

Legally Speaking

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Off Campus Cyberbullying

By Laurie Dart, Staff Attorney

A recent amendment to Florida law requires that school districts across the state adopt a policy authorizing schools to punish students for cyberbullying - even if the cyberbullying occurs from the student's home computer. School Board Policy 5517.01 is in the process of being amended in accordance with this statutory mandate. The proposed policy amendment expands the definition of "bullying" to specifically include "cyberbullying" which it defines as follows:

"Cyberbullying" means bullying through the use of technology or any electronic communication, which includes, but is not limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic system, photoelectronic system or photooptical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyberbullying includes the creation of a webpage or weblog in which the creator assumes the identity of another person, or the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation cre-



Mission Statement

The mission of the School Board Attorney and Staff Attorney Offices is to provide the highest quality legal services to the Pinellas County School Board, the superintendent and the district by ensuring timely and accurate legal advice and effective representation on all legal matters.

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Welcome Heather Wallace

By David Koperski, School Board Attorney

We are very happy to publicly welcome Heather Wallace as the new Assistant School Board Attorney. Heather started in late spring and has proved a great asset to the legal office and the district since. She comes to us from Lee County School District, where she served as one of its attorneys for more than seven years. Prior to that, she practiced law in the private sector, focusing on real estate and corporate matters. Heather will work on a variety of legal issues and has particular expertise in contract issues, charter schools and real estate. With Heather's arrival, we are again at full strength in the Legal Department and look forward to providing the highest level of legal services available as we move forward in the district. ■

Recent Ruling on Student Free Speech

By Heather Wallace, Assistant School Board Attorney

A federal district court in Michigan has recently ruled that removing a student from class for making religious-based anti-gay comments violated that student's First Amendment right to freedom of speech. In Glowacki v. Howell Public School District, the court relied on the standard established in 1969 in the Tinker v. Des Moines Independent Community School District case, to find that the student's speech did not cause a substantial disruption, or impinge on the rights of other students, so it was protected.

In 2010, some students and staff at a high school recognized Anti-Bullying Day, an event to raise awareness of bullying based on sexual orientation. A number of students and faculty members were wearing purple in order to show support for the cause. An economics teacher at the school, Jay McDowell, who was wearing a purple t-shirt, decided to engage students in a discussion about bullying and show a video about an individual who committed suicide after being bullied based on his sexual orientation. As the students entered for his sixth period class, he asked one of them to remove a confederate flag belt buckle. As he began his discussion of the purple t-shirt, a student, Daniel, asked why he had required the student to remove the belt buckle

if students and teachers could wear purple shirts. In the exchange that ensued, Daniel indicated that he did not accept gays because he was Catholic and he felt that the purple t-shirts discriminated against Catholics. McDowell responded that it was not appropriate in a classroom setting to state that he did not accept gays and ordered him to go to the office. When questioned by other students as to why Daniel was not allowed to exercise free speech, the teacher "explained that a student cannot voice an opinion that creates an uncomfortable learning environment for another student." After an investigation, the district expunged any reference to Daniel's referral and suspended McDowell without pay for one day and ordered him to attend training on the First Amendment. McDowell grieved the suspension and his penalty was reduced. Daniel, his mother, and his younger brother (also a student at the school) filed suit against the district and McDowell alleging that the district and teacher had violated the student's First Amendment free speech rights and rights of equal protection under the Fourteenth Amendment.

The Court applied the standard from Tinker which indicates that schools may regulate student speech when it substantially disrupts school activities or impinges upon the rights of

other students. To meet this standard, a desire to avoid discomfort that results from an unpopular viewpoint is not sufficient. The Court determined in this case that Daniel's speech did not impinge upon the rights of any student because it did not identify a particular student for attack "but simply expressed a general opinion – albeit one that some may have found offensive." It was also determined that there was no substantial disruption of school activities. In light of the fact that Daniel's speech was protected pursuant to the Tinker analysis, the Court found that McDowell violated Daniel's First Amendment rights by engaging in viewpoint-based discrimination. McDowell was not entitled to qualified immunity as a government official as McDowell should have known that Daniel's speech was protected and could not serve as the basis for discipline. Because he should have known his conduct was unlawful, he was not entitled to immunity. McDowell was ordered to pay \$1.00 in symbolic damages to Daniel. The Court dismissed the claim filed by Daniel's brother who indicated his right to free speech was chilled by the treatment of Daniel. His own testimony indicated that he did not refrain from saying or doing anything at school as the result of these events. ■

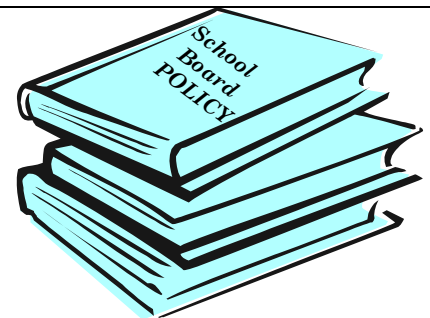
SNAPshot

By David Koperski, School Board Attorney

This periodic feature of *Legally Speaking* summarizes new and amended School Board policies adopted since the last SNAPshot. All adopted policies are collected in the official School Board Policy Manual, which can be found on the district website by clicking on the "District Bylaws and Policies" link under the

"About Us" tab at the top of the main page.

Since our last update, the Superintendent has recommended and the School Board has adopted several new and amended policies. The following is a brief description of some of the more significant ones.



Policy 2130 – DISTRICT MONITORING AND ADVISORY COMMITTEE

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Off Campus Cyberbullying

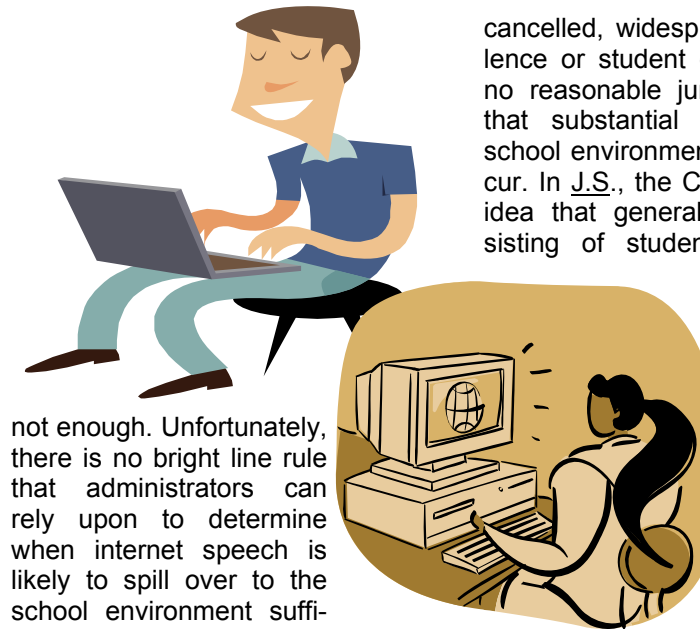
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ates any of the conditions enumerated in the definition of bullying. Cyberbullying also includes the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in the definition of bullying.

While the expansive language appears to extend the scope of the school district's jurisdiction to regulate speech over the internet and specifically on social media sites, in reality, the statutory change and policy amendment merely codify the First Amendment's free speech protection discussed in an article in the Spring 2012 edition of *Legally Speaking* entitled "Student Use of Social Network Sites." As amended, the policy reaffirms that bullying which occurs "through the use of data or computer software that is accessed at a non-school related location, activity, function or program or through the use of technology or an electronic device that is not owned, leased or used by a school district or school" can be sanctioned only if it "substantially interferes" with the victim's educational activities or services or "substantially disrupts the education process or orderly operation of the school."

What is Substantial Disruption or Interference?

Cyber speech may be rude, offensive or even hateful but absent the requisite substantial disruption of the educational process or operations of the school, courts have not upheld a school district's attempt to discipline the student. As stated by one court, the "emotive impact" that the speech has on the listener, without more, is



not enough. Unfortunately, there is no bright line rule that administrators can rely upon to determine when internet speech is likely to spill over to the school environment sufficiently enough to meet the "substantial disruption or interference" test. The United States Supreme Court had an opportunity to weigh in to help define a school district's ability to discipline students for off campus internet speech but declined to do so following the appeal of two decisions from the Third Circuit Court of Appeals involving student speech over the internet. See Layshack v. Hermitage School District, 650 F.3d 205 (3rd Cir. 2011) and J.S. v. Blue Mountain School District, 650 F.3d 915 (3rd Cir. 2011). In each of these cases, the student created a fictitious MySpace profile mocking the school principal. The postings took place off school grounds, after school hours and on personal computers. Both students were suspended and in each case the parents challenged the suspension on First Amendment free speech grounds. Following tortured procedural histories, the appellate court ultimately ruled in favor of the students in each case.

The facts of Layshock, J.S., and some other cases throughout the country are instructive because they provide some insights into the type of disruption which would likely not meet the "substantial disruption or interference" test. For example, in Layshock, the lower court stated that absent evidence of classes being

cancelled, widespread disorder, violence or student disciplinary action, no reasonable jury could conclude that substantial disruption to the school environment was likely to occur. In J.S., the Court dismissed the idea that general "rumblings" consisting of students talking during class or in the hall amounted to a substantial disruption. Likewise, the court found that the cancellation of a small number of student counseling appointments so that the guidance counselor could

participate in a meeting with J.S.'s parents following the posting, was insufficient to meet the standard. Other courts have agreed that the time spent by school administrators and teachers investigating complaints, while a disruptive diversion from the educational mission, is not sufficient to sanction student discipline for off campus speech.

Although discipline of a student involved in off-campus cyberbullying may not be an available remedy, the safety and well being of the student who was victimized is the real purpose of the law and the school board policy. If the results of the investigation reveal that the act of bullying occurred but is outside of the scope of the district, (and assuming the speech is not believed to be criminal in which case law enforcement should be notified), the results of the investigation must be shared with the parents/legal guardians of all the students involved and a plan developed to protect the victim against future acts of bullying.

If you have any questions, please call Joan Reubens in the Prevention Office - 588-6348 or the Legal Department - 588-6221. ■

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SNAPshot

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(DMAC). This policy was amended to update DMAC practices and add certain provisions to strengthen DMAC's ability to perform its functions. DMAC is a committee that was formed as a result of the district's long-standing desegregation lawsuit that was settled in 2000, when the district was awarded "Unitary Status" with certain on-going obligations. "Unitary Status" means that the district met the legal requirements of desegregation. DMAC reviews district data relating to student achievement, transportation, hiring and other areas, and formulates recommendations to the school board in an effort to ensure the district remains in unitary status. The policy changes include the requirement of an annual joint meeting between DMAC and the school board, the provision of DMAC meetings throughout the county, as opposed to just at the administration building, and more detailed trainings for DMAC members on the history of desegregation and the role of DMAC.

POLICY 7300 – PROPERTY CUSTODIANSHIP AND INSURANCE. This policy was amended to clarify the procedures for reimbursement for lost or damaged property in an employee's custody. All employees should be aware of their obligations for the safekeeping of district property in their possession. Under this policy, employees may be held personally responsible for District property assigned to them as part of their job duties or on a short-term basis, such as checking out a piece of equipment to use at home for work purposes. If an employee does not take reasonable

measures to ensure the safety of this property, the district may seek reimbursement from the employee. However, there is a review committee that will review all of the facts before a final decision is made. For example, assume an AP takes a laptop computer home because she needs it for training at another school the next morning. The AP drives home for the evening, but leaves the laptop in plain sight on the passenger seat of the car and leaves the car unlocked on a city street overnight. This action would most likely be found to be unreasonable and the AP would be responsible to the district for the loss. Each case is unique and the review committee would review the facts to determine reasonableness.

POLICY 5517.01 – POLICY AGAINST BULLYING AND HARASSMENT. This policy is not yet final, having only gone before the school board for the first of two readings, but I mention it here since it is an important issue for the school year start and relates to the article in this issue written by Laurie Dart. This policy amendment adds "cyberbullying" to the policy such that schools would have the obligation and power to investigate and respond to instances of on-line bullying, including those occurring off of school grounds so long as certain impacts are felt in the school environment. The issue of off-campus cyberbullying raises various legal issues, including First Amendment Free Speech and the jurisdiction of schools to discipline students for words spoken (or typed) off of school grounds. Ms. Dart explores this topic in more depth in another article in this issue, and in a related article in Volume XII, Issue 3 "Student Use of Social Network Sites". All prior issues of *Legally Speaking* are on the District's website under "About Us" – "Legal Services" – "*Legally Speaking* Newsletter." ■

United States Constitution

*Amendment XIV
Section 1*

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.