of the following conditions:

(1) Places the student in reasonable fear of harm to the student's person or property.

(2) Has a substantially detrimental effect on the student's physical or mental health.

(3) Has the effect of substantially interfering with a student's academic performance.

(4) Has the effect of substantially interfering with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school.

c. "Trait or characteristic of the student" includes but is not limited to age, color, creed, national origin, race, religion, marital status, sex, sexual orientation, gender identity, physical attributes, physical or mental ability or disability, ancestry, political party preference, political belief, socioeconomic status, or familial status.

d. "Volunteer" means an individual who has regular, significant contact with students.

3. Policy. On or before September 1, 2007, the board of directors of a school district and the authorities in charge of each accredited nonpublic school shall adopt a policy declaring harassment and bullying in schools, on school property, and at any school function, or school-sponsored activity regardless of its location, in a manner consistent with this section, as against state and

school policy. The board and the authorities shall make a copy of the policy available to all school employees, volunteers, students, and parents or guardians and shall take all appropriate steps to bring the policy against harassment and bullying and the responsibilities set forth in the policy to the attention of school employees, volunteers, students, and parents or guardians. Each policy shall, at a minimum, include all of the following components:

- a. A statement declaring harassment and bullying to be against state and school policy. The statement shall include but not be limited to the following provisions:
 - (1) School employees, volunteers, and students in school, on school property, or at any school function or school-sponsored activity shall not engage in harassing and bullying behavior.
 - (2) School employees, volunteers, and students shall not engage in reprisal, retaliation, or false accusation against a victim, witness, or an individual who has reliable information about such an act of harassment or bullying.
- b. A definition of harassment and bullying as set forth in this section.
- c. A description of the type of behavior expected from school employees, volunteers, parents or guardians, and students relative to prevention measures, reporting, and investigation of harassment or bullying.
- d. The consequences and appropriate remedial action for a person who violates the antiharassment and antibullying policy.
- e. A procedure for reporting an act of harassment or bullying, including the identification by job title of the school official responsible for ensuring that the policy is implemented, and the identification of the person or persons responsible for receiving reports of harassment or bullying.
- f. A procedure for the prompt investigation of complaints, either identifying the school superintendent or the superintendent's designee as the individual responsible for conducting the investigation, including a statement that investigators will consider the totality of circumstances presented in determining whether conduct objectively constitutes harassment or bullying under this section.
- g. A statement of the manner in which the policy will be publicized.

4. Programs encouraged. The board of directors of a school district and the authorities in charge of each accredited nonpublic school are encouraged to establish programs designed to eliminate harassment and bullying in schools. To the extent that funds are available for these purposes, school districts and accredited nonpublic schools shall do the following:

- a. Provide training on antiharassment and antibullying policies to school employees and volunteers who have significant contact with students.
- b. Develop a process to provide school employees, volunteers, and students with the skills and knowledge to help reduce incidents of harassment and bullying.

5. Immunity. A school employee, volunteer, or student, or a student's parent or guardian who promptly, reasonably, and in good faith reports an incident of harassment or bullying, in compliance with the procedures in the policy adopted pursuant to this section, to the appropriate school official designated

by the school district or accredited nonpublic school, shall be immune from civil or criminal liability relating to such report and to participation in any administrative or judicial proceeding resulting from or relating to the report.

6. Collection requirement. The board of directors of a school district and the authorities in charge of each nonpublic school shall develop and maintain a system to collect harassment and bullying incidence data.

7. Integration of policy and reporting. The board of directors of a school district and the authorities in charge of each nonpublic school shall integrate its antiharassment and antibullying policy into the comprehensive school improvement plan required under section 256.7, subsection 21, and shall report data collected under subsection 6, as specified by the department, to the local community.

8. Existing remedies not affected. This section shall not be construed to preclude a victim from seeking administrative or legal remedies under any applicable provision of law.

This law has been incorporated into the accreditation rules adopted by the State Board of Education as rule 12.3(13). Failure of a school board to adopt a policy that is in compliance with the rule below subjects the district or accredited nonpublic school to removal of accreditation.

281—Iowa Administrative Code rule 12.3(13)

The policy adopted by the board regarding harassment of or by students and staff shall declare harassment and bullying in schools, on school property, and at any school function or school-sponsored activity regardless of its location to be against state and school policy. The board shall make a copy of the policy available to all school employees, volunteers, students, and parents or guardians and shall take all appropriate steps to bring the policy against harassment and bullying and the responsibilities set forth in the policy to the attention of school employees, volunteers, students, and parents or guardians. Each policy shall, at a minimum, include all of the following components:

a. A statement declaring harassment and bullying to be against state and school policy. The statement shall include but not be limited to the following provisions:

(1) School employees, volunteers, and students in school, on school property, or at any school function or school-sponsored activity shall not engage in harassing and bullying behavior.

(2) School employees, volunteers, and students shall not engage in reprisal, retaliation, or false accusation against a victim, a witness, or an individual who has reliable information about such an act of harassment or bullying.

b. A definition of harassment and bullying consistent with the following: Harassment and bullying shall be construed to mean any electronic, written, verbal, or physical act or conduct toward a student which is based on the student's actual or perceived age, color, creed, national origin, race, religion, marital status, sex, sexual orientation, gender identity, physical attributes,

physical or mental ability or disability, ancestry, political party preference, political belief, socioeconomic status, or familial status, and which creates an objectively hostile school environment that meets one or more of the following conditions:

- (1) Places the student in reasonable fear of harm to the student's person or property.
- (2) Has a substantially detrimental effect on the student's physical or mental health.
- (3) Has the effect of substantially interfering with a student's academic performance.
- (4) Has the effect of substantially interfering with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school.

The local board policy must set forth all 17 of the above-enumerated traits or characteristics, but does not need to be limited to the 17 enumerated traits or characteristics.

c. A description of the type of behavior expected from school employees, volunteers, parents or guardians, and students relative to prevention, reporting, and investigation of harassment or bullying.

d. The consequences and appropriate remedial action for a person who violates the antiharassment and antibullying policy.

e. A procedure for reporting an act of harassment or bullying, including the identification by job title of the school official responsible for ensuring that the policy is implemented, and the identification of the person or persons responsible for receiving reports of harassment or bullying.

f. A procedure for the prompt investigation of complaints, identifying either the school superintendent or the superintendent's designee as the individual responsible for conducting the investigation, including a statement that investigators will consider the totality of circumstances presented in determining whether conduct objectively constitutes harassment or bullying under this subrule.

g. A statement of the manner in which the policy will be publicized. The board shall integrate its policy into its comprehensive school improvement plan. The board shall develop and maintain a system to collect harassment and bullying incidence data, and report such data, on forms specified by the department, to the local community and to the department.

The Department has also drafted a sample policy⁴ and forms⁵ for schools and school districts to use.

⁴ The sample policy is just that...sample language for schools and school districts to consider. As long as the required elements in rule 12.3(13) are included, the policy does not have to mirror precisely the sample policy, and in fact, the sample anti-bullying/anti-harassment policy put forth by the Iowa Association of School Boards (IASB) is somewhat different from the department's.

⁵ Sample forms are included at the end of this document.

SAMPLE ANTI-BULLYING/ANTI-HARASSMENT POLICY

Harassment and bullying of students and employees are against federal, state and local policy, and are not tolerated by the board. The board is committed to providing all students with a safe and civil school environment in which all members of the school community are treated with dignity and respect. To that end, the board has in place policies, procedures, and practices that are designed to reduce and eliminate bullying and harassment as well as processes and procedures to deal with incidents of bullying and harassment. Bullying and harassment of students by students, school employees, and volunteers who have direct contact with students will not be tolerated in the school or school district.

The board prohibits harassment, bullying, hazing, or any other victimization, of students, based on any of the following actual or perceived traits or characteristics: age, color, creed, national origin, race, religion, marital status, sex, sexual orientation, gender identity, physical attributes, physical or mental ability or disability, ancestry, political party preference, political belief, socioeconomic status, or familial status. Harassment against employees based upon race, color, creed, sex, sexual orientation, gender identity, national origin, religion, age or disability is also prohibited.

This policy is in effect while students or employees are on property within the jurisdiction of the board; while on school-owned or school-operated vehicles; while attending or engaged in school-sponsored activities; and while away from school grounds if the misconduct directly affects the good order, efficient management and welfare of the school or school district.

If, after an investigation, a student is found to be in violation of this policy, the student shall be disciplined by appropriate measures up to, and including, suspension and expulsion. If after an investigation a school employee is found to be in violation of this policy, the employee shall be disciplined by appropriate measures up to, and including, termination. If after an investigation a school volunteer is found to be in violation of this policy, the volunteer shall be subject to appropriate measures up to, and including, exclusion from school grounds. "Volunteer" means an individual who has regular, significant contact with students.

Harassment and bullying mean any electronic, written, verbal, or physical act or conduct toward a student which is based on any actual or perceived trait or characteristic of the student and which creates an objectively hostile school environment that meets one or more of the following conditions:

- Places the student in reasonable fear of harm to the student's person or property;
- Has a substantially detrimental effect on the student's physical or mental health;
- Has the effect of substantially interfering with the student's academic performance; or
- Has the effect of substantially interfering with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school.

“Electronic” means any communication involving the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. “Electronic” includes but is not limited to communication via electronic mail, internet-based communications, pager service, cell phones, electronic text messaging, or similar technologies.

Harassment and bullying may include, but are not limited to, the following behaviors and circumstances:

- Verbal, nonverbal, physical or written harassment, bullying, hazing, or other victimization that have the purpose or effect of causing injury, fear, or suffering to the victim;
- Repeated remarks of a demeaning nature that have the purpose or effect of causing injury, fear, or suffering to the victim;
- Implied or explicit threats concerning one's grades, achievements, property, etc. that have the purpose or effect of causing injury, fear, or suffering to the victim;
- Demeaning jokes, stories, or activities directed at the student that have the purpose or effect of causing injury, fear, or suffering to the victim; and/or
- Unreasonable interference with a student's performance or creation of an intimidating, offensive, or hostile learning environment.

Sexual harassment means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:

- Submission to the conduct is made either implicitly or explicitly a term or condition of the student's education or benefits;
- Submission to or rejection of the conduct by a school employee is used as the basis for academic decisions affecting that student; or
- The conduct has the purpose or effect of substantially interfering with the student's academic performance by creating an intimidating, hostile, or offensive education environment.

In situations between students and school officials, faculty, staff, or volunteers who have direct contact with students, bullying and harassment may also include the following behaviors:

- Requiring that a student submit to bullying or harassment by another student, either explicitly or implicitly, as a term or condition of the targeted student's education or participation in school programs or activities; and/or
- Requiring submission to or rejection of such conduct as a basis for decisions affecting the student.

Any person who promptly, reasonably, and in good faith reports an incident of bullying or harassment under this policy to a school official, shall be immune from civil or criminal liability relating to such report and to the person's participation in any administrative, judicial, or other proceeding relating to the report. Individuals who knowingly file a false complaint may be subject to appropriate disciplinary action.

Retaliation against a person because the person has filed a bullying or harassment complaint or assisted or participated in a harassment investigation or proceeding is

prohibited. An individual who knowingly files a false harassment complaint and a person who gives false statements in an investigation shall be subject to discipline by appropriate measures, as shall a person who is found to have retaliated against another in violation of this policy. A student found to have retaliated in violation of this policy shall be subject to measures up to, and including, suspension and expulsion. A school employee found to have retaliated in violation of this policy shall be subject to measures up to, and including, termination of employment. A school volunteer found to have retaliated in violation of this policy shall be subject to measures up to, and including, exclusion from school grounds.

The school or school district will promptly and reasonably investigate allegations of bullying or harassment. The (*state the title of the investigator*) or designee will be responsible for handling all complaints by students alleging bullying or harassment. The (*state the title of the investigator*) or designee will be responsible for handling all complaints by employees alleging bullying or harassment.

It also is the responsibility of the superintendent, in conjunction with the investigator and principals, to develop procedures regarding this policy.

[OPTIONAL, BUT STRONGLY SUGGESTED THAT IT BE INCLUDED AND FOLLOWED:] The superintendent also is responsible for organizing training programs for students, school officials, faculty, staff, and volunteers who have direct contact with students. The training will include how to recognize harassment and what to do in case a student is harassed. It will also include proven effective harassment prevention strategies. The superintendent will also develop a process for evaluating the effectiveness of the policy in reducing bullying and harassment in the board. The superintendent shall report to the board on the progress of reducing bullying and harassment in the board.

The board will annually publish this policy. The policy may be publicized by the following means:

- Inclusion in the student handbook,
- Inclusion in the employee handbook
- Inclusion in the registration materials
- Inclusion on the school or school district's web site,
- (other) _____,

and a copy shall be made to any person at the central administrative office at (street address).

ANTI-HARASSMENT/BULLYING INVESTIGATION PROCEDURES

Individuals who feel that they have been harassed should:

- Communicate to the harasser that the individual expects the behavior to stop, if the individual is comfortable doing so. If the individual wants assistance communicating with the harasser, the individual should ask a

teacher, counselor or principal to help.

- If the harassment does not stop, or the individual does not feel comfortable confronting the harasser, the individual should:
 - tell a teacher, counselor or principal; and
 - write down exactly what happened, keep a copy and give another copy to the teacher, counselor or principal including;
 - what, when and where it happened;
 - who was involved;
 - exactly what was said or what the harasser did;
 - witnesses to the harassment;
 - what the student said or did, either at the time or later;
 - how the student felt; and
 - how the harasser responded.

COMPLAINT PROCEDURE

An individual who believes that the individual has been harassed or bullied will notify _____, the designated investigator. The alternate investigator is _____. The investigator may request that the individual complete the Harassment/Bullying Complaint form and turn over evidence of the harassment, including, but not limited to, letters, tapes, or pictures. The complainant shall be given a copy of the completed complaint form. Information received during the investigation is kept confidential to the extent possible.

The investigator, with the approval of the principal, or the principal has the authority to initiate a investigation in the absence of a written complaint.

INVESTIGATION PROCEDURE

The investigator will reasonably and promptly commence the investigation upon receipt of the complaint. The investigator will interview the complainant and the alleged harasser. The alleged harasser may file a written statement in response to the complaint. The investigator may also interview witnesses as deemed appropriate.

Upon completion of the investigation, the investigator will make written findings and conclusions as to each allegation of harassment and report the findings and conclusions to the principal. The investigator will provide a copy of the findings of the investigation to the principal.

RESOLUTION OF THE COMPLAINT

Following receipt of the investigator's report, the principal may investigate further, if deemed necessary, and make a determination of any appropriate additional steps which may include discipline.

Prior to the determination of the appropriate remedial action, the principal may, at

the principal's discretion, interview the complainant and the alleged harasser. The principal will file a written report closing the case and documenting any disciplinary action taken or any other action taken in response to the complaint. The complainant, the alleged harasser and the investigator will receive notice as to the conclusion of the investigation. The principal will maintain a log of information necessary to comply with Iowa Department of Education reporting procedures.

POINTS TO REMEMBER IN THE INVESTIGATION

- Evidence uncovered in the investigation is confidential.
- Complaints must be taken seriously and investigated.
- No retaliation will be taken against individuals involved in the investigation process.
- Retaliators will be disciplined up to and including suspension and expulsion.

CONFLICTS

If the investigator is a witness to the incident, the alternate investigator shall investigate.

CIPA: Children's Internet Protection Act, 20 U.S.C. § 9134(f) and 47 U.S.C. § 254(h)

The Children's Internet Protection Act (CIPA) is a federal law enacted by Congress to address concerns about access to offensive content over the Internet on school and library computers. CIPA imposes certain types of requirements on any school or library that receives funding for Internet access or internal connections from the E-rate program – in Iowa, that's all school districts and public libraries.

CIPA requires the following:

- Schools and libraries subject to CIPA may not receive the discounts offered by the E-rate program unless they certify that they have an Internet safety policy and technology protection measures in place. An Internet safety policy must include technology protection measures to block or filter Internet access to pictures that are: (a) are obscene, (b) child pornography, or (c) harmful to minors (for computers that are accessed by minors).
- Schools and libraries must also certify that, as part of their Internet safety policy, they are educating minors about appropriate online behavior, including cyberbullying awareness and response and interacting with other individuals on social networking sites and in chat rooms.
- Schools subject to CIPA are required to adopt and enforce a policy to monitor online activities of minors.
- Schools and libraries subject to CIPA are required to adopt and implement a policy addressing: (a) access by minors to inappropriate matter on the Internet;

(b) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications; (c) unauthorized access, including so-called “hacking,” and other unlawful activities by minors online; (d) unauthorized disclosure, use, and dissemination of personal information regarding minors; and (e) restricting minors’ access to materials harmful to them.

CIPA does not require the tracking of Internet use by minors or adults. any of the following. It also permits an authorized person to disable the blocking or filtering measure during any use by an adult to enable access for bona fide research or other lawful purposes.

The provisions of CIPA were upheld by the U.S. Supreme Court in 2003 in the case *U.S. v. American Library Association*, 539 U.S. 194.

Congress amended the law late last year to require schools and libraries that receive E-rate funds to educate minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms, and about cyberbullying awareness and response.

III. GUIDANCE FROM CASELAW

Much like the legal analysis for hazing, there must be a close connection – a *nexus* – to school for school officials to be able to regulate cyberbullying. But *in addition*, because cyberbullying involves student speech, the school must demonstrate legitimate pedagogical concerns before courts will allow schools to take action. Before discussing some recent cyberbullying cases, here is a review of student free speech cases:

<p style="text-align: center;">The First Amendment Congress shall make no law ... abridging the freedom of speech ...</p>
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The traditional triumvirate of student free speech cases is – in chronological order – *Tinker v. Des Moines Independent Community School District et al.*, 393 U.S. 503, 89 S.Ct. 733 (1969); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159 (1986); and *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562 (1988). This document goes into some depth to discuss those three cases, and adds a briefer discussion of *Morse v. Frederick* [the “Bong HiTS 4 Jesus” case], 127 S.Ct. 2618 (2007).

***Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733 (1969)**

John and Mary Beth Tinker were public school students in Des Moines who were part of a group against American involvement in the Vietnam War. Wanting to publicize their opposition to the same, the Tinker children decided to wear black armbands to

school. Up to this point, the Des Moines District had no policy concerning armbands. Having heard of the students' plans, however, the principals of the public schools in Des Moines adopted and informed students of a new policy prohibiting the wearing of armbands. A student who refused to take off his or her armband would be suspended until agreeing to return to school without the band.

With knowledge of the school policy, the Tinker children and a friend decided to wear armbands to school. Upon arriving at school, the children were asked to remove their armbands. They did not remove the armbands and were subsequently suspended until they returned to school without their armbands. Their parents filed suit in federal trial court asking for a small amount of money for damages and an injunction to restrain school officials from enforcing their armband policy.

Although the trial court recognized the children's First Amendment right to free speech, the court refused to issue an injunction, claiming that the school officials' actions were reasonable in light of potential disruptions from the students' protest. The Tinkers appealed their case to the Eighth Circuit Court of Appeals where a tie vote in that court allowed the lower court's ruling to stand. As a result they decided to appeal the case to the U.S. Supreme Court.

The case came down to this fundamental question: Do the First Amendment rights of free speech extend to symbolic speech by students in public schools? And, if so, in what circumstances is that symbolic speech protected?

The First Amendment states "Congress shall make no law . . . abridging the freedom of speech." The Fourteenth Amendment extends this to state governments, of which school systems are a part. The First Amendment, however, does not identify which kinds of speech are protected. For example, it is not clear whether hate speech against an individual or group is protected. Neither does the First Amendment specify what types of expressive actions should be considered as speech.

The Supreme Court ruled 7-2 in favor of the students. From the majority opinion come the following words:

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . .

...That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. . . .

. . . On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.

. . . In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show

that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained . . .

.... In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. . . .

Bethel School Dist. No. 403 v. Fraser,
478 U.S. 675, 106 S.Ct. 3159 (1986)

The lesson from *Fraser* is that lewd, indecent, objectively offensive speech by students may be regulated by school officials.

Matthew Fraser was a high school student in Pierce County, Washington, who delivered a speech at a mandatory school assembly of about 600 fellow students, some as young as 14 years of age, nominating a classmate for class vice president. Matthew thoughtfully, creatively, and wholly inappropriately laced his nomination speech with sexual innuendo and outright graphic, explicit sexual metaphor. The reaction of the captive audience of students ranged from clueless bewilderment to embarrassment to enthusiastic "hooting and yelling," accompanied by gestures that "graphically simulated the sexual activities pointedly alluded to in [Fraser's] speech."

The federal district court awarded modest (less than \$300) monetary damages to Fraser, plus attorney's fees, and enjoined the district from preventing Fraser from being considered as a commencement speaker. This ruling was upheld by the Ninth Circuit Court of Appeals, which held that Fraser's speech was indistinguishable from *Tinker's* armband.

A divided (6-3) U.S. Supreme Court reversed the lower courts, holding that there is a "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech." Chief Justice Burger, writing for the majority, acknowledged *Tinker's* rationale that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," but clarified that *Tinker* is not to be read as precluding any discipline of students for indecent speech and lewd conduct at school.

In his dissent, Justice Stevens stated that he was not denying a school's duty to prescribe rules of conduct within its walls. Rather, Justice Stevens did not believe that Fraser had fair notice that he would be punished for his speech. (The school's policy under which Fraser was suspended for three days prohibited "disruptive conduct.")

Hazelwood School Dist. v. Kuhlmeier,

484 U.S. 260, 108 S.Ct. 562 (1988)

School officials may regulate content of articles in school newspaper as school-sponsored expressive activity. So held the Supreme Court (another 6-3 decision) in *Hazelwood*.

Students in a high school journalism class in St. Louis published their school's newspaper as part of the curriculum of that class. They customarily submitted the paper to the class advisor prior to publication. One the occasion in question, the advisor had concerns about two articles, the first regarding teen pregnancy (including comments attributed to pregnant students at the school) and the second about divorce (including scathing comments by one student against her father). Because of time restraints, the advisor pulled two entire pages, including a number of non-offensive articles. The students took their case to federal court in Missouri.

The federal trial court did not agree with the students, but this decision was reversed by the Eighth Circuit Court of Appeals. The school appealed this decision.

The Supreme Court took this opportunity to differentiate regulation of this type of student speech.

The question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. [Emphasis added.]

***Morse v. Frederick*, 127 S.Ct. 2618 (2007)**

The U.S. Supreme Court held in *Morse* [the “Bong HiTS 4 Jesus” case] that a school may restrict student speech that is harmful, such as speech that appears to promote illegal drug use. It remains to be seen how far-reaching the effects of this holding will be. (For instance, if a school can demonstrate that certain student speech will lead to a decline in test scores or increased truancy, may the school intercede? How about speech that leads to more dental decay in students?)

The immediate benefit of the *Morse* decision was to High School Principal Deborah Morse and all public school administrators and board members everywhere. The Supreme Court's ruling undid the Ninth Circuit's decision that Principal Morse was not entitled to qualified immunity from suit because the law in this area was so well settled that she should have known that it was wrong for her to take the banner away from young Mr. Frederick (now a teacher himself) and to punish him for its display.

In summary, our starting point consists of the following:

1. *Tinker*: Absent either impingement on the rights of others or the likelihood of a substantial and material disruption at school, school officials may not regulate student speech.
2. *Fraser*: Lewd, indecent, objectively offensive speech by students may be regulated by school officials.

3. *Hazelwood*: School officials may regulate content of articles in school newspaper as school-sponsored expressive activity.
4. *Morse*: School officials may regulate speech that appears to promote illegal or harmful activity.

Look for the nexus, or lack thereof, to school in the following sampling of caselaw regarding cyberbullying:

1. A high school student created a Web site that used crude and vulgar language in criticizing the school administration. He did not use school resources to create the site, but the site included a hyperlink to the school's official homepage, and the student invited readers of his Web site to contact the school to communicate their observations about the high school. The school imposed a ten day suspension, which was overturned by the court because the principal testified that he suspended the student because the principal did not like the *content* of the student's Web site. Had the principal testified about the site causing a substantial disruption of educational time at school, there might have been a different outcome. [*Beussink v. Woodland R-IV School District*, 30 F.Supp.2d 1175 (E.D. Mo. 1998).]
2. A student included mock obituaries of his friends in a web site he created and named "Unofficial Kentlake High Home Page." The student – an honors student with no disciplinary history – included a disclaimer on his web site that noted that the site had no connection to the school and was for entertainment purposes only. Readers of the web site were invited to vote on "who should die." When local media picked up on this, one TV station characterized the site as having a "hit list." Mortified, the student removed his site the day after this news item ran on television. There was no evidence that any of the students whose obits were featured felt threatened, no evidence that the creator of the web site intended to do any harm, and no evidence of any disruption to the educational environment. The court found in favor of the student. [*Emmett v. Kent School District No. 415*, 92 F.Supp.2d 1088 (W.D. Wash. 2000).]
3. In this case one student wrote an e-mail about the school's activities director that was very unflattering about his weight (very large) and genital size (not so very large). The student sent the email from his home computer to friends on their home computers, but one recipient brought several copies of the e-mail to school. In ruling in favor of the student, the court stated that the mere desire on the part of school officials to avoid discomfort or unpleasantness did not justify a restriction of private student speech. However, because this student had previously written "poison pen" e-mails about school employees on school computers, the court left the door open for a school to prevail if the school can demonstrate a "well-founded expectation of disruption." [*Killion v. Franklin Regional School District*, 136 F.Supp.2d 446 (W.D. Pa. 2001).]
4. The court reversed the expulsion of a student who posted derogatory comments on the student's personal Web site about Canadians, lesbians, albino florists, oh, yes, and his teachers. School district also ended up paying the student \$20,000. [*Muss v. Beaverton School District*, No. CV-02-1706-AA (D. Ore. 2002).]

{If you're keeping score, the school districts haven't won yet; this next case ends that streak.}

5. The court upheld the expulsion of a student based upon a Web site the student created at home that contained *threatening* comments against a teacher and a principal. The student attempted to shield himself from school discipline or regulation by putting a disclaimer on his site (which was not password-protected) that viewers promised not to tell any school officials or employees about the site. This attempt proved futile. His site had *many* visitors, so the word got back to the teacher who was threatened that he was actually soliciting donations from site visitors to hire a hitman to take out the teacher. [*J.S. ex rel. H.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002).]
6. Comments typed in class and printed off in class alleging that a teacher and principal were having sex were proper grounds to suspend the student who typed and printed the comments. This student was an honor student who went to court to try to get the suspension off her student record. The court denied her request. [*Matos ex rel. Matos v. Clinton School District*, 367 F.3d 68 (1st Cir. 2004).]
7. A male middle school student who was a competitive ballroom dancer was verbally harassed and taunted by peers almost daily; some students also posted derogatory comments about him on an internet chat room that was accessed from the school library. In response, the district made classroom announcements, contacted parents, and suspended students. The harassment continued; the family sued. The school was able to get the lawsuit dismissed because it showed that it took reasonable steps to try to get the harassment to stop. [*Shaposhnikov v. Pacifica School District*, WL 931731 (N.D. Cal. 2006).]
8. A senior with no disciplinary history and who was academically successful decided just before the Christmas recess to create a "parody profile" of one of the high school principals on MySpace.com. The profile was juvenile in its conception, vulgar in parts, and crude. It did not provide a flattering profile of the principal. The student did not use school equipment or school time to develop the profile. The court determined that the student's off-campus speech did not result in a substantial disruption of school operations; therefore, it granted summary judgment to the student. This case is on appeal to the Third Circuit Court of Appeals. [*Layshock v. Hermitage School District*, 496 F.Supp.2d 587 (W.D. Pa. 2007).]
9. A year later, another federal trial court in Pennsylvania reached the opposite conclusion, ruling that school officials did not violate a student's free speech rights by disciplining her for creating a parody online profile of her principal, and granting *the school's* motion for summary judgment. As in *Layshock*, the student here created a fake MySpace profile and used a photo of the principal from the district's Web site. The personal profile section depicted the principal as a pedophile and sex addict. The court here found that *Fraser's* regulation of lewd and vulgar speech applied. [*J.S. v. Blue Mountain School District*, No. 07-585 (M.D. Pa. 9/11/08).]

10. The suspension of a middle school student who created an instant messaging (IM) icon depicting his English teacher being shot was upheld by a federal court. The student created the icon at home and sent it to 15 other students, one of whom showed it to the teacher. The teacher was distressed enough that he was allowed to stop teaching this student's class. The court concluded that "it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot," thus deciding that the material and substantial disruption of the work of the school was met. [*Wisniewski v. Weedsport Cent. School District*, 494 F. 3d 34 (2nd Cir. 2007).]
11. Student who wrote vulgar comments about school officials in a blog could be barred from running for class secretary as punishment. The student was unhappy that school officials were not cooperating with her efforts to organize a music event. In this extraordinarily thoughtful decision, the Court noted that the student was a "good student and a good citizen" who had a "momentary lapse of judgment," and that the school officials were not "tyrants bent on curbing the constitutional rights of all who criticize them." The decision upholding the punishment turned on the fact that the student's blog gave false information about the music event and then urged other students to contact the school superintendent in support of the event "to piss her off more." It is also worth noting that the student was not suspended, did not receive any other written discipline, and was allowed to continue as a member of the student council. [*Doninger v. Niehoff*, 2007 WL 2523753 (D. Conn. 8-31-07); *aff'd*, 527 F.3d 41 (2nd Cir. 2008).]
12. The expulsion for the remainder of a semester of a high school student was upheld by a state court where the student violated the school's computer use policy by decoding encrypted information and helping another student to access extremely sensitive and private school information. This student had previously committed a serious violation of the policy, and his conduct was felonious under state criminal statutes. [*M.T. v. Central York School Dist.*, 2007 WL 3239280 (Pa. Cmwlth. 2007).]
13. *It's not just the kids!*
A teacher created a MySpace account ("Mr. Spiderman"), ostensibly so he could answer questions about homework and to learn more about his students so he could better relate to them. Several students complained to the school's counselor about the content of the teacher's MySpace account. When the counselor looked at the web site, he saw pictures of naked men and inappropriate conversations that the teacher had conducted with students. The teacher closed down this account, but soon activated another account under the name "Apollo68." This account again generated student complaints. Eventually, the teacher was terminated and his termination was upheld by the courts. [*Spanierman v. Hughes, et al.*, ___ F.Supp.2d ___ (D. Conn 2008).]

IV. PROTECTING THE TARGET

Just because it may be more difficult to gather evidence does not excuse school officials from taking some kind of action. And just because a school may not be able to directly discipline the bully/ies does not excuse school officials from acting.

School officials must take reasonable steps to avoid being successfully sued. If sued, the courts will examine the school's actions to determine whether the school and its officials acted with "deliberate indifference" to the harm being perpetrated against the target student.

Knowing of allegations of bullying/harassment or just being vaguely aware of rumors of bullying/harassment and doing nothing will almost certainly result in a finding of deliberate indifference.

For the most part, success in stopping the bullying/harassment is not the yardstick by which liability of schools is measured. As long as schools take steps that are reasonably calculated to end the bullying/harassment, a school and school officials will be held harmless. However, one federal court just ruled that even though a school district reacted to each allegation of harassment, the fact that the harassment continued over four years means that a jury can decide if at some point over those four years the district's ineffective response was "clearly unreasonable," and thus, that the district was deliberately indifferent. *Patterson v. Hudson Area Schools*, ___ F.3d ___ (6th Cir. 2009).

So here are some steps to consider directly related to protection of targeted students:

- Notify the perpetrator and perpetrator's parents of the allegation
 - Just because you may not have a sufficient nexus to discipline the perpetrator doesn't mean that you ignore him/her. Call that student and parents into your office for a heart-to-heart.
- 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
 - In Iowa, the crimes of harassment and terrorism can be committed by electronic means. So just because a school may not be able to take action, law enforcement should be contacted if the family is willing to cooperate.
 - If the cyberbullying involves a threat, notify law enforcement directly and inform the families of both students that you have done so.
 - Of course, the school must fully cooperate with law enforcement.
- 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(s) in question for as long as you need to investigate
 - Learn how to do this or find an expert

- See information about school policy in next section
 - Document, document, document
 - Keep target and target’s family posted as to progress made during investigation, but remember not to tell them what discipline is ultimately imposed against the perpetrator.
- Check with the target often to make sure s/he is not suffering any retaliation from the initial perpetrator or friends of the perpetrator
- Offer counseling/mental health support to the target

V. OTHER ACTIONS TO CONSIDER

There are other action steps that a school should consider that are proactive and not reactive to situations in which allegations are made. These include the following:

- Professional development
- Parent/Community outreach
- Filter and monitor...but DO NOT rely on filtering software to control Internet activities of students
- Update and post school rules, policies
 - Include the policy, as well as student handbook, a statement that students have a limited expectation of privacy on the school’s Internet system, and that routine monitoring or maintenance may lead to discovery that a user has violated district policy or law. Also, individual targeted searches will be conducted if there is reasonable suspicion that a user has violated policy or law.
 - Include an “Internet Acceptable Use” policy to stress that students are prohibited from name-calling, bullying, or harassment online during school on personal or school equipment.
 - Include a statement that the personal electronic devices of any student suspected of violation of the above policy will be confiscated for investigation and may be turned over to law enforcement.
- Implement a prevention-intervention curriculum such as the one in Part VII of this document

VI. RESOURCES

Web sites⁶:

⁶ The inclusion or exclusion of a Web site does not indicate approval or disapproval by the Iowa Department of Education. Any known Web sites regarding the topic of cyberbullying that may be helpful to educators have been included. The educator can determine for himself or herself the helpfulness of the site.

<http://csriu.org>

<http://cyberbully.org>

<http://cyber-safe-kids.com>

<http://www.isafe.org>

<http://look-both-ways.com/stayingsafe/bullying.htm>

<http://www.netsmartz.org>

<http://www.k12.wa.us/Safetycenter>

<http://www.webwisekids.org>

<http://www.ctap4.org/cybersafety/>

<http://www.caabi.org>

<http://www.bullypolice.org>

VII. CURRICULUM

An anti-cyberbullying curriculum is free and available for everyone at these Web sites⁷:

<http://www.seattleschools.org/area/prevention/cbms.html>

<http://www.incredibleinternet.com>

(Either link takes the educator to the same program, which is used in the Seattle school district, and is Olweus-based.)

⁷ See footnote #2.

VIII. FORMS

Harassment/Bullying Complaint Form

Is this form being filed because of retaliation for filing an earlier complaint? Yes _____ No _____

Name of complainant: _____
(Student, Parent, Employee, Other – Please Specify)

Date of complaint: _____

Name(s) of student(s) alleged to be responsible for incident: _____

Date and place of incident or incidents: _____

Describe what happened: *(Use back of form or attach additional pages if necessary)* _____

Name(s) of witness(es) _____

Is there any documentation of the incident? Yes _____ No _____ Please attach evidence OR explain why not. _____

Any other relevant information: _____

I feel I was harassed based upon: _____
(LIST ALL THAT APPLY) *sexual orientation, gender identity, physical attribute, race, color, creed, age, national origin, religion, disability, ethnicity, political party preference, sex, marital status, familial status, socioeconomic status, political belief, ancestry*

I agree that all of the information on this form is true to the best of my knowledge.

Complainant's signature: _____

Interview Notes Form

Signature of Interviewee: _____ Date: _____

Signature of Interviewer: _____

Name of Interviewee: _____

Name of Interviewer: _____

Date of Interview: _____

Description of Incident: _____
(Attach additional pages if necessary)

Any other information: _____
(Attach additional pages if necessary)

