

School Response to Cyberbullying and Sexting: The Legal Challenges

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The wonderful new interactive communication technologies that are immersing and benefitting our society--are also causing some major headaches for school leaders. Young people are engaging in what is commonly called "cyberbullying"--the use of electronic communication technologies to intentionally engage in repeated or widely disseminated acts of cruelty towards another that results in emotional harm. The newly emerging issue of sexting--sending nude sexy issues via cell phone texting--presents ever more challenging concerns. These two concerns clearly overlap--that is distributing nude images is one form of cyberbullying.

There is limited direct case law to provide guidance in this area. This document will present what the author, a former attorney who has been working in the field of youth risk online since 1995, considers to be legal standards that are supported by a reasonable analysis of existing case law. This is an educational document, not legal guidance. Districts must ensure appropriate review by their legal counsel. The author is willing to discuss these issues with such counsel.

Statement of Arguable Legal Standards

This document will provide an analysis to support the following legal standards:

- School officials have the authority to respond to off-campus student speech if that speech has caused, or there are particular reasons to believe it could cause, a substantial disruption at school or interference with the rights of students to be secure.
 - This disruption or interference could include violent physical or verbal altercations between students, significant interference with the right of a student to receive an education and feel safe at school, or significant interference with instruction or school operations.
- The disruption or interference must impact students and interfere or potentially interfere with their right to be safe at school and receive an education.
 - If the off-campus speech has targeted a staff member, the only time a school official has the authority to respond is if the off-campus speech has caused, or threatens, a substantial disruption of school activities that will interfere with the ability of the school to deliver instruction. The fact that a school official must take the time to investigate or that material posted is highly offensive does not likely give rise to the authority to formally respond with discipline--although a range of informal responses, including talking with the student and notifying the parents, may be appropriate.¹
- School officials do not have the responsibility to monitor or supervise student's off-campus or personal communications--and, in fact, this would be impossible.
 - But school officials likely do have a responsibility to respond to situations involving off- and on-campus harmful interactions that have created a hostile environment at school when they are informed about the situation.
- School officials have the authority and responsibility to respond to any harmful or inappropriate speech through the District Internet system based on pedagogical reasons, if such speech is lewd and contrary to the educational mission of the school, or has caused, or threatens a substantial disruption at school or significant interference with the rights of students to be secure.

¹ As will be discussed below, this standard may be changed in the context of an upcoming decision by the Third Circuit Court of Appeals. This article will be rewritten as soon as that decision has been released.

- School officials have the authority and responsibility to respond to any harmful or inappropriate speech of students using cell phones or other personal digital devices at school if those actions are inconsistent with the school's educational mission or if the speech has caused, or threatens, a substantial disruption at school or interference with the rights of students to be secure.
- To search the records held on a student's cell phone or other personal digital device, a school official must have a reasonable suspicion that the records would reveal that a law or school policy has been violated and that search is likely to turn up evidence of that violation. The extent of the search must be reasonably related to the circumstances which justified the search in the first place. The simple fact that a device is visible in school when it is not supposed to be will not, without more, justify searching all of the records on that device.
 - However, state wiretapping laws may impact the authority to search. These laws vary by state. School districts should consult with their legal counsel for guidance on the application of their state's wiretap law on a student's personal communication device.
- The possession and distribution of a nude image of a minor may constitute a federal and state crime. There are no exceptions in these statutes provided for school officials, thus school officials face the potential of prosecution. This is a concern that must be addressed through the development of an investigation protocol that has been approved by the local district attorney.

Historical Framework of Free Speech

It is helpful to frame this discussion with an analysis of the historical underpinnings of the free speech provision in the First Amendment. According to Levy, in his excellent book, *The Emergence of a Free Press*, it is generally accepted that the framers of the First Amendment were thinking in terms of the English common-law notion of freedom of speech when they adopted language that prohibited laws "abridging the freedom of speech, or of the press."² The English common-law notion of freedom of speech prohibited prior restraints on the press, but did not preclude civil or criminal prosecution, after the fact, for obscene, blasphemous, libelous, or seditious speech.³

Levy noted that there is an alternative perspective on the historical basis for freedom of speech. This is the natural rights philosophy advocated by John Locke, who was revered by many of the early leaders. John Trenchard and Thomas Gordon writing under the nom de plume "Cato" addressed the issue of freedom of speech as follows:⁴

Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech; Which is the Right of every Man, as far as by it does not hurt and controul the Right of another; and this is the only Check which it ought to suffer, the only Bounds which it ought to know. "

The essential difference in these two philosophies is that under the English common law approach, government has the authority to determine what speech is contrary to the public good, including such social values as order, morality, and religion. Whereas under the natural rights philosophy, the role of government is to enforce the fundamental rights of other individuals, if those rights are injured by the exercise of speech by another.

Supreme Court Student Free Speech Cases

While neither the Supreme Court, nor lower Federal Courts, have referenced this historical basis in cases addressing school authority in the context of student speech, it appears that the courts have created standards that are grounded in both of these philosophies. Understanding this distinction can assist in gaining a better understanding of the situations under which school officials have the constitutional authority to formally respond, including imposing a disciplinary consequence, to off-campus student speech.

² Leonard W. Levy, *The Emergence of a Free Press* 220-81 (1985).

³ William Blackstone, 4 *Commentaries on the Laws of England* 151-52 (1783 ed.) (reprint ed. 1978).

⁴ *Of Freedom of Speech*", No 15, Feb 4, 1720, in John Trenchard and Thomas Gordon, *I Cato's Letters: Essays on Liberty, Civil and Religious* 96 (reprint ed. 1971)

The landmark case involving student free speech rights is the case of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*⁵ *Tinker* involved a group of high school students who decided to wear black armbands to school to protest the Vietnam War. The Court began its opinion by stating that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁶ However, the Court acknowledged “the special characteristics of the school environment” by permitting school officials to prohibit student speech if that speech “would substantially interfere with the work of the school or impinge upon the rights of other students,” including the right “to be secure.”⁷

The decision in *Tinker* appears to be grounded in the natural rights analysis, balancing student right to speech against the rights of other students to receive an education and be safe.

The Supreme Court’s next student speech case was *Bethel School District No. 403 v. Fraser*.⁸ Fraser made a speech before a high school assembly that presented “an elaborate, graphic, and explicit sexual metaphor” and was suspended.⁹ The Supreme Court held that the school district acted “entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.”¹⁰

The Court stressed that the purpose of public education was to “prepare pupils for citizenship in the Republic” and indicated that to do so it “must inculcate the habits and manners of civility.”¹¹ However, it is important to note that in a concurring opinion, Justice Brennan noted that:¹²

(I)f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.

In *Hazelwood Sch. Dist. v. Kuhlmeier*, the Supreme Court held that schools are able to exercise greater control over speech that appears to be school-sponsored and that the *Tinker* substantial disruption standard does not apply in such situations.¹³ School officials are able to exercise editorial control over student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. It is important to note that some states have enacted student free press laws that have pulled back on school district authority.

Note that in *Fraser* and *Hazelwood*, the Court appeared to have followed the English common law standard indicating that when students are in school school officials have the authority to determine what student speech was contrary to the public good, including such social values as order and morality.

Additional insight can be derived from the most recent Supreme Court student speech case, *Morse v Frederick*.¹⁴ *Morse* involved a cryptic, supposedly pro-drug use, statement, “Bong hits 4 Jesus,” on a banner raised by a student across the street from a school during a time when students had been released to watch a parade for the Olympic torch. In a split 5-4 decision, the Court ruled that public school officials may restrict student speech at a school event when the speech is reasonably viewed as promoting illegal drug use. The Court specifically rejected the argument advanced by the petitioners and school leadership organizations that the First Amendment permits school officials to censor any speech that could fit under some definition of offensive or might interfere with a school’s educational mission. Instead, the focus of the Court was on the student safety concerns.

Despite questions about the intent of the language on the banner, the Court clearly supported the perspective that the principal’s interpretation of the banner as advocating illegal drug use was valid. The Court described, in extensive detail, the concerns related to drug abuse by young people. The Court cited statistics that documented the fact that this was a serious problem. The Court further discussed the state and federal efforts directed towards address drug abuse and noted the important role schools play in addressing this concern.

5 393 U.S. 503, 507 (1969).

6 Id. at 506.

7 Id. at 508 and 509.

8 478 U. S. 675 (1986).

9 Id., at 678.

¹⁰ Id. at 685.

11 Id. at 681 (citations omitted).

12 Id. at 688 citations omitted.

13 484 U.S. 260 (1988).

14 551 U. S. ____ (2007).

The manner in which the Supreme Court described the concerns related to student drug use and the initiatives that have been established to address this concern could easily be emulated in the context of the research-documented harm inflicted upon students by bullying and cyberbullying. Research is unequivocal that bullying and cyberbullying can lead to severe emotional distress, school failure and avoidance, school violence, and even youth suicide. In light of these well-documented concerns most states and almost all school districts have adopted bullying prevention policies.

The importance of the focus on student safety in the *Morse* case is strengthened by the comments made by Justice Alito in his concurring opinion:

(A)ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. ... During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.

In most settings, the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence. ... But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, *Tinker's* "substantial disruption" standard permits school officials to step in before actual violence erupts.

It is also important to view the issue of student free speech rights in the context of students' rights to receive an education. As the Court said in *Brown v. Board of Education*:¹⁵

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Thus, the *Morse* opinions provide strong support for the belief that when faced with speech that by its very nature can be demonstrated to significantly interfere with the safety of students or could potentially cause violence, the Court will support the authority of school officials to effectively respond to such speech. If a district has been legally challenged in a situation involving discipline imposed on a student who has engaged in off-campus attack on another student, emulating the manner in which the Supreme Court outlined the student safe concerns in *Morse* and directly referencing this, as well as Justice Alito's language, as the foundation for a defense is highly advised.

Legal Analysis of Bullying Prevention Policies

Further insight into how the *Tinker* standard should be applied in the context of bullying comes from two important Third Circuit cases that specifically addressed discrimination and harassment policies.

Saxe v. State College Area School District was written by then-Judge Alito whose language was quoted above.¹⁶ The State College Area School District's anti-harassment policy had been challenged on the basis that it was overbroad and could impact speech that someone might find merely offensive. In discussing various provisions of the policy, Alito noted:¹⁷

We agree that the Policy's first prong, which prohibits speech that would "substantially interfer[e] with a student's educational performance," may satisfy the *Tinker* standard. The primary function

¹⁵ 347 U.S. 483 (1954).

¹⁶ 240 F.3d 200 (3rd Cir. 2001).

¹⁷ Id. at 217.

of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment.

Note specifically the use of the term “a” student which leads to the presumption that speech that interferes with the rights of any student, not the school or school activities, can be restricted. Further, Alito appeared to be drawing a close connection between the two prongs of *Tinker*, essentially stating that speech that substantially interferes with a student’s education constitutes a substantial disruption. Another part of the school district’s policy was found to be overbroad and potentially interfering with protected speech that some might find to be offensive.

In a subsequent Third Circuit case, *Sypniewski v. Warren Hills Regional Board of Education*, which also addressed the constitutionality of school’s anti-harassment policy, the court quoted with approval the new policy language adopted by the State College Area School District after the prior decision:¹⁸

The term "harassment" as used in the Policy means verbal, written, graphic or physical conduct which does or is reasonably believed under the totality of the circumstances to 1. substantially or materially interfere with a student’s or students’ educational performance; and/or 2. deny any student or students the benefits or opportunities offered by the School District; and/or 3. substantially disrupt school operations or activities; and/or 4. contain lewd, vulgar or profane expression; and/or 5. create a hostile or abusive environment which is of such pervasiveness and severity that it materially and adversely alters the condition of a student’s or students’ educational environment, from both an objective viewpoint and the subjective viewpoint of the student at whom the harassment is directed. The term "harassment" for purposes of this Policy does not mean merely offensive expression, rudeness or discourtesy; nor does the term "harassment" mean the legitimate exercise of constitutional rights within the school setting. The School District recognizes there is a right to express opinion, ideas and beliefs so long as such expression is not lewd or profane or materially disruptive of school operations or the rights of others.

The court in *Sypniewski* also affirmed the rights of students to attend school in an environment free from abuse, stating:¹⁹

Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to prevent. There is no constitutional right to be a bully. ... Schools are generally permitted to step in and protect students from abuse.

The importance of the “subjective” and “objective” language in the new State College School District policy relates to an additional discussion in the *Saxe* case. Referring to a Supreme Court case related to finding a hostile environment in the workplace, Alito noted:²⁰

(I)n order for conduct to constitute harassment under a "hostile environment" theory, it must both: (1) be viewed subjectively as harassment by the victim and (2) be objectively severe or pervasive enough that a reasonable person would agree that it is harassment. ... The Court emphasized that the objective prong of this inquiry must be evaluated by looking at the "totality of the circumstances." "These may include," the Court observed, "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

From an evidentiary standpoint, school officials would be well-advised to consider any situation from both the subjective and objective perspective: What evidence is there that an environment has been created by a student’s actions which is of such pervasiveness and severity that it materially and adversely alters the condition of another student’s educational experience, from both an objective viewpoint and the subjective viewpoint of the student at whom the aggression is directed?

Off-Campus Online Speech Cases

So far, Federal Court decisions related to a school disciplinary consequence imposed on a student related to off-campus online speech have been decided under the *Tinker* standard, and have rejected the

18 307 F.3d 243 (3rd Cir. 2002).

19 Id. at 264

20 Supra at

Fraser standard. It should be noted that all but one of these cases, which will be discussed below, have involved student speech directed at a school staff member.

In these cases, school officials have set forth arguments that school officials should have the authority to respond to student off-campus speech grounded in the objective of serving their educational mission, a *Fraser*-based argument, or that there was a substantial disruption at school, a *Tinker*-based argument. Organizations such as the American Civil Liberties Union argue that school officials have no authority to respond to off-campus student speech whatsoever.²¹

In early cases, the Courts discussed whether the *Fraser* or *Tinker* standard was appropriate, declined to apply the *Fraser* standard because the student was off-campus, and applied the *Tinker* standard--but did not find the requisite substantial disruption.²² More two recent cases in the Second Circuit, the Court applied the *Tinker* standard and found there to be substantial disruption.²³

Currently, this issue is under review by the full Third Circuit Court of Appeals in two cases: *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District*.²⁴ On Feb. 4, 2010, two separate three-judge panels of the Third Circuit Court of Appeals issued conflicting opinions in the cases. Both involved the creation of an offensive profile on a social networking site that was directed at the school principal. The losing parties in both cases asked the full court to rehear the cases. This decision has not yet been issued.

In *Layshock*, the District Court declined to apply the *Fraser* standard and relied on the *Tinker* standard, but failed to find a substantial disruption caused by the speech. At the Circuit Court level, the school district conceded that there was not a sufficient nexus between the profile and any disruption on campus. Instead, the school district argued that there because the speech was aimed at the school community, *Layshock* took a photograph from the district site and accessed the profile from school, and it was foreseeable that the speech would come to the attention of the school community, that the case should be evaluated under the *Fraser* standard. The three-judge panel rejected this argument.

In *J.S.*, the three-judge panel relied on *Tinker* but did not find any actual disruption. However, because the profile featuring the principal and alluded to his engagement in sexually inappropriate behavior and illegal conduct, two judges determined that it was reasonably foreseeable that the profile threatened to substantially disrupt the school because other students and parents might question the principal's conduct and his fitness to serve as a principal. In a dissenting opinion, the third judge argued that the facts did not support the conclusion that a forecast of substantial disruption was reasonable. This judge compared the foreseeable impact of the student's private profile that set forth allegations that were not credible to the potential disruption in the *Tinker* case related to wearing of armbands at school to protest an unpopular war. This judge indicated that if the apprehension of disruption related to the armbands was not sufficient to overcome the students' rights of freedom of speech, any apprehension related to the impact of this profile certainly was not sufficient.

The full court decision in these two cases will be helpful, but will only impact the guidance set forth in this article if the Court adopts the argument set forth by the ACLU, that the school district has no authority whatsoever to respond to student off-campus speech. This is considered unlikely. The following discussion is premised in the likelihood that *Fraser* does not apply, that *Tinker* does, and that to meet the *Tinker* standard, school districts must be prepared to demonstrate that a substantial disruption or significant interference has occurred or is clearly foreseeable.

Applying *Tinker* to Student Speech

It is appropriate to consider cases where the court has applied the *Tinker* standard to student speech, both on and off-campus to determine what kinds of situations have been found to meet this standard. If *Tinker* is the standard, the application of *Tinker* should not be dependent on the geographic origin of the speech.

21 The briefs submitted in the *Layshock* case that can all be found on this page demonstrate the manner in which these cases are argued: <http://www.aclupa.org/legal/legaldocket/studentsuspendedforinterne.htm>

22 Eg. *Beussink v. Woodland R-IV School District*, 30 F.Supp. 2d 1175 (E.D. Mo. 1998); *Emmett v. Kent School District*, 92 F. Supp. 2d 1088 (W.D. Wa. 2000).

23 Eg. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d. Cir 2007); *Doninger v. Niehoff*, ___ F.3d ___ (2d Cir. 2008).

24 Duffy, S.P., (June 04, 2010) 3rd Circuit Mulls Student Suspensions for MySpace Postings. Law.com. <http://www.law.com/jsp/article.jsp?id=1202459201824>

One line of lower court cases has focused on school dress code issues, such as T-shirts or other items worn by students in school. The courts have followed a consistent approach to analysis of these cases.²⁵ If the material is considered offensively lewd, or indecent, the courts generally apply the *Fraser* standard. Otherwise, the courts have applied *Tinker*. The decision in these latter cases has been dependent on the ability of the district to present facts that establish a past history of discord related to the symbol or slogan that could portend the potential of school violence.

In *West v. Derby Unified Sch. Dist.* the district's restriction against wearing Confederate symbols was upheld because the district was able to demonstrate that there had been actual fights at school involving racial symbols, particularly the Confederate flag.²⁶ In *Scott v. Sch. Bd. of Alachua County*, the Court held that restrictions on Confederate symbols were justified because of the school's history of racial tensions including racially based altercations.²⁷

Two off-campus newspaper cases are also instructive. In these cases, the Court rejected the use of *Fraser* and applied *Tinker*. In *Boucher v. School Board of the School District of Greenfield*, a high school student wrote and distributed an off-campus newspaper that provided instructions on "how to hack the school's gay ass computers."²⁸ The Seventh Circuit ruled that it was reasonable for school officials to foresee that the article would cause a substantial disruption of school operations by disrupting the functions of the school computer. In *Pangle v. Bend-Lapine School District*, the student advocated specific methods for causing personal injury, property damage and the disruption of school activities.²⁹ The court held that the school district reasonably could have believed that the newspaper would substantially interfere with the work of the school or impinge upon the rights of other students.

Thus, under *Saxe* and *Sypniewski*, both of which also applied the *Tinker* standard, as well as Justice Alito's language in *Morse*, school officials appear to have the authority to respond to student speech that has, or foreseeably could, significantly interfere with the ability of a student to feel safe at school and receive an education. Under a long line of dress code cases, as well as Justice Alito's language in *Morse*, school officials have the authority to respond to speech that has or foreseeably could trigger violence at school. Under cases related to off-campus newspapers, school officials have the authority to respond to student speech that could cause a substantial disruption in school operations, thus likely to interfere with the delivery of instruction.

Off-Campus Online Speech Targeting a Student

Unfortunately, there has been one case involving online hurtful speech directed at a student where the Court presented a highly questionable opinion, the case of *J.C. v. Beverly Hills Unified School District*.³⁰ In this case, J.C. created a video depicting several other students disparaging C.C. and posted this video on YouTube. C.C. and her mother raised this video to the attention of the school. J.C. was suspended. In this case, the Court decided to apply the *Tinker* standard, but struggled with how to apply this standard to a situation where speech was directed at a student. The Court noted, "(f)urther complicating matters is the fact that the Court has not uncovered any cases, in this Circuit or otherwise, that address speech targeted at a particular student, as is the case here" and failed to discuss *Saxe* or *Sypniewski* which clearly do discuss this issue.

The primary focus on the Court was on the prior cases that involved student speech directed at staff--where interference with school activities is clearly highly relevant. The Court ultimately decided that the substantial disruption must be of school activities and found that such disruption did not occur, nor was it foreseeable.

The court appeared to discount the emotional harm inflicted on C.C. The Court indicating that after meeting with the principal C.C. was willing to go to class--and failed to note that her willingness to go to class was predicated on her knowledge of the forthcoming discipline of the students who had attacked her.

25 Wendy Mahling, Note, Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools, 80 Minn. L.Rev. 715 (February 1996) http://www.modrall.com/articles/article_13.html

26 206 F.3d 1358 (10th Cir. 2000)

27 324 F.3d 1246 (11th Cir. 2003), cert. denied, 540 U.S. 824 (2003).

28 134 F.3d 821 (7th Cir. 1998).

29 10 P.3d 275 (Or. App. 2000).

30 United States District Court for the Central District of California. (CV 08-03824 SVW, 2009). <http://lawyersusaonline.com/wp-files/pdfs/jc-v-beverly-hills-a.pdf>

While the principal's testimony did apparently address concerns related to bullying, it is probable that the district's case could have been strengthened by expert testimony about the harm sustained by students from such aggression. As suggested earlier, districts must be prepared to present evidence of actual interference or facts that provide the basis to predict actual interference, as well as evidence which an objective person would agree that the actions of a student reasonably have or could create a significant interference with the ability of the student targeted to feel safe and receive an education. This evidence, in combination with reference to *Saxe* and *Sypniewski*, as well as Justice Alito's language in *Morse*, would likely have led to a different decision.

Unfortunately, this case was not appealed. Thus, at this point in time, school district officials, in conjunction with their local counsel, will need to decide whether to rely on the analysis set forth in *J.C.* or based on the guidance presented in *Saxe*, *Sypniewski*, and *Morse*. The following discussion is grounded in the latter.

It is also important that school officials recognize that in the vast majority of these situations, the aggression directed at a student is not solely occurring off-campus. These hurtful situations most often involve both off-campus and on-campus altercations. The on-campus actions most likely include sending hurtful text messages via cell phone and a range of personal acts, including offensive comments and "mean-mugging." Further, if hurtful material has been posted on a commercial site, such as Facebook, school officials must be aware that many students now have Internet access through their cell phones or I-Pods, or they can easily bypass the school's filter to access these sites through the district's Internet system. What might appear at first to be off-campus speech, might actually have been posted when the aggressor was at school.

Thus, while the majority of the most offensive speech may have been posted or appear to have been posted from off-campus, there are generally many indications that the overall harmful interactions are also occurring on-campus. A full investigation of these incidents will specifically document all on-campus actions that are related to the overall incident. A record of these on-campus altercations will support the student's subjective perspective as well as the objective perspective.

On-Campus Speech

As noted in the above discussion about school dress codes, the courts normally approach these cases by first determining whether the speech can be addressed under the *Fraser* standard. If not, the student speech is analyzed under *Tinker*. The same approach can be applied to situations where student speech originates on campus.

School officials should have the authority and responsibility to respond to any harmful or inappropriate speech through the District Internet system and by students using digital devices at school. This authority can be grounded in *Hazelwood*, for any student speech appearing in school-sponsored online publications, under *Fraser*, if the speech is lewd and offensive or are inconsistent with the school's educational mission, or under *Tinker*, if the speech has created, or threatens, a substantial disruption at school or interference with the rights of students to be secure. However, in states with school free speech statutes, reliance on *Hazelwood* is a question that will have to be answered by local counsel.

School officials reviewing material posted on commercial sites that appears to be off-campus speech should look very closely at the time such speech has been posted. There is a possibility that students were able to bypass the district's Internet filter to post this material or were using a personal digital device while on campus.

School Discipline for Sexting

Districts will need to consider how these standards may apply to handle situations involving student sexting. In some situations, generally where the dissemination of images could be considered bullying or harassment, school officials should have the authority to impose discipline for on- or off-campus sexting acts that are directed at harming a student's reputation or causing a hostile environment at school for that student. This could include situations where the act of sending the image to a recipient who does not want to receive it constitutes harassment, distributing an image to others, or maliciously soliciting the image.

In a situation where a student created an image and sent it privately to someone in a non-harassing manner and that person has disseminated the image is likely not to meet these standards with respect to the student depicted. The fact that a student may have engaged in an action that is now causing him or

her to be ridiculed does not mean that this student has caused the substantial disruption. It is the students who are distributing the image who are causing the harm and disruption.

In situations where the images have been retained privately and there is no apparent intent to distribute, but for some reason such images have been reported to or their existence has been discovered by a school official, it may be difficult to justify a school response. School officials may argue that they have a responsibility to inculcate values or the possession of these images are a violation of the law. But if the images are not significantly impacting the school or other students, school officials likely have no authority to seek to usurp the role of parents in inculcating values. Even the possibility that a student might have committed a criminal offense, if not committed at school, likely does not provide the justification for a school disciplinary response. Certainly, the school official will want to alert parents and make sure the images are destroyed so that distribution is not possible.

It is also exceptionally important that the responses to these situations be based on who actually has caused the harm and that the disciplinary responses are applied in a manner that is gender neutral. A district in Washington is being sued because it allegedly banned a cheerleader from the squad for sending an image, but did not ban the football players who were distributing her image without her consent.³¹

A situation that must be handled very delicately is when a student has been pressured to provide an image or has sent an image with the expectation that it would remain private and that image has been disseminated. The student or students who are at fault in this situation and should receive discipline are the one(s) who provided the coercion to produce the image or are distributing the image. Imposing a disciplinary consequence on the student who is depicted can contribute to profound harm.

The situation of Hope Witsell provides vitally important guidance in this matter.³² On one occasion she sent a nude image to a boy she liked. Another girl found the image on the boy's phone and sent it throughout the school. Later, on a school field trip, she was coerced by a group of boys to provide an image. The result of these actions was intense bullying at school. When the school officials found out they suspended Hope for a week and refused to allow her to be a leader in the extracurricular organization that she was very active in. Shortly after the school imposed discipline, Hope committed suicide.

Notice and Due Process

In a separate opinion in the *J.C.* case, the Court also found a lack of appropriate due process.³³ The Court determined that neither the district policy nor the state statute provided notice to J.C. that the school would impose discipline in response to off-campus speech, therefore due to the failure to provide notice there was a lack of due process. If a district decides that the *Tinker* standard does apply to off-campus student speech, which is advised, it is very important to include language in the district policy making it clear to students and their parents regarding when the school will assume authority to respond to off-campus student speech.

A situation is present in some states that raises significant concerns with respect to notice. In some states, legislation has passed to address cyberbullying. In other states, the Department of Education or the state's school board association has provided a model bullying prevention policy that includes cyberbullying.

An example of statutory language is the language in Oregon:

339.351 As used in ORS 339.351 to 339.364:

(1) "Cyberbullying" means the use of any electronic communication device to harass, intimidate or bully.

(2) "Harassment, intimidation or bullying" means any act that substantially interferes with a student's educational benefits, opportunities or performance, that takes place on or immediately

31 National School Boards Association, (February 2010) *Sexting at School: Lessons Learned the Hard Way* (<http://www.nsba.org/MainMenu/SchoolLaw/Issues/Technology/Resources/IA-Feb-10.aspx>).

32 Inbar, M. (December 2, 2009) 'Sexting' bullying cited in teen's suicide *TODAYshow*. http://today.msnbc.msn.com/id/34236377/ns/today-today_people/.

33 <http://lawyersusaonline.com/wp-files/pdfs/jc-v-beverly-hills.pdf>.

adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop, and that has the effect of:

- (a) Physically harming a student or damaging a student's property;
- (b) Knowingly placing a student in reasonable fear of physical harm to the student or damage to the student's property; or
- (c) Creating a hostile educational environment.

The problem with this language is that this appears to create a limitation that would prevent school officials from responding to cyberbullying that occurs off-campus. If districts adopt a policy grounded in this language, such as has been provided by the Oregon School Board Association, this policy will fail to provide appropriate notice to students that the district may also impose discipline for off-campus speech that causes an impact at school that meets the *Tinker* standard.

The failure to provide appropriate notice to students is evident in a new bullying prevention policy provided by the Florida Department of Education. This policy specifically states:³⁴

The school district upholds that bullying or harassment of any student or school employee is prohibited:

- a) During any education program or activity conducted by a public K-12 educational institution;
- b) During any school-related or school-sponsored program or activity;
- c) On a school bus of a public K-12 educational institution; or
- d) Through the use of data or computer software that is accessed through a computer, computer system, or computer network of a public K-12 education institution.

The failure to provide effective notice of the school official's authority to also respond to off-campus online speech that has or could cause a substantial disruption at school or interference with the rights of students to be secure presents a "no-win" situation for principals. If the principal feels it necessary to impose a suspension upon a student to get a situation where that student has been attacking another student online, that student or his or her parents will likely argue that based on the language of the policy, such disciplinary response is not justified.

If students who are targeted do not feel there are any options available to stop the harm they could take matters into their own hands and engage in a violent act at school against the aggressor. Alternatively, a student could not feel safe coming to school and thus be denied the right to receive an education.

Additionally, if school officials take the perspective that the hurtful material is on an off-campus web site that is blocked by the filter, and fail to fully investigate, this could result in a failure to detect that material is being posted while the aggressor is at school either using a personal digital device or bypassing the district filter or that the off-campus harm is combining with on-campus negative interactions that have created a hostile environment. The failure to fully investigate and respond based on the misperception that this is "off-campus, not my job" could be considered deliberate indifference and lead to liability.

The statutory language of the recently passes New Hampshire bullying prevention statute, HR 1523 is vastly superior:³⁵

193-F:4 Pupil Safety and Violence Prevention.

I. Bullying or cyberbullying shall occur when an action or communication as defined in RSA 193-F:3:

- (a) Occurs on, or is delivered to, school property or a school-sponsored activity or event on or off school property; or

³⁴ The Model Policy link on this site: http://www.fldoe.org/safeschools/bullying_prevention.asp.

³⁵ <http://www.gencourt.state.nh.us/legislation/2010/HB1523.html>.

(b) Occurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event.

Likewise, the new policy of the Chicago Public Schools effectively addresses off-campus activities:³⁶

The SCC applies to actions of students during school hours, before and after school, while on school property, while traveling on vehicles funded by the Board, at all school-sponsored events, and while using the CPS Network or any computer or Information Technology Devices, when the actions affect the mission or operation of the Chicago Public Schools. Students may also be subject to discipline for Group 5 or 6 Inappropriate Behaviors that occur either off campus or during non-school hours when the misconduct disrupts or may disrupt the orderly educational process in the Chicago Public Schools.

In consultation with local counsel, school districts could conclude that the statutory requirements constitute the base requirements for what their policy should provide. Districts should be free to adopt policies that are grounded in appropriate constitutional standards to address off-campus harmful speech. Thus, even with these statutory provisions in place, districts can adopt policies that are in accord with the *Tinker* standard with respect to off-campus speech.

Suggested Requirements to Respond to Off-Campus Speech

The following possible requirements for school officials to respond to off-campus speech have been developed primarily in reliance on the cases set forth above, specifically including the decisions in *Tinker*, *Saxe, J.C.*, and the District Court decision in *Layshock* which outlined the application of *Tinker* in situations involving off-campus speech:³⁷

- Notice. While this requirement may not be required by all courts, it is prudent for districts to ensure that their disciplinary policy provides clear notice to students and parents that the school intends to discipline students for off-campus speech that causes or threatens a substantial disruption at school or interference with rights of students to be secure.
- School "nexus." A nexus between the off-campus online speech and the school community. The speech involves students or staff or is in some other manner connected to the school community.
- Impact at school. The impact has, or it is reasonably foreseeable it will be, at school. "School" includes school-sponsored field trips, extracurricular activities, sporting events, and transit to and from school or such activities.
- Impact has occurred or is reasonably foreseeable. School officials must be able to point to specific and particularized facts that support why they foresee a substantial disruption or interference--not mere apprehension of the possibility of a disruption. Timing is also an issue. The formal response should be for the purpose of preventing an imminent foreseeable substantial disruption or interference--not after the fact because a disruption could possibly have occurred, but did not.³⁸
- Impact is material and substantial. The impact has, or it is reasonably foreseeable it will be, significant. Not anger or annoyance. Not disapproval of the expression of a controversial opinion. Not simply a situation that requires a school official to investigate.
- The disruption has negatively impacted, or is reasonably predicted it will negatively impact, the rights of students. The speech has caused, or it is reasonably foreseeable it will, cause:³⁹

36 <http://www.cps.edu/Documents/Resources/.../SCCfiles/SCCscope.pdf>

37 <http://www.aclupa.org/downloads/LayshockOrder.pdf>. As noted, the Layshock decision is under review at the Circuit Court level. The school district dropped the *Tinker*-based argument presumably in light of the manner in which the District Court analyzed the situation. The District Court decision in Layshock provides an excellent analysis to guide the application of *Tinker* to situations involving off-campus student speech.

38 See also: *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) ("Tinker does not require school officials to wait until disruption actually occurs before they may act."). As the Sixth Circuit recently explained, "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place." *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007).

39 As discussed above, these situations have been identified as meeting the *Tinker* standard in cases involving dress codes, off-campus newspapers, and the *Saxe* decision.

- Significant interference with instructional activities, school activities, or school operations. (If speech is directed at staff, a significant interference with instruction, school activities, or school operations must be demonstrated.)
 - Physical or verbal violent altercations.
 - A hostile environment or substantial interference with a student's ability to participate in educational programs or school activities. Establish such interference based on the target's subjective response and a reasonable observer perspective.
- Causal relationship. The speech has, or it is reasonably foreseeable it will, be the actual cause of the disruption. Not some other factor, such as administrator actions or student responses to administrator actions.

Potential of Liability for Hostile Environment

School officials must also be mindful of potential liability for failure to respond. Although there are no cases directly on point, the combination of off- and on-campus harmful actions can contribute to the creation of a hostile environment at school for the student targeted. As noted above, the vast majority of these situations involve both off- and on-campus harmful interactions. If these interactions have created a hostile environment for a student, to which school officials fail to fully investigate and effectively respond due to the misperception that this is "off-campus, not my job," there appears to be a potential for district liability.

Students receive important protections from discrimination. Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs and activities that receive federal financial assistance.⁴⁰ Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in programs or activities receiving federal financial assistance.⁴¹ Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on disability in programs or activities receiving federal financial assistance. Title II of the Americans with Disabilities Act of 1990 prohibits discrimination based on disability in public entities, including educational institutions.⁴² Some state statutes offer even greater protection against discrimination.

Schools have a legal responsibility to prevent student-on-student harassment. In *Davis v. Monroe Bd. of Educ.*⁴³ the Supreme Court allowing a private Title IX damages action against a school board in cases of student-on-student harassment. To establish a prima facie case of student-on-student harassment, the student must demonstrate each of the following elements:⁴⁴

- The harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school,
- The school had actual knowledge of the harassment, and
- The school was deliberately indifferent to the harassment.

Several recent Circuit Court cases have focused on the adequacy and effectiveness of the school's response. As noted in *Vance v. Spencer County Public School District*:⁴⁵

(W)here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

It is imperative that school officials recognize the concern of the potential of sexual harassment in the context of sexting. The fact that a student has done something incredibly "stupid"--like provide a nude or

40 20 U.S.C 1681.

41 42 U.S.C. 2000d, et seq.

42 42 U.S.C. § 12101.

43 *Davis v. Monroe Bd. of Educ.* 526 U.S. 629 (1999),

44 Based on language from *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999) citing *Davis*, 526 U.S. at 633

45 231 F.3d 253, 261 (6th Cir. 2000). See also *Theno v. Tonganoxie Unified Sch. Dist.* No. 464, 377 F. Supp. 2d 952, 966 (D. Kan. 2005) and *Patterson et al. v. Hudson Area Schools et al.* No. 08-1008 (January 6, 2009, 6th Circuit).

semi-nude image that has now “gone viral” and has led to sexual harassment--does not likely absolve school officials of their responsibility to prevent a hostile environment and stop the sexual harassment.

School officials must be exceptionally careful in how they handle these situations so as to ward off, as best as possible, subsequent sexual harassment of the students, especially any students depicted. Further, such harassment must be predicted. Efforts to stop it must be implemented--with ongoing consultation with the students involved to ensure success of the school prevention efforts.

The situation of Jessica Logan is instructive.⁴⁶ Jessica Logan, a senior at an Ohio high school, had sent nude photos of herself to a boyfriend. After the relationship ended, her ex-boyfriend sent the photos to other female students at Logan’s school, after which the image went “viral” and was distributed to many students. This resulted in months of harassment and teasing for Logan. Logan hung herself one month after her graduation. Logan’s parents filed suit against the high school and several other defendants, alleging that the school and the local police did not do enough to protect their daughter from harassment.

A very significant challenge in this regard is what has been happening in some schools when police officers overreact. News reports of students involved in sexting who have been hauled from school in handcuffs are exceptionally disturbing. The highly predictable consequence of this police overreaction is to place the student depicted at exceptionally high risk of intense harassment by peers. This could place the student at high risk of suicide. Such actions will also make it exceptionally difficult for school officials to prevent sexual harassment--for which schools could be held liable.

School officials must assert authority over actions that might take place on their campus that could cause emotional harm to students. It is entirely unnecessary, even if a law enforcement response might be appropriate, to have students hauled from school in handcuffs. As described below, it is recommended that school districts work with their local district attorney, as well as with their legal counsel, to develop an approved protocol to follow in these situations--a protocol that will ensure that to the greatest degree possible students are protected from emotional harm. It is essential that the provisions of this protocol be effectively communicated to all school officials and police officers.

Search and Seizure

In 1985, the U.S. Supreme Court, in *New Jersey v. T.L.O.*, held that the Fourth Amendment prohibition on unreasonable search and seizures applies to searches by public school officials of students and their possessions.⁴⁷ The Court held that student searches must be reasonable--a balance between students privacy rights and the school’s need to maintain order. To determine the reasonableness, two questions must be asked: 1) whether the action was justified at its beginning, and 2) whether the extent of the search as conducted was reasonably related to the circumstances which justified the search in the first place. To justify a student search, reasonable grounds must exist for suspecting that the search will turn up evidence that the student has violated or is violating either the law or school policy. The *TLO* standard will apply to school official searches of a student’s cell phone or other digital device.

In 2006, a federal court in Pennsylvania applied the *T.L.O.* reasonableness standard in the context of a search of cell phone records in the case of *Klump v. Nazareth Area School District*.⁴⁸ In *Klump*, a teacher had confiscated a student’s cell phone because it was visible in class, violation of a school policy that prohibited the display or use of cell phones during instructional time. An administrator then searched through the student’s stored text messages, voicemail, and phone number directory. The student filed suit, asserting that these actions constituted an unreasonable search.

The Court determined that the district had reasonable suspicion that the display/use policy was violated, but did not have reasonable suspicion that any other law or policy had been violated. Thus, the confiscation of the cell phone was justified, but the search of the phone records violated the student’s Fourth Amendment rights. In addition, the Court found that the district violated the Pennsylvania Wiretap Act by accessing stored voicemail and text messages.

46 Perry, K. (May 12, 2009) Lawsuit filed over 'sexting' suicide. Cincinnati.com <http://news.cincinnati.com/article/20090512/NEWS0107/305120011/Lawsuit-filed-over-sexting-suicide>.

47 469 U.S. 325 (1985).

48 425 F. Supp. 2d. 622 (E.D. Pa. 2006).

The issue of school official review of cell phone records when the cell phone was merely visible or used at school is also under litigation in Mississippi in the case of *J.W. v. Desoto County School District*.⁴⁹

The issue of consent to search is likely to become more relevant, especially if there is the potential for any significant criminal charges. Consent must be voluntary and knowing.⁵⁰ Important factors to consider include the age, education, intelligence, physical and mental condition of the person giving consent, whether the person was under arrest, and whether the person had been advised of his right to refuse consent. The government carries the burden of proving that consent was voluntary. If a police officer asks for consent to look at images on a student's cell phone while the student is sitting in the school office, how many students or parents will know that they have the right to refuse consent and require the officer to obtain a search warrant? Likely not many. Considering the potential seriousness of the situation, likely they should be informed.

Confiscation of cell phones suspected of having images and search of the call records of those phones to facilitate confiscation of other phones may qualify as exigent circumstances. But this should be determined by local counsel.

Thus, it is very important that school officials have a clear understanding of what they can and cannot do in the context of cell phone searches in the context of T.L.O., as well as state wire-tapping laws and the potential nature of images they might suspect are present. The fact that a cell phone is visible, which may be in violation of a district policy, does not, in and of itself, appear to provide the authority to search the records on that phone other than perhaps a search of "recent call records."

The presence of state and federal wire-tapping laws further complicates the matter. How these laws might impact searches is not clear. The state statutes vary from state to state, making the provision of general guidance impossible. This is an issue school officials must review with local counsel.

Searching for Nude Images

If a school official is faced with a situation where there has been a report of nude images of a student presents even greater concerns.

It is necessary to consider the implications of the recent U.S. Supreme Court decision in *Safford Unified School District v. Redding*.⁵¹ The Supreme Court referred to a strip search of a student as "categorically extreme intrusiveness" and indicated that the barrier for justification for such a search was extremely high. See also *Beard v. Whitmore Lake School District* where the Circuit Court stated, "(s)tudents have a significant privacy interest in their unclothed bodies."⁵²

School officials in the Tunkhannock Area School District in Pennsylvania are currently facing litigation for violating a student's privacy by viewing nude images.⁵³ A commentary that appeared in the *Times Tribune* entitled *Electronic Peeping Toms*, stated:⁵⁴

It's one thing for school officials to confiscate a phone in order to enforce policy. It's quite another to search its memory as part of a fishing expedition. ... As lawmakers, the courts and schools figure out how to deal with sexting, they should pay equal attention to protecting the privacy rights of students.

The other issue that school officials must pay scrupulous attention to is that these are nude images of minors. Possession or distribution by an adult constitutes a federal and state felony. There are currently no statutory "exceptions" for school officials to possess or distribute these images.

Both through news reports and privately reported situations, it is clear that some administrators are not handling these images properly. The author heard of one incident where an overreacting principal sent the nude image of a minor student to a dozen others asking for guidance on what to do. School

49 <http://www.aclu.org/racial-justice/jw-v-desoto-county-school-district>.

50 *Schneekloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973).

51 557 U.S. ____ (2009).

52 402 F.3d 598, 604 (6th Cir. 2005).

53 *School Turned Over Girl's Private Nude Photos to Law Enforcement*. <http://www.aclupa.org/pressroom/acluofpasuesschooldistrict.htm>.

54 <http://thetimes-tribune.com/opinion/electronic-peeping-toms-1.807464>.

administrators in Pennsylvania were under criminal investigation for how they handled student images, although it does not appear that charges are forthcoming.⁵⁵

The youths involved in a sexting case at Susquehanna High School last year are facing felony charges.

Now, based on parents' complaints, the administrators who caught them might face their own consequences, creating another murky legal issue in the largely untested intersection of children, technology and pornography.

Susquehanna High School officials are being investigated after parents claimed pornographic images and videos from cell phones confiscated from students were "passed around" and viewed by more than just those administrators who investigated the incident.

"Of course, one or two people had to see the images to determine what they were," Perry County District Attorney Charles Chenot said. "But if more than one or two top administrators saw them, there better be a good reason why."

School employees could be charged with displaying child pornography--the same charges the students involved face--if they showed the images to people not involved in the investigation, Chenot said.

In another incident, an assistant principal was prosecuted for possession of child pornography, although ultimately the charges were dismissed because the image itself was not deemed to be pornographic.⁵⁶

Sexting Protocol

It is imperative that school districts have a clear protocol for reporting and investigating these incidents that has been approved by their local district attorney and school district counsel. Ideally, the development of this protocol will be under the auspices of the regional Multidisciplinary Team (MDT). This will ensure involvement of school officials, law enforcement, and mental health, including organizations that address sexual violence.

The following protocol can serve as a model, but obviously must be approved locally.

- Establish an investigation team within the school includes the principal, counselor/psychologist and school resource officer--with back-up from district legal and risk prevention services.
 - Make sure all school staff know who they should report situations to and how images and cell phones should be handled.
 - Make sure all principals have a clear understanding of the search and seizure standards that have been approved by the local district attorney and school district legal counsel. It may be safest for school officials that the only actions they take with respect to the cell phones that might contain such images is to confiscate the cell phones, check the call records to identify other cell phones that might have images, and provide the cell phones to the police. Outline how students and their parents will be informed of their right not to consent to a search but to require that a search warrant be obtained.
- Once reported, strive to stop further dissemination of the images.
 - Make sure students know that cell phone distribution paths can be traced and if they are found to have distributed an image, this will result in a disciplinary consequence.
 - Promise confidentiality for student reports about such distribution and assure students that if they report receipt of an image, they will not be disciplined for having the image on their cell phone. (This will still allow discipline if they have engaged in other hurtful actions.)

55 Elias, J. & Victor, D. Susquehanna High School officials being investigated for handling of images in 'sexting' case. The Patriot News. http://www.pennlive.com/midstate/index.ssf/2010/04/susquehanna_high_school_officia.html.

56 Zetter, K. (April 3, 2009) 'Sexting' Hysteria Falsely Brands Educator as Child Pornographer, Wired Magazine. <http://www.wired.com/threatlevel/2009/04/sexting-hysteri/>.

- Establish parameters for how and when incidents should be reported to the MDT and investigated. Recommendations are as follows:
 - Immediately report situation to MDT and based on what is known at the time, make a decision about who will take the initial lead in conducting an investigation.
 - Recognize that the student(s) depicted could potentially be in a situation of severe emotional distress. Insist that whoever interviews a depicted student has professional training in mental health, especially working with sex abuse victims.
 - In consultation with the MDT, determine how and when to contact parents. Most district policies require contacting a parent prior to any investigation, unless there are family-related sexual abuse concerns.
 - As names of participants are identified, immediately transmit these to the MDT to determine whether there are any prior records.
- Discuss findings and propose plan for further investigation or intervention. Intervention should be addressed in a manner that relates to the type of situation.
 - Developmentally normative. Not intended to cause harm, but mistakes have led to distribution. Impose mild level school discipline for any students who violated trust--if there has been a substantial disruption at school or creation of a hostile environment for any student(s) depicted. Consider juvenile court review in some situations leading to informal disposition, deferred prosecution, or diversion for anyone violated trust and distributed image outside of relationship or group.
 - Harassment. Intended to cause harm to person depicted or that constitutes harassment. Impose more significant school discipline for any students who engaged in harassment activities. Implement juvenile court review of circumstances--which could lead to informal disposition, deferred prosecution, diversion, or detention--depending on egregiousness of situation. Possible charges include: Harassment. Invasion of privacy. Disorderly conduct. Malicious acquisition or distribution. False light. The reason for juvenile jurisdiction is to ensure a disciplinary consequence, as well as supervision and rehabilitation.
 - At-Risk. Teen depicted is engaging in at-risk behavior by sending images for the purpose of soliciting sexual activity. Impose school discipline only appropriate if at-risk behavior constituted sexual harassment of other students. Implement juvenile court review of circumstances--which could lead to informal disposition, diversion, status offense, or detention--depending on degree/manner of risky behavior. Possible charges include: Harassment. Indecent exposure. Solicitation. Prostitution. The reason for juvenile jurisdiction is to ensure counseling, supervision, and rehabilitation.
 - Exploitive. The situation involves sexual abuse or other significant harm. Impose significant school discipline for any students who engaged in harassment activities that have impacted a student or students at school. Implement juvenile court review of circumstances--which could lead to informal disposition, diversion, status offense, or detention, depending on degree/manner of harmful behavior. Possible charges include: Harassment. Malicious acquisition or distribution. Stalking. Blackmail. Solicitation or exploitation. Child pornography. The reason for juvenile jurisdiction is to ensure a disciplinary consequence, as well as counseling, supervision, and rehabilitation.
 - Young Adult Students. How law enforcement will handle situations of over-18 year old students engaged in unlawful behavior is out of the hands of the MDT or school officials. Hopefully, school officials will strongly encourage a balanced approach. Most often, these are teens in a peer environment who simply do not understand the implications of their actions. Encourage use of lowest level of criminal charges and avoidance of any charges that could result in required registration as a sex offender. Given the degree of normality of these incidents, registration as a sex offender will rarely be justified, would destroy the future of this student, and provide no community protection against future sexual abuse whatsoever.

- Prevent Sexual Harassment. Articulate a plan to stop anticipated sexual harassment of the student(s) depicted. Implement a plan to provide emotional support. The student depicted is likely at risk for severe emotional distress and may need to be on “suicide watch.” Ensure regular check-ins with the student to allow for continued monitoring of this student’s emotional well-being.
- Strive to keep these incidents out of the news, if possible. If news coverage does occur, ensure statements made will minimize the emotional harm to the teens depicted. Talk with media about concerns related to such harm.
 - News of these situations could lead to further dissemination of the images. This will likely increase the emotional harm to the students depicted and the sexual harassment they will receive on campus. School officials and law enforcement officials should avoid making any statements that other students might use against the students involved, especially any student who was depicted.
- Routinely evaluate the report, investigate, and intervene protocol as applied to situations to determine effectiveness of the protocol and develop better prevention initiatives.

About the Author

Nancy Willard, M.S., J.D. is the director of the Center for Safe and Responsible Internet Use. She has degrees in special education and law. She taught “at risk” children, practiced computer law, and was an educational technology consultant before focusing her professional attention, beginning in 1995, on issues of youth risk online and effective management of student Internet use. Nancy’s focus is on applying research insight into youth risk and effective research-based risk prevention approaches to these new concerns.

Nancy is author of two books. *Cyberbullying and Cyberthreats: Responding to the Challenge of Online Social Cruelty, Threats, and Distress* (Research Press) and *Cyber-Safe Kids, Cyber-Savvy Teens, Helping Young People Use the Internet Safety and Responsibly* (Jossey Bass). She is currently writing a book for teachers on teaching Internet safety. Her self-published book, *Cyber Secure Schools in a Web 2.0 World*, which addresses effective Internet use management and legal issues related to Web 2.0 in schools is available on her site. A 2-hour video presentation for educators on *Cyberbullying, Cyberthreats, and Sexting* is available on her web site.

Nancy is available to provide presentations, both in person and online webinars, on all of these issues. She is also available to provide legal consultation services to district legal counsel.

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