

Cyberbullying



Revised November 2009

Introduction

The issue for schools is how to protect students and teachers from bullying and harassment that occur through the Internet and other electronic means while protecting the First and Fourteenth Amendment rights of the “speakers,” particularly those who are not physically at the school or at a school-sponsored event. The issue for parents and communities is how to protect children at home and away from home.



Pennsylvania Case Law

Pennsylvania Supreme Court

J.S. v. Bethlehem Area School District, 569 Pa. 638, 807 A.2d 847 (2002)

The Pennsylvania Supreme Court considered the following: “whether a school district may, consistent, with the First Amendment to the United States Constitution, discipline a student for creating at home, and posting on the Internet, a web site that. . .contained derogatory, profane, offensive and threatening statements directed toward one of the student’s teachers and his principal.” *Id.*, at 643. The court held that the school could expel the student under the circumstances of this case. J.S.’s web page contained such graphic material as the following: a caption “Why Should She Die?”; a request to readers to “Take a look at the diagram and the reasons I gave, then give me \$20 to help pay for the hitman”; and a “drawing of the teacher with her head cut off and blood dripping from her neck.” *Id.*, at 645. The teacher suffered mentally and physically and was unable to complete the school year or to return the following year. The school determined that the site constituted harassment and expelled J.S.

J.S. through his parents, appealed the school’s determination, claiming First Amendment right to freedom of speech. The court first considered whether the web site could be considered on-campus speech. It acknowledged that “Only a few courts have considered whether the off-campus posting of email or a web site, and the accessing of the mail or site at school constitutes on-campus or off-campus speech. These cases have differed in their conclusions.” *Id.* at 666. Here, the court found a “sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus.” *Id.* at 668. The court held that “where speech that is aimed

at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.” *Id.*

The court then examined precedent set by the United States Supreme Court in *Tinker* and *Fraser*, annotated below. The court found the web site at issue vulgar, lewd and plainly offensive under *Fraser* and found that the web site caused “actual and substantial disruption to the work of the school, disrupting the entire school community — teachers, students and parents” under *Tinker*. *Id.* at 673. Therefore, the school did not violate the First Amendment in disciplining J.S. Bullying precedent suggests that courts will apply similar treatment to peer-to-peer cyberbullying.

Pennsylvania’s Federal District Courts

***Killion v Franklin Regional School District*, 136 F. Supp. 2d 446 (W.D. Pa. 2001) – 42 U.S.C.S. § 1983 (First and 14th Amendments)**

Free Speech and Due Process Case

Student was suspended for compiling an arguably rude, abusive, demeaning, and lewd “Top Ten” list about his athletic director’s appearance. The plaintiff prepared the list at home after school hours and e-mailed it to his friends from his home computer. Another student reformatted the list and distributed it on school grounds. Parents filed suit based on the First and Fourteenth Amendments, arguing student had been denied free speech rights and procedural process and that school’s policy was unconstitutionally vague and overbroad. The court found that the suspension violated the student’s First Amendment for the following reasons: there was no actual or reasonable fear of disruption under *Tinker*. Students cannot be punished for lewd and obscene speech occurring off school grounds absent exceptional circumstances, not present here. In addition, the court found the following school policy overbroad and vague: “It must be clearly understood that if a student verbally or otherwise abuses a staff member, he or she will be immediately suspended from school. It may then be the recommendation of the administration to the Board of School Directors that they indefinitely suspend or expel the student involved.” The court found the policy overbroad because it lacked a definition of “abuse,” failed to include any specificity or limitations such as geographical or contextual limitations, and could prohibit protected speech such as whistle blowing. In addition, the administration did not offer any factors, not included in the actual policy, that it routinely considered in determining whether behavior constituted a violation. The court determined that the policy was unconstitutionally vague because it failed to give a student adequate warning of prohibited conduct and offered an unrestricted delegation of power to school officials.

***Flaherty v Keystone Oaks School District*, 247 F. Supp. 2d 698 (W.D. Pa. 2003) - 42 U.S.C.S. § 1983 (First and 14th Amendment); Pa. Constitution Article I, section 7**

Free Speech Case

Disciplinary action was taken against Flaherty for posting on a website message board Internet messages critical of the school and arguably “lewd, indecent, and plainly

offensive.” Three messages were posted from home, one from school. Student handbook prohibited speech which was abusive, harassment, inappropriate, and offensive. Court found policy unconstitutional because it did not adequately notify students of what was prohibited, and it could be enforced arbitrarily.

***T.W. v School District of Philadelphia*, 2003 U.S. Dist. LEXIS 5945 (E.D. Pa. 2003), vacated and remanded to be dismissed as moot, 2004 U.S. App. LEXIS (3rd Cir. 2004); 42 U.S.C.S. § 1983 (First and 14th Amendment) and state law claims**

Free Speech and Due Process Case

T.W. was transferred to a less desirable high school for violating the school district’s “off school grounds” disciplinary provision of the student code of conduct by fighting with another student off school grounds, but threatening to continue the fight at school. The provision stated, in part, that discipline could result for any behavior “off school grounds when the conduct may reasonably be expected to undermine the proper disciplinary authority of the school, the safety of students or staff, and [cause] disruption within the school.” T.W. argued that the policy was unconstitutionally vague under the 14th Amendment. The court disagreed and, furthermore, considered her speech “true threatening speech,” not entitled to First Amendment protection.

In a later decision (2004 U.S. App. LEXIS 14590), in response to TW’s motion to dismiss her appeal and vacate the district court’s judgment, the Third Circuit Court of Appeals vacated the lower court’s judgment and remanded the case to be dismissed as moot: TW had been accepted into college and no longer wished to transfer back to her original school.

***Latour v. Riverside Beaver School District*, 2005 U.S. Dist. LEXIS 35919 (W.D. Pa. 2005); preliminary injunction granted**

Free Speech Case

Latour wrote and recorded in his home four rap songs that contained violent language and mentioned another middle school student, without communicating these songs directly to those people he sang about or to the school. Song titles included “Murder, He Wrote,” “Massacre,” and “Actin Fast ft. Grimey.” School expelled him for two years, arguing that the songs were true threats, defined by the court as those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. According to a December 29, 2006, *Pittsburgh Post-Gazette* article, the school district agreed to pay Anthony Latour a \$90,000 settlement to end his suit. Latour and his parents also filed a federal lawsuit against North Sewickley and Franklin Township police departments alleging false arrest and First Amendment free speech violations. The parties reached a \$60,000 settlement agreement in that case.

***Layshock v Hermitage School District*, 412 F. Supp. 2d 502 (W.D. Pa. 2006) – 42 U.S.C.S. § 1983 (First and 14th Amendments)**

Free Speech Case

Layshock, an academically successful 17-year-old senior taking advanced placement classes, created and posted a crude parodying profile of a principal on MySpace.com. He used his grandmother's computer during non-school hours. Except for a photo of the principal copied from the school's website, he used no school resources to create the parody. When word of the parody leaked, so many students attempted to access the site at school that the school shut down its computer system, causing several classes to be cancelled and interfering with students' ability to use computers for legitimate purposes. The school's computer technology coordinator devoted 25% of his time to dealing with the issue. The school, claiming disruption under *Tinker*, suspended Layshock, barred him from school activities, and placed him in an alternative academic program for students with behavioral problems. The court, which denied the parents' motion for a temporary restraining order and/or preliminary injunction, determined that no First Amendment violation had been established and that there was no proof that the student would be harmed by participating in alternative education. The court found that the student had also apparently violated the school's computer policy. The court expressed no opinion on the due process claims. In a later opinion, (*Layshock v Hermitage School district*, 2006 U.S. Dist. LEXIS 21080 (W.D. Pa. 2006)), however, the court denied the school's motion to dismiss the due process claims.

In a July 10, 2007, decision (496 F. Supp. 2d 587), the Western District ruled for the student on his First Amendment violation claim, finding the school district liable because "there was an insufficient nexus between the student's off-campus conduct and any substantial disruption of the school environment; there were other unflattering profiles of the principal available on the same website, and the profiles were accessible for less than one week before being disabled on school computers."

This case is awaiting an appellate decision by the Third Circuit Court of Appeals.

J.S. v Blue Mountain School District, 2007 U.S. Dist. LEXIS 23406 (M.D. Pa. 2007) – 42 U.S.C.S. § 1983 (First and 14th Amendments)

Free Speech Case

In this case with facts very similar to those in *Layshock*, 14-year-old eighth-grader J.S. and another student created a MySpace.com profile of their principal. The profile, which included a photograph copied from the district's website, indicated that the principal was a bisexual sex addict who "hit on" students and their parents. The site also made disparaging comments about the principal's wife and children. When word of the profile reached the principal, he suspended J.S. for ten days. The parents of J.S. requested a temporary restraining order and preliminary injunction, claiming that her First Amendment right to freedom of speech and their Fourteenth Amendment right to determine how best to raise, nurture, discipline and educate their children had been violated. Stating, "It is not our task to micromanage the school's disciplinary procedure," the court denied their request and noted that "The Defendant may regulate this speech if it substantially disrupts school operations or interferes with the rights of others." Questions

remained about the extent of the disruption caused by the posting. At least the principal and guidance counselor spent time investigating and holding meetings.

In a later opinion on the merits of the case (2008 U.S. Dist. LEXIS 72685), the Middle District, guided by the U.S. Supreme Court's discussion in *Bethel School Dist. v. Fraser*, granted the school summary judgment. The court found that (1) the school did not violate J.S.'s First Amendment rights; (2) the school's policies were not unconstitutionally vague and overbroad; and (3) the school did not violate J.S.'s parents rights. The court noted the following:

[J.S.'s] website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website. Plaintiff created the profile out of anger at the principal for punishment the plaintiff had received at school for violating the dress code. . . J.S. lied in school to the principal about the creation of the imposter profile. Moreover, although a substantial disruption . . . did not occur. . . there was in fact some disruption during school hours. Additionally, the profile was viewed at least by the principal at school and a paper copy of the profile was brought into school. On these facts, and because the lewd and vulgar off-campus speech had an effect on-campus, we find no error in the school administrating discipline to J.S.

This case is on appeal to the Third Circuit Court of Appeals.

Sexting

Sexting, sending nude and/or sexually explicit photographs and messages electronically, if they meet the definition of child pornography under Pennsylvania's crimes code, can result in felony charges for possession of child pornography for those who take, receive and/or forward the photographs. According to a 2008 survey by the National Campaign to Prevent Teen and Unplanned Pregnancy, 20% of teens surveyed had engaged in sexting.

The only court case as of October 2009 which specifically addresses sexting is a Pennsylvania case. In *Miller v Skumanick*, 605 F. Supp. 2d 634, 2009 U.S. Dist. LEXIS 27275 (M. D. Pa. 2009), the federal district court enjoined Wyoming County District Attorney George Skumanick from initiating criminal charges against three juvenile girls who had taken two photographs of themselves. One of the photographs, taken when two of the girls were thirteen years old, showed the plaintiffs from the waist up, each wearing a white, opaque bra. One was speaking on the phone, and the other was making the peace sign with her hand. The other photograph showed the third, slightly older, girl wrapped in a white, opaque towel just below her nude breasts. The two sections of Pennsylvania criminal law at issue in the case are included in their entirety below:

§ 6312. Sexual abuse of children

(a) Definition -- As used in this section, "prohibited sexual act" means sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality,

fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.

(b) Photographing, Videotaping, Depicting on Computer or Filming Sexual Acts -- Any person who causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act is guilty of a felony of the second degree if such person knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed. Any person who knowingly photographs, videotapes, depicts on computer or films a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act is guilty of a felony of the second degree.

(c) Dissemination of Photographs, Videotapes, Computer Depictions and Films --

(1) Any person who knowingly sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or who possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

(2) A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

(d) Possession of Child Pornography --

(1) Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

(2) A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

(e) Evidence of Age -- In the event a person involved in a prohibited sexual act is alleged to be a child under the age of 18 years, competent expert testimony shall be sufficient to establish the age of said person.

(E.1) Mistake as to Age -- Under subsection (b) only, it is no defense that the defendant did not know the age of the child. Neither a misrepresentation of age by the child nor a bona fide belief that the person is over the specified age shall be a defense.

(f) Exceptions -- This section does not apply to any material that is possessed, controlled, brought or caused to be brought into this Commonwealth, or presented for a bona fide educational, scientific, governmental or judicial purpose.

18 Pa.C.S. § 6312

§ 7512. Criminal use of communication facility

(a) Offense Defined -- A person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section.

(b) Penalty -- A person who violates this section shall, upon conviction, be sentenced to pay a fine of not more than \$ 15,000 or to imprisonment for not more than seven years, or both.

(c) Definition -- As used in this section, the term “communication facility” means a public or private instrumentality used or useful in the transmission of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part, including, but not limited to, telephone, wire, radio, electromagnetic, photoelectronic or photo-optical systems or the mail.

18 Pa.C.S. § 7512

Federal Case Law

U.S. Supreme Court

In March 2008, the U.S. Supreme Court denied certiorari in a cyberbullying case: *Wisniewski v Weedsport Central School District*, 494 F.3d 34 (2nd Cir. 2007). The Second Circuit held that the district did not violate the First Amendment by suspending a student who sent, as an instant messaging icon, a violent image calling for the death of a teacher. The appeals court stated, the student’s sending the icon “crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would materially and substantially disrupt the work and discipline of the school.” The icon was prepared off-campus.

Constitutional Considerations



U.S. Constitution Amendment XIV - Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without **due process** of law; nor deny to any person within its jurisdiction the **equal protection** of the laws.

A right to privacy is implicit.

Due Process

Procedural: proper notice, opportunity to be heard, and fair hearing

Substantive: the state or one of its agencies may not deprive a person of life, liberty or property by an act having no reasonable relationship to any proper governmental purpose, or by an act which is an arbitrary exercise of governmental power.

U. S. Constitution Amendment 1:

Congress shall make no law respecting an **establishment of religion**, or prohibiting the **free exercise** thereof; or abridging the **freedom of speech**, or of the **press**; or the **right** of the people **peaceably to assemble**, and to **petition the government for a redress of grievances**.

A right to privacy is implicit.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 21 L.Ed. 2d 731, 89 S.Ct. 733 (1969) - Students do not “shed their constitutional rights to freedom of speech or expression at the school house gate.” Regulating public school students’ speech is generally permissible only if the evidence in the records is sufficient to permit school officials reasonably to forecast “substantial disruption of or material interference with school activities” or “impinge upon the rights of other students.”

Bethel School District No. 403 v. Fraser, 478 U.S. 675, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986) - A student’s “lewd, indecent, or plainly offensive speech” is not protected by the First Amendment and may be regulated.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 21 L.Ed. 2d 731, 89 S.Ct. 733 (1969) - Students do not “shed their constitutional rights to freedom of speech or expression at the school house gate.” Regulating public school students’ speech

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Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 98 L.Ed. 2d 592, 108 S. Ct. 562 (1988) - School-sponsored speech, that speech which “members of the public might reasonably perceive to bear the imprimatur of the school,” may be regulated so long as the regulation is reasonably related to legitimate pedagogical concerns.

Saxe v. State College, 240 F.3d 200 (3rd Cir. 2001) - There is no categorical “harassment exception” to the First Amendment’s free speech clause.

Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243 (3rd Cir. 2002)- “There is no constitutional right to be a bully. On the other hand, confining prohibited speech to that which constitutes ‘harassment’ is not alone sufficient to ensure constitutionality.”

In Morse v. Frederick, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007), its first student-speech case in nearly twenty years, the U.S. Supreme Court ruled that schools are entitled to take steps to safeguard those entrusted to their care from speech that could reasonably be regarded as encouraging illegal drug use. Juneau-Douglas High School officials did not violate the First Amendment by confiscating a 14-foot pro-drug banner, “Bong Hits 4 Jesus,” and suspending the 18-year-old student responsible for it.

Agencies and Laws



Enforces Pennsylvania’s civil rights laws

The **Pennsylvania Human Relations Act (PHR Act)** prohibits discrimination against prospective and current students because of **race, color, sex, religious creed, ancestry, national origin, handicap or disability, relationship or association with an individual with a handicap or disability, use of a guide or support animal, and/or handling or training of support or guide animals.**

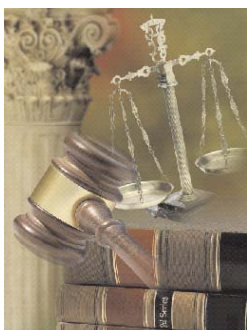
The **Pennsylvania Fair Educational Opportunities Act (PFEO Act)** prohibits discrimination against prospective and current students of postsecondary and career-oriented secondary schools because of **race, religion, color, ancestry, national origin, sex, handicap or disability, and relationship or association with an individual with a handicap or disability.**

The **Pennsylvania Human Relations Act** and the **Pennsylvania Fair Educational Opportunities Act** do not specifically discuss cyberbullying or cyber-harassment as a form of discrimination. The agency would examine allegations in accordance with our own established procedures (based on protected class status) and applicable case law.

Statement re Sexual Orientation/Gender Identity Acts of Bias Adopted October 28, 2002 (in pertinent part):

The Commission . . . opposes discriminatory acts against all individuals, including those who belong to classes not currently protected under the PHR Act or the PFEO Act.

The Pennsylvania Human Relations Commission deplores the use of violence and therefore strongly supports the Ethnic Intimidation and Institutional Vandalism Act (Ethnic Intimidation Act).



Cyberbullying as a Form of Discrimination in Education

Discrimination
Harassment (Cyberbullying) based on protected class
Hostile Education Environment

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) - teacher-to-student sexual harassment

Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) - peer sexual harassment

To prevail in a case of harassment pursuant to the Davis decision, the student must show the following:

- Student is a member of a protected class
- Student was harassed because of his/her protected class status (sexual propositions, racial slurs, etc.)
- An appropriate person with the authority to institute corrective measures on the school's behalf had timely actual knowledge of the sexual harassment
- The school was deliberately indifferent to the harassment, **and**
- The harassment was so severe, pervasive, **and** objectively offensive that it deprived the student of access to educational opportunities or benefits.



The Pennsylvania Office of Attorney General

Civil Rights Enforcement Section

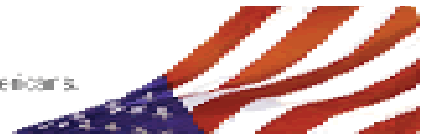
Works with other agencies such as the Pennsylvania Human Relations Commission, federal civil rights agencies and the Inter-Agency Task Force on Civil Tension in providing training and brings actions where case presents an important legal issue of statewide significance.

Child Predator Unit

The Child Predator Unit, created in 2005, uses specially trained agents and prosecutors throughout Pennsylvania to identify and capture online predators. According to Attorney General Corbett, agents and attorneys have created a training program to teach young people and their parents how to avoid being a victim of a sexual predator. Anyone with information about child predators may contact the Attorney General's Child Predator Unit at 1-800-385-1044.



U.S. Department of Education
Promoting educational excellence for all Americans.



The United States Department of Education Office for Civil Rights

Enforces federal laws prohibiting education-related discrimination, including harassment.

Disabilities

Title II of the Americans with Disabilities Act – 42 U.S.C. § 12132 - Prohibits discrimination on the basis of disability by public entities, whether or not they receive federal funding.

Section 504 of the Rehabilitation Act of 1973 – 29 U.S.C. § 794(a) – A student with disabilities may not “by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

Gender (can include GLBT issues)

Title IX of the Education Amendments of 1972 – 20 U.S.C. § 1681(a) - Prohibits sex discrimination: “No person. . .shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”

Race

Title VI of the Civil Rights Act of 1964 – 42 U.S.C. § 2000d - Prohibits discrimination on the bases or race, color, and national origin. “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits or, or be subjected to discrimination under any program or activity receiving federal financial assistance.”



The Pennsylvania Department of Education

Disabilities

The Individuals with Disabilities Education Act (IDEA) 20 U.S.C.S. §1400 *et seq* – frequently combined with other laws in suits.

PaTTAN – Pennsylvania Training and Technical Assistance Network
Information and grievances: Consultline 1-800-879-2301
Office for Dispute Resolution: 1-800-222-3353

The Pennsylvania Department of Education’s Professional Standards and Practices Commission’s Code of Professional Practice and Conduct for Educators:

“Professional educators shall exhibit consistent and equitable treatment of students, fellow educators and parents. They shall respect the civil rights of all and not discriminate on the basis of race, national or ethnic origin, culture, religion, sex or sexual orientation, marital status, age, political beliefs, socioeconomic status, disabling condition or vocational interest. This list of bases of discrimination is not all-inclusive.” 22 Pa. Code § 235.4(b) (4).

Pennsylvania Legislation

Bullying Policy

In July 2008, the Pennsylvania Legislature passed, and Governor Rendell signed, legislation requiring school entities to adopt policies related to bullying or to update their existing policies and incorporate these policies into their student codes of conduct by January 1, 2009. Policies must identify the appropriate school personnel to receive reports of bullying and must include disciplinary consequences for bullying. They may provide for prevention, intervention and education programs.

The law defines bullying as follows: (1) an intentional electronic, written, verbal or physical act, or a series of acts; (2) directed at another student or students; (3) which occurs in a school setting; (4) that is severe, persistent or pervasive; and, (5) that has the effect of doing any of the following: (i) substantially interfering with a student's education; (ii) creating a threatening environment; or (iii) substantially disrupting the orderly operation of the school. Under the law, a school setting is defined as inside the school, on school grounds, in school vehicles, at designated bus stops, or at any activity sponsored, supervised or sanctioned by the school.

The law allows school entities to define bullying to encompass acts that occur outside a school setting if those acts meet the following criteria: (1) an intentional electronic, written, verbal or physical act, or a series of acts; (2) directed at another student or students; (3) that is severe, persistent or pervasive; and, (4) that has the effect of doing any of the following: (i) substantially interfering with a student's education; (ii) creating a threatening environment; or (iii) substantially disrupting the orderly operation of the school.

Senate Bill No. 1121 Printer's No. 1500

This bill, referred to the Judiciary Committee on October 19, 2009, would amend the Pennsylvania crimes code to cover "sexting." A copy of the bill will be distributed separately.

Pennsylvania Criminal Law

Harassment - Section 2709 of the Pennsylvania Crimes Code, 18 P.S. Section 2709

"A person commits the crime of harassment," which is a summary offense, "when, with intent to harass, annoy or alarm another, the person. . .communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures; Communicates means "Conveys a message without intent of legitimate communication or address by oral, nonverbal, written or electronic means, including telephone, electronic mail, Internet, facsimile, telex, wireless communication or similar transmission."

Stalking - Section 2709.1 of the Pennsylvania Crimes Code, 18 P.S. Section 2709.1

"A person commits the crime of stalking when the person. . .repeatedly communicates to another person under circumstances which demonstrate or communicate either an intent to place such other person in reasonable fear of bodily injury or to cause substantial emotional distress to such other person." Communicates means "To convey a message without intent of legitimate communication or address by oral, nonverbal, written or electronic means, including telephone, electronic mail, Internet, facsimile, telex, wireless communication or similar transmission." Depending on the specific circumstances, stalking can be a first-degree misdemeanor or a third-degree felony.

Hate Crimes Enhancement - If the crime was motivated by an offender's bias against an individual's or a group's protected class, Ethnic Intimidation, with an additional criminal penalty, can be charged.

Hate Crimes - 18 Pa. C.S. Section 2710

Pennsylvania's hate crimes law is the Ethnic Intimidation Law. When certain crimes against people or property are committed, and there is evidence that these crimes are motivated by hatred toward the race, color, religion or national origin of another individual or group of individuals, an additional criminal offense, Ethnic Intimidation, with an additional criminal penalty can be charged.

Frequently used possible underlying offenses: simple assault, aggravated assault, harassment, stalking, and criminal mischief.

United States Legislation

Two cyberbullying bills, Representative Linda Sanchez's "Megan Meier Cyber Bullying Prevention Act" and Representative Debbie Wasserman Schultz's "Adolescent Web Awareness Requires Education Act (AWARE)," have been introduced in the House of Representatives. The Megan Meier bill would criminalize cyberbullying. AWARE would provide \$125 million in grants per year to develop Internet crime awareness and cybercrime prevention programs to educate parents and children, support prevention, and develop public education campaigns to promote awareness. The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, which both the House and the Senate have passed, will, with the President's signature, expand the federal hate-crimes statute to include sexual orientation and gender identity in addition to actual or perceived race, color, religion, national origin, gender, and disability.



Civil Right of Action

42 Pa.C.S.A. § 8309. Civil rights violations.

A person who suffers personal injury or property damage related to ethnic intimidation may file a civil suit against the perpetrator for an injunction, general and special damages, damages for emotional distress, punitive damages, reasonable attorney fees and costs, and/or other appropriate civil or equitable relief. In addition, the District Attorney of the county in which the violation occurred or the Attorney General, after consulting with the District Attorney, may file a civil suit for redress on behalf of others.



Communications Decency Act

Section 230 of the federal Communications Decency Act (CDA) of 1996, 47 U.S.C.S. Section 230, shields from most civil liability providers or users of interactive computer services. Section 230 (c) (1) states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” Section 230(e)(3) extends protection to state law causes of action: “No cause of action may be brought and no liability may be imposed under any state or local

law that is inconsistent with this section.” The Act has no effect on the enforcement of federal criminal law (230(e)(1)), intellectual property law (230(e)(2)), state law that is consistent with the CDA (230(e)(3)), nor the Electronic Communications Privacy Act of 1986 as amended or any similar state law (230(e)(4)).

The restriction on civil liability for any third-party statements has been interpreted by courts to apply to civil rights law as well as to state-law tort suits. Title II of the Civil Rights Act of 1964, 42 U.S.C.S. Section 2000a, provides that “all persons shall be entitled to full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation... without discrimination or segregation on the ground of race, color, religion, or national origin.” In a 2003 case, the United States District Court for the Eastern District of Virginia held that an American Online (AOL) subscriber’s Title II claim failed, in part, because of CDA immunity. *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532, 2003 U.S. Dist. LEXIS 8242 (E.D. Va. 2003), aff’d 2004 U.S. App. LEXIS 5495 (4th Cir. Mar. 24, 2004). The court specifically discounted plaintiff’s argument that Section 230 immunity does not apply to claims brought under federal civil rights statutes.

To date, however, there has been no court decision that has specifically addressed the possible liability of a provider or user of an interactive computer service pursuant to the Pennsylvania Human Relations Act or the Pennsylvania Fair Educational Opportunities Act with respect to third-party statements posted by the provider or user.



Harassment Prevention Strategies and Tips Based on Case Law

- Set precedent
- Discipline the bully, positively if possible; not the bullied person
- Respond similarly to reports regardless of basis
- Follow through and take ongoing remedial action to prevent reoccurrence
- Be especially vigilant in upper grades and in non-classroom areas
- Start early
- Develop and enforce clear written policies prohibiting unlawful harassment
- Maintain a record of issues which have caused disruption or have infringed upon the rights of students
- Train and retrain faculty and staff to set a good example
- Provide peer mediation training and services (if the process is voluntarily selected by all participants; the victim has full knowledge of his or her right for the formal process; and the school determines that peer involvement is appropriate)
- Provide social worker mediation
- Offer diversity and anti-bullying seminars
- Counsel the bullies and the bullied
- Discipline employee harassers appropriately
- Avoid disparate discipline based on any protected class
- Protect the bullied person from reprisals from the aggressor and others

Additional Resources

SPIRIT (Student Problem Identification and Resolution of Issues Together).

The following administrators are willing to discuss their schools' SPIRIT programs:

Deb Marteslo, Assistant Principal
Cedar Cliff High School, Camp Hill
717-737-8654

Brian Ginter, Principal
Warwick High School, Lititz
717-626-3700, extension 3740

PROGRESS (Partnerships for Restorative Outcomes, Growth, Redemption and Enhancement of Social Skills), based on a restorative justice model, is a Bucks County community supervision program for children from 12 to 17 who become involved with juvenile court. Telephone number: 215-783-6389.

Some student strategies used by schools to decrease bullying:

Mediators serve as mentors to younger students and forward any bullying concerns to school officials.

At the beginning of the school year, students sign no-bullying contracts.

Bully boxes or hotlines are used to allow students to report bullying anonymously.



Web sites

Pennsylvania Human Relations Commission

www.phrc.state.pa.us

United States Department of Education, Office for Civil Rights

<http://www.ed.gov/about/offices/list/ocr/index.html?src=oc>

Overview of rights

<http://www.ed.gov/about/offices/list/ocr/know.html>

Filing a complaint

<http://www.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt>

Pennsylvania Office of Attorney General, Civil Rights

<http://www.attorneygeneral.gov/consumers.aspx?id=230>

Pennsylvania Department of Education

http://www.pde.state.pa.us/special_edu/cwp/view.asp?a=177&Q=48604&g=214&special_eduNav

www.pattan.net

Filing a complaint against a professional educator

<http://www.pde.state.pa.us/k12/cwp/view.asp?A=11&Q=54337&teachingNav=%7C1906%7C>

Cyberbullying is an evolving area of the law. Because of the complexities, anyone needing specific advice should contact his or her attorney.