

School Administrator's Guide Responding to Harmful Online Student Speech

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This document provides educational guidance, not legal guidance. Prior to relying on the guidance in this document, contact your district's attorney for review and approval. State cyberbullying laws may have changed the legal standards in your state.

School officials have the authority to impose discipline for harm caused by off-campus online speech when - and only when - the speech has caused or threatens a substantial disruption at school or interference with the rights of students to be secure or is a "true threat." *Tinker v. Des Moines Indep. Community School District* (1969); *Lovell v. Poway Unified School District* (1996).

Essentially this analysis requires balancing the free speech rights of a student with the equally important rights of other students to be safe and secure at school and to pursue their education. There appear to be three types of situations where formal discipline may be justified under the substantial disruption standard. These include speech that has caused or threatens:

- Significant interference with instruction, school activities, or school operations.
- Creation of a hostile, abusive environment for any student that is significantly interfering with that student's ability to participate in educational activities.
- Violent verbal or physical altercations.

Whether the speech threatens such disruption is assessed based on the "reasonable person" standard: A reasonable person knowing the facts and history would anticipate substantial disruption. A true threat is a statement that, considered as a whole, would cause a reasonable person to regard the statement as showing an immediate, unequivocal attempt to cause harm. A true threat is not protected speech under the First Amendment.

Do not discipline students for off-campus online speech that is "lewd," "vulgar," "indecent," "plainly offensive" or "inconsistent with your school's educational mission." "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech ... *Beussink v. Woodland R-IV School District* (1998). Parents are responsible for addressing this speech.

Guidelines

- You must be able to prove facts supporting substantial disruption or reasonable likelihood thereof. If you can't prove this, seek informal resolution.
- Never investigate or make a disciplinary decision if you are the target of the speech or are emotionally upset by the speech. You are at greater risk of making a bad decision.
- Speech that targets staff will rarely meet the legal standard. Seek informal resolution by asking the parents to discipline the child - most will. Consider assisting the staff member

in suing the parents in a case involving truly egregious speech. There is a greater chance of success and greater ability to motivate other parents in region to monitor their children's online activities.

- If the off-campus speech of a student(s) targeting another student(s) who attend the same school has resulted in the targeted student(s) not feeling safe to come to school or feeling significant emotional distress while at school and/or has caused or threatens violent physical or verbal altercations between students or significant interference with instruction or school operations, then you have the legal authority to impose formal discipline.
- If the off-campus speech of a student(s) targeting another student(s) who attend a different school but are together for extracurricular activities has caused or threatens students to not feel safe to participate in activities, violent physical or verbal altercations and/or substantial disruption of activities, then you should also have the legal authority to impose formal discipline and restrict student(s) who have posted such speech from participating or attending activity.
- If the off-campus speech of a student(s) targeting another student(s) has resulted in the creation of a "hostile environment" and the targeted student(s) is "protected class" under civil rights laws or if there is a clear potential of violence, you could face litigation under civil rights laws or negligence if you know of the concern and are deliberately indifferent. If on-campus online speech has created a "hostile environment" or potential of violence, you are at even greater risk of litigation if you know of the speech and are deliberately indifferent.
- Upon any report of off-campus speech always conduct a full search of district Internet system for online activities of all participants, because what initially appears to be off-campus speech may also be on-campus speech. This allows you greater ability to impose discipline. If you could have found this on-campus material, but did not look, this could lead to greater liability.
- Sometimes the student who posts harmful material online is the victim of emotional harm inflicted by other students - or staff. Students need to be held accountable for what they post online. But everyone who has had a negative role to play in the situation should be held accountable or the problem will fester
- You must fully investigate and retain all evidence. You must be able to prove that student safety, school security, and/or instruction were substantially disrupted or there was a clear risk of disruption under the reasonable person standard. Good documentation can ward off lawsuits.
- Do not impose excessive discipline. The goals of discipline should be: the child who posted material feeling remorseful, so the harm will not continue and the parents are actively involved in preventing any continuation. Excessive discipline works against these goals because it turns remorse into anger at the school official and target. Excessive discipline can result in vicious online retaliation, involving unknown and potentially untraceable online "friends." Parents who become angry will rationalized that actions of child were not that bad. Excessive discipline can lead to lawsuits.

- Whether or not you can impose formal discipline may end up being the least important question. Stopping the harm is the most important objective. With or without formal discipline, other actions must be taken:
 - Make sure all harmful materials are removed to the best degree possible.
 - Ward against retaliation. Warn parents that if their child engages in, encourages, suggests, or fails to discourage retaliation, they can face civil litigation because the original harm started with their child.
 - Seek to “bully-proof” the target.
 - Find ways for bully to repair the damage.

- Advise staff member or parents that they may have the ability to file a civil lawsuit against the parents of the child who posted the material under the state parental liability statute or parental negligence. Advise parents of child who posted the harmful material that they could be sued, especially if they know of the harm and fail to prevent continuation or retaliation. Possible causes of action include:
 - Defamation. Someone publishes a false statement about a person that damages his or her reputation.
 - Invasion of privacy/public disclosure of private fact. Someone publicly discloses a private fact about a person under conditions that would be highly offensive to a reasonable person.
 - Invasion of personal privacy/false light. Publicly disclosing information that places an individual in a false light.
 - Intentional infliction of emotional distress. Someone’s intentional actions are outrageous and intolerable and have caused extreme distress.

- ALWAYS consult with your district’s attorney if ...
 - You intend to impose discipline for speech targeting a staff member.
 - You want to evaluate the records on a student’s personal digital device and do not have parent permission. (This may be a violation of state wiretapping law.)
 - You think the speech constitutes a “true threat.”
 - The speech is political in nature, but raises civil rights concerns.
 - Harmful speech on-campus or off-campus has arguably created a hostile environment for a student.
 - You intend to impose what would be considered excessive discipline.
 - You are ever in doubt.
 - You are really upset and angry.

Cyberbullying Incident Evaluation Form

Incident Investigation

- Describe incident and attach a copy of all downloaded materials.
- Conduct a search of the computer records of all involved students through the district Internet system. Attach any findings. Regardless of findings, document that you made this request to search.

Student Target

- Identify the target(s):
- Is there any evidence that the target of the online harmful material may have instigated the problem by bullying or denigrating the student(s) who have posted the material? If yes, describe:
- Describe substantial disruption or facts that create reasonable anticipation that a disruption is highly likely to occur in any or all of the following areas.
 - Interference with instructional activities or school operations.
 - Creation of a hostile, abusive environment for any student that is significantly interfering with that student's ability to participate in educational activities.
 - Violent verbal or physical altercations.
- To strengthen evidence of emotional harm and negative impact on target(s), have target(s) evaluated by school psychologist or counselor. Attach written report and any other documentation, such as attendance records, grades, etc. reports from parents, teachers, and friends of target, to demonstrate evidence of harmful impact.
- Does the evidence justify the imposition of formal discipline? Explain why:
- Describe proposed disciplinary action. Remember: The imposition of excessive punishment can create more problems.
- Describe other measures to be taken to ensure removal of the harmful material and security of the target.
- If the evidence does not support the imposition of formal discipline, describe actions to be taken to resolve the situation informally.

Staff Target

Remember, the staff member who is targeted should not conduct the investigation or make a final decision regarding discipline.

- Identify target(s):

- Is there any evidence of ongoing difficulties between student(s) posting online material and the target(s)? If yes, describe concerns and describe plan to address:
- Has the off-campus speech created or is there a reasonable anticipation that it will create a substantial interference with instructional activities or school operations? If yes, describe:

If you cannot document substantial interference with instructional activities or school operations, then you cannot impose formal discipline.

- Proceed informally with parents. Provide evidence of the online speech and request that they ensure that it is removed and impose appropriate discipline.
- Is the speech especially egregious in nature? If yes, consider advising staff member to seek legal guidance on the ability to file a civil law suit against the parents of the student who has posted the speech.